Constitution of the United States: 2000 Supplement

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OF THE
UNITED STATES OF AMERICA
ANALYSIS AND INTERPRETATION

2000 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME

COURT OF THE UNITED STATES TO JUNE 28, 2000

<GRAPHIC(S) NOT AVAILABLE IN TIFF FORMAT>

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ARTICLE I

DELEGATION OF LEGISLATIVE POWER
The Effective Demise of the Nondelegation Doctrine

[P. 78, add to text following n.79:]

The infirm state of the nondelegation doctrine was demonstrated further in Loving v. United States.\1\ Article 118 of the Uniform Code of Military Justice (UCMJ) \2\ 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 jurisprudence, which requires the death sentence to be cabined by standards so that the sentencing authority is constrained to narrow the class of convicted persons to be so sentenced and to justify the individual imposition of the sentence.\3\ However, the President in 1984 had promulgated standards that purported to supply the constitutional validity the UCMJ needed.\4\

\1\ 517 U.S. 748 (1996). The decision was unanimous in result, but there were several concurrences reflecting some differences among the Justices.

\2\ 10 U.S.C. Sec. Sec. 918(1), (4).

\3\ 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.

\4\ Rule for Courts-Martial; see 517 U.S. at 754.

The Court held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty--Congress' power under Article I, Sec. 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.'' \5\ Acknowledging that a delegation must contain some ``intelligible principle'' to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander-in-Chief. ``The same limitations on delegation do not apply'' if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President's responsibilities as Commander-in-Chief require him to superintend the military, including the courts-martial, and thus the delegated duty is interlinked with duties already assigned the President by the Constitution.\6\

\5\ 10 U.S.C. Sec. Sec. 818, 836(a), 856.

\6\ 517 U.S. at 771-74.

In the course of the opinion, 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,\7\ thus confirming what has long been evident that the delegation doctrine is unmoored to separation-of-powers principles altogether.

\7\ Id. at 758-59.

--The Regulatory State

[P. 82, add to n.106:]

Notice Clinton v. City of New York, 524 U.S. 417 (1998), in which the Court struck down what Congress had intended to be a delegation to the President, finding that the authority

conferred on the President was legislative power, not executive power, which failed because the Presentment Clause had not and could not have been complied with. The dissenting Justices argued that the law, the Line Item Veto Act, was properly treated as a delegation and was clearly constitutional. Id. at 453 (Justice Scalia concurring in part and dissenting in part), 469 (Justice Breyer dissenting).

QUALIFICATIONS OF MEMBERS OF CONGRESS

Exclusivity of Constitutional Qualifications

--Congressional Additions

[P. 111, add to n.297:]

Powell's continuing validity was affirmed in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), both by the Court in its holding that the qualifications set out in the Constitution are exclusive and may not be added to by either Congress or the States, id. at 787-98, and by the dissent, which would hold that Congress, for different reasons, could not add to qualifications, although the States could. Id. at 875-76.

--State Additions

[P. 114, add to text following n.312:]

The long-debated issue whether the States could add to the qualifications that the Constitution prescribed for Senators and Representations was finally resolved, by a surprisingly close vote, in U.S. Term Limits, Inc. v. Thornton.\8\ Arkansas, along with twenty-two other States, all but two by citizen initiatives, had imposed maximum numbers of terms that Members of Congress could serve. In this case, the Court held that the Constitution's qualifications clauses \9\ establish exclusive qualifications for Members that may not be added to either by Congress or the States. The four-Justice dissent argued that while Congress had no power to increase qualifications, the States did.

\8\ 514 U.S. 779 (1995). The majority was composed of Justice Stevens (writing the opinion of the Court) and Justices Kennedy, Souter, Ginsburg, and Breyer. Dissenting were Justice Thomas (writing the opinion) and Chief Justice Rehnquist and Justices O'Connor and Scalia. Id. at 845.

\9\ Article I, Sec. 2, cl. 2, provides that a person may qualify as a Representative if she is at least 25 years old, has been a United States citizen for at least seven years, and is an inhabitant, at the time of the election, of the State in which she is chosen. The qualifications established for Senators, Article I, Sec. 3, cl. 3, are an age of 30, nine years' citizenship, and being an inhabitant of the State at the time of election.

Richly embellished with disputatious arguments about the text of the Constitution, the history of its drafting and ratification, and the practices of Congress and the States in the early years of the United States, the actual determination of the Court as controverted by the dissent was much more over founding principles than more ordinary constitutional interpretation.\10\

\10\ See Sullivan, Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton, 109 Harv. L. Rev. 78 (1995).

Thus, the Court and the dissent drew different conclusions from the text of the qualifications clauses and the other clauses respecting the elections of Members of Congress; the Court and the dissent reached different conclusions after a minute examination of the records of the Convention respecting the drafting of these clauses and the

ratification debates; and the Court and the dissent were far apart on the meaning of the practices in the States in legislating qualifications and election laws and in Congress in deciding election contests based on qualifications disputes.

A default principle relied on by both Court and dissent, given the arguments drawn from text, creation, and practice, had to do with the fundamental principle underlying the Constitution's adoption. In the dissent's view, the Constitution was the result of the resolution of the peoples of the separate States to create the National Government. The conclusion to be drawn from this was that the peoples in the States agreed to surrender powers expressly forbidden them and to surrender those limited powers that they had delegated to the Federal Government expressly or by necessary implication. They retained all other powers and still retained them. Thus, ``where the Constitution is silent about the exercise of a particular power--that is, where the Constitution does not speak either expressly or by necessary implication--the Federal Government lacks that power and the States enjoy it.'' \11\ The Constitution's silence about the States being limited meant that the States could legislate additional qualifications.

\11\ 514 U.S. at 848 (Justice Thomas dissenting). See generally id. at 846-65.

Radically different were the views of the majority of the Court. After the adoption of the Constitution, the States had two kinds of powers: powers that they had before the founding and powers that were reserved to them. The States could have no reserved powers with respect to the Federal Government. ``As Justice Story recognized, `the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them . . . . No state can say, that it has reserved, what it never possessed.' '' \12\ The States could not before the founding have possessed powers to legislate respecting the Federal Government, and since the Constitution did not delegate to the States the power to prescribe qualifications for Members of Congress, the States did not have it.\13\

\12\ Id. at 802.

\13\ Id. at 798-805. And see id. at 838-45 (Justice Kennedy concurring).

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

APPORTIONMENT OF SEATS IN THE HOUSE

The Census Requirement

[P. 115, add to n.317:]

Another census controversy was resolved in Wisconsin v. City of New York, 517 U.S. 1 (1996), in which the Court held that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute.

THE LEGISLATIVE PROCESS

Presentation of Resolutions

[P. 144, add new topic at end of section:]

The Line Item Veto.--For more than a century, United States Presidents had sought the authority to strike out of appropriations bills particular items, to veto ``line items'' of money bills and sometimes legislative measures as well. Finally, in 1996, Congress approved and the President signed the Line Item Veto Act.\14\ The law empowered the President, within five days of signing a bill, to ``cancel in whole'' spending items and targeted, defined tax benefits. In acting on this authority, the President was to determine that the cancellation of each item would ``(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.'' \15\ In Clinton v. City of New York,\16\ the Court held the Act to be unconstitutional because it did not comply with the Presentment Clause.

\14\ Pub. L. No. 104-130, 110 Stat. 1200, codified in part at 2 U.S.C. Sec. Sec. 691-92.
\15\ Id. at Sec. 691(a)(A).
\16\ 524 U.S. 417 (1998).

Although Congress in passing the Act considered itself to have been delegating power,\17\ and although the dissenting Justices would have upheld the Act as a valid delegation,\18\ the Court instead analyzed the statute under the Presentment Clause. In the Court's view, the two bills from which the President subsequently struck items became law the moment the President signed them. His cancellations thus amended and in part repealed the two federal laws. Under its most immediate precedent, the Court continued, statutory repeals must conform to the Presentment Clauses's ``single, finely wrought and exhaustively considered, procedure'' for enacting or repealing a law.\19\ In no respect did the procedures in the Act comply with that clause, and in no way could they. The President was acting in a legislative capacity, altering a law in the manner prescribed, and legislation must, in the way Congress acted, be bicameral and be presented to the President after Congress acted. Nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court could construe both constitutional silence and the historical practice over 200 years as ``an express prohibition'' of the President's action.\20\

\17\ 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'').
\18\ 524 U.S. at 453 (Justice Scalia concurring in part and dissenting in part); id. at 469 (Justice Breyer dissenting).
\19\ 524 U.S. at 438-39 (citing and quoting INS v. Chadha, 462 U.S. 919, 951 (1983).
\20\ 524 U.S. at 439.

POWER TO REGULATE COMMERCE
Definition of Terms
--Federalism Limits on Exercise of Commerce Power
[P. 167, add to n.619, immediately after New York v. United States:]
See also Printz v. United States, 521 U.S. 898 (1997).
The Commerce Clause as a Source of National Police Power
--Is There an Intrastate Barrier to Congress' Commerce Power?
[P. 206, add to n.818:]
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, 120 S. Ct. 1904 (2000). An owner-occupied building is not

``used'' in interstate commerce within the meaning of the statute, the Court concluded.

[P. 207, add to text following n.820:]

For the first time in almost 60 years,\21\ the Court invalidated a federal law as exceeding Congress' authority under the Commerce Clause.\22\ The statute was a provision making it a federal offense to possess a firearm within 1,000 feet of a school.\23\ 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.\24\ The Court identified three broad categories of activity that Congress may regulate under its commerce power. ``First, Congress may regulate the use of the channels of interstate commerce . . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,\25\ even though the threat may come only from intrastate activities . . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.'' \26\

\21\ The last such decision had been Carter v. Carter Coal Co., 298 U.S. 238 (1936).

\22\ United States v. Lopez, 514 U.S. 549 (1995). The Court was divided 5 to 4, with Chief Justice Rehnquist writing the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with dissents by Justices Stevens, Souter, Breyer, and Ginsburg.

\23\ The Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, Sec. 1702, 104 Stat. 4844, 18 U.S.C. Sec. 922(q)(1)(A). Congress subsequently amended the section to make the jurisdiction turn on possession of ``a firearm that has moved in or that otherwise affects interstate or foreign commerce.'' Pub. L. No. 104-208, Sec. 657, 110 Stat. 3009-370.

\24\ 514 U.S. at 556-57, 559.

\25\ For a recent example of such regulation, see Reno v. Condon, 120 S. Ct. 666 (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).

\26\ 514 U.S. at 558-59.

Clearly, said the Court, the criminalized activity did not implicate the first two categories.\27\ 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.'' \28\ 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.'' \29\ The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case. Finally, the Court rejected the arguments of the Government and of the dissent that there existed a sufficient connection between the offense and interstate

commerce.\30\ At base, the Court's concern was that accepting the attenuated connection arguments presented would result in the evisceration of federalism. ``Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.'' \31\

\27\ Id. at 559.
\28\ Id. at 559-61.
\29\ Id. at 561.
\30\ Id. at 563-68.
\31\ Id. at 564.

Whether Lopez bespoke a Court determination to police more closely Congress' exercise of its commerce power, so that it would be a noteworthy case,\32\ 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,\33\ however, suggests that stricter scrutiny of Congress' commerce power exercises is the chosen path, at least for legislation that falls outside the area of economic regulation.\34\ The Court will no longer defer, via rational basis review, to every congressional finding of substantial effects on interstate commerce, but instead will examine the nature of the asserted nexus to commerce, and will also consider whether a holding of constitutionality is consistent with its view of the commerce power as being a limited power that cannot be allowed to displace all exercise of state police powers.

\32\ ``Not every epochal case has come in epochal trappings.'' Id. at 615 (Justice Souter dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).
\33\ 120 S. Ct. 1740 (2000). Once again, the Justices were split 5 to 4, with Chief Justice Rehnquist's opinion of the Court being joined by Justices O'Connor, Scalia, Kennedy, and Thomas, and with Justices Souter, Stevens, Ginsburg, and Breyer dissenting.
\34\ 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).

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,'' \35\ 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,\36\ 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.'' \37\ 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.\38\ 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.'' \39\

\35\ 120 S. Ct. at 1751.

\36\ Dissenting Justice Souter pointed to a ``mountain of data'' assembled by Congress to show the effects of domestic violence on interstate commerce. 120 S. Ct. at 1760-63. 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,'' infra. In Morrison itself, the Court determined that congressional findings were insufficient to justify the VAWA as an exercise of Fourteenth Amendment power. 120 S. Ct. at 1755.

\37\ 120 S. Ct. at 1752.

\38\ 120 S. Ct. at 1752-53. Applying the principle of constitutional doubt, the Court in Jones v. United States, 120 S. Ct. 1904 (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. 120 S. Ct. at 1911.

\39\ 120 S. Ct. at 1754.

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

[Pp. 215-16, add to n.864:]

Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Justice Scalia concurring) (reiterating view); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200-01 (1995) (Justice Scalia, with Justice Thomas joining) (same). Justice Thomas has written an extensive opinion rejecting both the historical and jurisprudential basis of the dormant Commerce Clause and expressing a preference for reliance on the Imports-Exports Clause. Camps Newfound/ Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (dissenting; joined by Justice Scalia entirely and by Chief Justice Rehnquist as to the Commerce Clause but not the Imports-Exports Clause).

State Taxation and Regulation: The Old Law

--Taxation

[P. 223, add to n.907:]

Notice the Court's distinguishing of Central Greyhound in Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 188-91 (1995).

--Regulation

[P. 227, add to n.928:]

And see C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) (discrimination against interstate commerce not preserved because local businesses also suffer).

[P. 227, add to n.930:]

For the most recent case in this saga, see West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

State Taxation and Regulation: The Modern Law

--Taxation

[P. 229, add to n.941:]

A recent application of the four-part Complete Auto Transit test is Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[P. 231, add to n.952:]

Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 120 S. Ct. 1022 (2000) (interest deduction not properly apportioned between unitary and non-unitary business).

[P. 232, add to text following n.959:]

A deference to state taxing authority was evident in a case in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the State but terminated in another State. The tax was not apportioned to reflect the intrastate travel and the interstate travel.\40\ The tax in this case was different from the tax upheld in Central Greyhound, the Court held. The previous tax constituted a levy on gross receipts, payable by the seller, whereas the present tax was a sales tax, also assessed on gross receipts, but payable by the buyer. The Oklahoma tax, the Court continued, was internally consistent, since if every State imposed a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one tax. The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the State, not a tax on the travel.\41\

\40\ Indeed, there seemed to be a precedent squarely on point. Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948). Struck down in that case was a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the State.

\41\ Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995). Indeed, the Court analogized the tax to that in Goldberg v. Sweet, 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the State and that were billed to an in-state address.

However, the Court found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the corporation's exposure to the state income tax.\42\

\42\ Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The State had defended on the basis that the tax was a ``compensatory'' one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. Id. at 333-44. See also South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (tax not justified as compensatory).

[P. 232, add to n.961:]

And see Oregon Waste Systems, Inc. v. Department of Envtl. 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).

[P. 233, add to n.965:]

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 General 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).

[P. 233, add to text following n.965:]

Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in Camps Newfound/Owatonna, Inc. v. Town of Harrison,\43\ applied its nondiscrimination element of the doctrine to invalidate the State's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily non-state residents. The claimant here operated a church camp for children, most of whom resided out-of-state. The discriminatory tax would easily have fallen had it been applied to profit-making firms, and the Court saw no reason to make an exception for nonprofits. The tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. ``For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.'' \44\

\43\ 520 U.S. 564 (1997). The decision was a 5 to 4 one with a strong dissent by Justice Scalia, id. at 595, and a philosophical departure by Justice Thomas. Id. at 609.

\44\ Id. at 586.

[P. 236, add to n.978:]

In West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), the Court held invalidly discriminatory against interstate commerce a state milk pricing order, which imposed an assessment on all milk sold by dealers to in-state retailers, the entire assessment being distributed to in-state dairy farmers despite the fact that about two-thirds of the assessed milk was produced out of State. The avowed purpose and undisputed effect of the provision was to enable higher-cost in-state dairy farmers to compete with lower-cost dairy farmers in other States.

--Regulation

[P. 236, add to text following n.980:]

Further extending the limitation of the clause on waste disposal,\45\ the Court invalidated as a discrimination against interstate commerce a local ``flow control'' law, which required all solid waste within the town to be processed at a designated transfer station before leaving the municipality.\46\ The town's reason for the restriction was its decision to have built a solid waste transfer station by a private contractor, rather than with public funds by the town. To make the arrangement appetizing to the contractor, the town guaranteed it a minimum waste flow, for which it could charge a fee significantly higher than market rates. The guarantee was policed by the requirement that all solid waste generated within the town be processed at the contractor's station and that any person

disposing of solid waste in any other location would be penalized.

\45\ See also Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) (discriminatory tax).

\46\ C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

The Court analogized the constraint as a form of economic protectionism, which bars out-of-state processors from the business of treating the locality's solid waste, by hoarding a local resource for the benefit of local businesses that perform the service. The town's goal of revenue generation was not a local interest that could justify the discrimination. Moreover, the town had other means to accomplish this goal, such as subsidization of the local facility through general taxes or municipal bonds. The Court did not deal with, indeed, did not notice, the fact that the local law conferred a governmentally-granted monopoly, an exclusive franchise, indistinguishable from a host of local monopolies at the state and local level.\47\

\47\ See The Supreme Court, Leading Cases, 1993 Term, 108 Harv. L. Rev. 139, 149-59 (1994). Weight was given to this consideration by Justice O'Connor, 511 U.S. at 401 (concurring) (local law an excessive burden on interstate commerce), and by Justice Souter, id. at 410 (dissenting).

Foreign Commerce and State Powers

[P. 241, add to n.1001:]

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).

[P. 242, add to text following n.1004:]

Extending Container Corporation, the Court in Barclays Bank v. Franchise Tax Board of California,\48\ 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 nor prevent the Federal Government from speaking with one voice in international trade. The result of the case, perhaps intended, is that foreign corporations have less protection under the negative Commerce Clause.\49\

\48\ 512 U.S. 298 (1994).

\49\ The Supreme Court, Leading Cases, 1993 Term, 108 Harv. L. Rev. 139, 139-49 (1993).

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

--The Standards Applied

[P. 247, add to n.1026, immediately preceding City of New York v. FCC:]

Smiley v. Citibank, 517 U.S. 735 (1996).

[P. 247, add to n.1027:]

And see Department of Treasury v. Fabe, 508 U.S. 491 (1993).

[P. 247, add to n.1029:]

See also American Airlines v. Wolens, 513 U.S. 219 (1995).

[P. 248, add to n.1032:]

District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992) (law requiring employers to provide health insurance coverage, equivalent to existing coverage, for workers receiving workers' compensation benefits); John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank, 510 U.S. 86 (1993) (ERISA's fiduciary standards, not conflicting state insurance laws, apply to insurance company's handling of general account assets derived from participating group annuity contract); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (no preemption of statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients covered by Blue Cross/Blue Shield plan); De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806 (1997); California Div. of Labor Stds. Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997); Boggs v. Boggs, 520 U.S. 833 (1997) (decided not on the basis of the express preemption language but instead by implied preemption analysis).

[P. 249, add to text following n.1035:]

Little clarification of the confusing Cipollone decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in Medtronic, Inc. v. Lohr,\50\ was the Medical Device Amendments (MDA) of 1976, which prohibited States from adopting or continuing in effect ``with respect to a [medical] device'' any ``requirement'' that is ``different from, or in addition to'' the applicable federal requirement and that relates to the safety or effectiveness of the device.\51\ The issue, then, was whether a common-law tort obligation imposed a ``requirement'' that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as determined by the FDA to be ``substantially equivalent'' to a device previously on the market, a situation of some import to at least some of the Justices.

\50\ 518 U.S. 470 (1996). See also CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) (under Federal Railroad Safety Act, a state common-law claim alleging negligence for operating a train at excessive speed is preempted, but a second claim alleging negligence for failure to maintain adequate warning devices at a grade crossing is not preempted); Norfolk So. Ry. v. Shanklin, 120 S. Ct. 1467 (2000) (applying Easterwood).

\51\ 21 U.S.C. Sec. 350k(a).

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent States from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4-1-4 with respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them from the category of requirements

``with respect to'' specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, ``requirements'' that were preempted, though they did not agree on the application of that view.\52\

\52\ The dissent, by Justice O'Connor and three others, would have held preempted the latter claims, 518 U.S. at 509, whereas Justice Breyer thought that common-law claims would sometimes be preempted, but not here. Id. at 503 (concurring).

Following Cipollone, the Court observed that while it ``need not go beyond'' the statutory preemption language, it did need to ``identify the domain expressly pre-empted'' by the language, so that ``our interpretation of that language does not occur in a contextual vacuum.'' That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not cavalierly preempt common-law causes of action and the principle that it is Congress' purpose that is the ultimate touchstone.\53\

\53\ 518 U.S. at 484-85. See also id. at 508 (Justice Breyer concurring); Freightliner Corp. v. Myrick, 514 U.S. 280, 288-89 (1995); Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); California Div. of Labor Stds. Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 334 (1997) (Justice Scalia concurring); Boggs v. Boggs, 520 U.S. 833 (1997) (using ``stands as an obstacle'' preemption analysis in an ERISA case, having express preemptive language, but declining to decide when implied preemption may be used despite express language), and id. at 854 (Justice Breyer dissenting) (analyzing the preemption issue under both express and implied standards).

The Court continued to struggle with application of express preemption language to state common-law tort actions in Geier v. American Honda Motor Co.\54\ The National Traffic and Motor Vehicle Safety Act contained both a preemption clause, prohibiting states from applying ``any safety standard'' different from an applicable federal standard, and a ``saving clause,'' providing that ``compliance with'' a federal safety standard ``does not exempt any person from any liability under common law.'' The Court determined that the express preemption clause was inapplicable. However, despite the saving clause, the Court ruled that a common law tort action seeking damages for failure to equip a car with an airbag was preempted because its application would frustrate the purpose of a Federal Motor Vehicle Safety Standard that had allowed manufacturers to choose from among a variety of ``passive restraint'' systems for the applicable model year.\55\ The Court's holding makes clear, contrary to the suggestion in Cipollone, that existence of express preemption language does not foreclose operation of conflict (in this case ``frustration of purpose'') preemption.

\54\ 120 S. Ct. 1913 (2000).

\55\ The Court focused on the word ``exempt'' to give the saving clause a narrow application--as ``simply bar[ring] a special kind of defense, . . . that compliance with a federal safety standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one.'' 120 S. Ct. at 1919.

[P. 251, add to n.1046 after Ray v. Atlantic Richfield citation:]

United States v. Locke, 120 S. Ct. 1135 (2000) (applying Ray).

[P. 252, add to n.1050 before Free v. Brand:]

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (federal arbitration law preempts state law invalidating pre-dispute arbitration agreements that were not entered into in contemplation of substantial interstate activity); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) (federal arbitration law preempts state statute that conditioned enforceability of arbitration clause on compliance with special notice requirement).

[P. 252, add to n.1054:]

See also Barnett Bank v. Nelson, 517 U.S. 25 (1996) (federal law empowering national banks in small towns to sell insurance preempts state law prohibiting banks from dealing in insurance; despite explicit preemption provision, state law stands as an obstacle to accomplishment of federal purpose).

[P. 253, add to text following n.1057:]

In Boggs v. Boggs,\56\ the Court, 5 to 4, applied the ``stands as an obstacle'' test for conflict even though the statute (ERISA) contains an express preemption section. The dispute arose in a community-property State, in which heirs of a deceased wife claimed property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law ``relate[d] to'' a covered pension plan or because state law had an impermissible ``connection with'' a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. ``We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase `relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption.'' \57\

\56\ 520 U.S. 833 (1997).

\57\ Id. at 841. The dissent, id. at 854 (Justice Breyer), agreed that conflict analysis was appropriate, but he did not find that the state law achieved any result that ERISA required.

Similarly, the Court found it unnecessary to consider field preemption due to its holding that a Massachusetts law barring state agencies from purchasing goods or services from companies doing business with Burma imposed obstacles to the accomplishment of Congress' full objectives under the federal Burma sanctions law.\58\ The state law was said to undermine the federal law in several respects that could have implicated field preemption--by limiting the President's effective discretion to control sanctions, and by frustrating the President's ability to engage in effective diplomacy in developing a comprehensive multilateral strategy--but the Court ``decline[d] to speak to field preemption as a separate issue.'' \59\

\58\ Crosby v. National Foreign Trade Council, 120 S. Ct. 2288 (2000).

\59\ 120 S. Ct. at 2295 n.8.

--Federal Versus State Labor Laws

[P. 255, add to n.1069, immediately following Bethlehem Steel:]

See also Livadas v. Bradshaw, 512 U.S. 107 (1994) (finding preempted because it stood as an obstacle to the achievement of the purposes of NLRA a practice of a state labor commissioner).

COMMERCE WITH INDIAN TRIBES

[P. 263, add to n.1114:]

For recent tax controversies, see Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Department of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[P. 263, add to n.1117, immediately following Brendale discussion:]

And see Hagen v. Utah, 510 U.S. 399 (1994).

[P. 264, add to n.1119:]

See South Dakota v. Bourland, 508 U.S. 679 (1993) (abrogation of Indian treaty rights and reduction of sovereignty).

ALIENS

The Power of Congress to Exclude Aliens

[P. 276, add to n.1199:]

See Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (construing statutes and treaty provisions restrictively to affirm presidential power to interdict and seize fleeing aliens on high seas to prevent them from entering U.S. waters).

Deportation

[P. 281, add to n.1232:]

In Reno v. Flores, 507 U.S. 292 (1993), the Court upheld an INS regulation providing for the ongoing detention of juveniles apprehended on suspicion of being deportable, unless parents, close relatives, or legal guardians were available to accept release, as against a substantive due process attack.

[P. 281, add to text at end of section:]

An alien unlawfully in the country ``has no constitutional right to assert selective enforcement as a defense against his deportation.'' \60\

\60\ Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).

COPYRIGHTS AND PATENTS

Procedure in Issuing Patents

[P. 297, add to n.1353:]

In Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996), the Court held that the interpretation of terms in a patent claim is a matter of law reserved entirely for the court. The Seventh Amendment does not require that such issues be tried to a jury.

Nature and Scope of the Right Secured

[P. 298, add to n.1359:]

For fair use in the context of a song parody, see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

THE POWER TO RAISE AND MAINTAIN ARMED FORCES

Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents

[P. 316, add to n.1465:]

See Loving v. United States, 517 U.S. 748 (1996) (in context of the death penalty under the UCMJ).

POWERS DENIED TO CONGRESS

Taxes on Exports

[P. 356, add to text following n.1772:]

Continuing its refusal to modify its Export Clause jurisprudence,\61\ the Court held unconstitutional the Harbor Maintenance Tax (HMT) under the Export Clause insofar as the tax was applied to goods loaded at United States ports for export. The HMT required shippers to pay a uniform charge on commercial cargo shipped through the Nation's ports. The clause, said the Court, ``categorically bars Congress from imposing any tax on exports.'' \62\ However, the clause does not interdict a ``user fee,'' that is a charge that lacks the attributes of a generally applicable tax or duty and is designed to compensate for government supplied services, facilities, or benefits, and it was that defense to which the Government repaired once it failed to obtain a modification of the rules under the clause. But the HMT bore the indicia of a tax. It was titled as a tax, described as a tax in the law, and codified in the Internal Revenue Code. Aside from naming, however, courts must look to how things operate, and the HMT did not qualify as a user fee. It did not represent compensation for services rendered. The value of export cargo did not correspond reliably with the federal harbor services used or usable by the exporter. Instead, the extent and manner of port use depended on such factors as size and tonnage of a vessel and the length of time it spent in port.\63\ The HMT was thus a tax, and therefore invalid.

\61\ See United States v. IBM Corp., 517 U.S. 843, 850-61 (1996).

\62\ United States v. United States Shoe Corp., 523 U.S. 360, 363 (1998).

\63\ Id. at 367-69.

[P. 356, add to text following n.1775:]

In United States v. IBM Corporation,\64\ the Court declined the Government's argument that it should refine its export-tax-clause jurisprudence. Rather than read the clause as a bar on any tax that applies to a good in the export stream, the Government contended that the Court should bring this clause in line with the Import-Export Clause \65\ and with dormant-commerce-clause doctrine. In that view, the Court should distinguish between discriminatory and nondiscriminatory taxes on exports. But the Court held that sufficient differences existed between the Export Clause and the other two clauses, so that its bar should continue to apply to any and all taxes on goods in the course of exportation.

\64\ 517 U.S. 843 (1996).

\65\ Article I, Sec. 10, cl. 2, applying to the States.

[P. 356, add to n.1778:]

In United States v. IBM Corp., 517 U.S. 843 (1996), the Court adhered to Thames & Mersey, and held unconstitutional a federal excise tax upon insurance policies issued by foreign countries as applied to coverage for exported products. The Court admitted that one could question the earlier case's equating of a tax on the insurance of exported goods with a tax on the goods themselves, but it observed that the Government had chosen not to present that argument. Principles of stare decisis thus cautioned observance of the earlier case. Id. at 854-55. The dissenters argued that the issue had been presented and should be decided by overruling the earlier case. Id. at 863 (Justices Kennedy and Ginsburg dissenting).

POWERS DENIED TO THE STATES

Ex Post Facto Laws

--Scope of the Provision
[P. 362, add to n.1815:]

In Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998) (concurring), Justice Thomas indicated a willingness to reconsider Calder to determine whether the clause should apply to civil legislation.

--Changes in Punishment
[P. 364, add to n.1829:]

But see California Dep't of Corrections v. Morales, 514 U.S. 499 (1995) (a law amending parole procedures to decrease frequency of parole-suitability hearings is not ex post facto as applied to prisoners who committed offenses before enactment). The opinion modifies previous opinions that had invalidated some laws because they operated to the ``disadvantage'' of covered offenders. Henceforth, ``the focus of ex post facto inquiry is . . . whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.'' Id. at 506 n.3. Accord, Garner v. Jones, 120 S. Ct. 1362 (2000) (evidence insufficient to determine whether change in frequency of parole hearings significantly increases the likelihood of prolonging incarceration). But see Lynce v. Mathis, 519 U.S. 433 (1997) (cancellation of release credits already earned and used, resulting in reincarceration, violates the Clause).

--Changes in Procedure
[P. 366, add to end of section:]

Changes in evidentiary rules that allow conviction on less evidence than was required at the time the crime was committed can also run afoul of the Ex Post Facto Clause. This principle was applied in the Court's invalidation of retroactive application of a Texas law that eliminated the requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses, and allowed conviction on the victim's testimony alone.\66\

\66\ Carmell v. Texas, 120 S. Ct. 1620 (2000).

Duties on Exports or Imports
--Scope
[P. 399, add to n.2000:]

Justice Thomas has called recently for reconsideration of Woodruff and the possible application of the clause to interstate imports and exports. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609, 621 (1997) (dissenting).

--Property Taxes
[P. 400, add to n.2020:]

See also Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76-8 (1993). And see id. at 81-2 (Justice Scalia concurring).

ARTICLE II

NATURE AND SCOPE OF PRESIDENTIAL POWER
Executive Power: Theory of the Presidential Office
--The Curtiss-Wright Case
[P. 420, add to n.34:]

In Loving v. United States, 517 U.S. 748 (1996), the Court recurred to the original setting of Curtiss-Wright, a delegation to the President without standards. Congress, the Court found, had delegated to the President authority to structure the death penalty provisions of military law so as to bring the procedures, relating to aggravating and mitigating factors, into line with constitutional requirements, but Congress had provided no standards to guide the presidential exercise of the authority. Standards

were not required, held the Court, because the President's role as Commander-in-Chief gave him responsibility to superintend the military establishment and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising the delegated authority itself possesses independent authority over the subject matter, the familiar limitations on delegation do not apply. Id. at 771-74.

Executive Power: Separation-of-Powers Judicial Protection

[P. 422, add to text following n.45:]

Significant change in the position of the Executive Branch on separation of powers may be discerned in two briefs of the Department of Justice's Office of Legal Counsel, which may spell some measure of judicial modification of the formalist doctrine of separation and adoption of the functionalist approach to the doctrine.\1\ The two opinions withdraw from the Department's earlier contention, following Buckley v. Valeo, that the execution of the laws is an executive function that may be carried out only by persons appointed pursuant to the appointments clause, thus precluding delegations to state and local officers and to private parties (as in qui tam actions), as well as to glosses on the take care clause and other provisions of the Constitution. Whether these memoranda signal long-term change depends on several factors, importantly on whether they are adhered to by subsequent administrations.

\1\ Memorandum for John Schmidt, Associate Attorney General, from Assistant Attorney General Walter Dellinger, Constitutional Limitations on Federal Government Participation in Binding Arbitration (Sept. 7, 1995); Memorandum for the General Counsels of the Federal Government, from Assistant Attorney General Walter Dellinger, The Constitutional Separation of Powers Between the President and Congress (May 7, 1996). The principles laid down in the memoranda depart significantly from previous positions of the Department of Justice. For conflicting versions of the two approaches, see Constitutional Implications of the Chemical Weapons Convention, Hearings Before the Senate Judiciary Subcommittee on the Constitution, Federalism, and Property Rights, 104th Cong., 2d Sess. (1996), 11-26, 107-10 (Professor John C. Woo), 80-106 (Deputy Assistant Attorney General Richard L. Shiffrin).

[P. 425, add to text following n.61:]

In the course of deciding that the President's action in approving the closure of a military base, pursuant to statutory authority, was not subject to judicial review, the Court enunciated a principle that may mean a great deal, constitutionally speaking, or that may not mean much of anything.\2\ The lower court had held that, while review of presidential decisions on statutory grounds might be precluded, his decisions were reviewable for constitutionality; in that court's view, whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine. The Supreme Court found this analysis flawed. ``Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority.'' \3\ Thus, the Court drew a distinction between executive action undertaken without even the purported warrant of statutory authorization and executive action in excess of statutory authority. The former may violate

separation of powers, while the latter will not.\4\

\2\ Dalton v. Specter, 511 U.S. 462 (1994).
\3\ Id. at 472.
\4\ See The Supreme Court, Leading Cases, 1993 Term, 108 Harv. L. Rev. 139, 300-10 (1994).

Doctrinally, the distinction is important and subject to unfortunate application.\5\ Whether the brief, unilluminating discussion in Dalton will bear fruit in constitutional jurisprudence, however, is problematic.

\5\ ``As a matter of constitutional logic, the executive branch must have some warrant, either statutory or constitutional, for its actions. The source of all federal governmental authority is the Constitution and, because the Constitution contemplates that Congress may delegate a measure of its power to officials in the executive branch, statutes. The principle of separation of powers is a direct consequence of this scheme. Absent statutory authorization, it is unlawful for the President to exercise the powers of the other branches because the Constitution does not vest those powers in the President. The absence of statutory authorization is not merely a statutory defect; it is a constitutional defect as well.'' 108 Harv. L. Rev. at 305-06 (footnote citations omitted).

THE EXECUTIVE ESTABLISHMENT
Appointments and Congressional Regulation of Offices
[P. 514, add to text following n.468:]

The Court, in Edmond v. United States,\6\ reviewed its pronouncements regarding the definition of ``inferior officer'' and, disregarding some implications of its prior decisions, seemingly settled, unanimously, on a pragmatic characterization. Thus, the importance of the responsibilities assigned an officer, the fact that duties were limited, that jurisdiction was narrow, and that tenure was limited, are only factors but are not definitive.\7\ ``Generally speaking, the term `inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an `inferior' officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase `lesser officer.' Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that `inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'' \8\

\6\ 520 U.S. 651 (1997).
\7\ Id. at 661-62.
\8\ Id. at 662-63. The case concerned whether the Secretary of Transportation, a presidential appointee with the advice and consent of the Senate, could appoint judges of the Coast Guard Court of Military Appeals; necessarily, the judges had to be ``inferior'' officers. In related cases, the Court held that designation or appointment of military judges, who are ``officers of the United States,'' does not violate the appointments clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so

that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review by the same method was impermissible; they had either to be appointed by an officer who could exercise appointment-clause authority or by the President, and their actions were not salvageable under the de facto officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[P. 516, add new footnote to end of first sentence of first full paragraph:]

As the text suggested, Freytag seemed to be a tentative decision, and Edmond v. United States, 520 U.S. 651 (1997), a unanimous decision written by Justice Scalia, whose concurring opinion in Freytag challenged the Court's analysis, may easily be read as retreating considerably from it.

--Financial Disclosure and Limitations

[P. 519, add to n.498:]

The Supreme Court held this provision unconstitutional in United States v. NTEU, 513 U.S. 454 (1995).

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

[P. 579, add to n.723:]

See also, following Franklin, Dalton v. Specter, 511 U.S. 462 (1994).

[P. 582, add to text following n.738:]

Unofficial Conduct.--In Clinton v. Jones,\9\ the Court, in a case of first impression, held that the President did not have qualified immunity from suit for conduct alleged to have taken place prior to his election to the Presidency, which would entitle him to delay of both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct--primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability--were inapplicable in this kind of case. Moreover, the separation-of-powers doctrine did not require a stay of all private actions against the President. Separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the Government at the expense of another. However, a federal trial court tending to a civil suit in which the President is a party performs only its judicial function, not a function of another branch. No decision by a trial court could curtail the scope of the President's powers. The trial court, the Supreme Court observed, had sufficient powers to accommodate the President's schedule and his workload, so as not to impede the President's performance of his duties. Finally, the Court stated its belief that allowing such suits to proceed would not generate a large volume of politically motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary to legislate, to afford the President protection.\10\

\9\ 520 U.S. 681 (1997).

\10\ The Court observed at one point that it doubted that defending the suit would much preoccupy the President, that his time and energy would not be much taken up by it. ``If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency.'' 520 U.S. at 702.

--The President's Subordinates

[P. 582, add to n.743:]

Following the Westfall decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act

of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the Government because the FTCA has not waived sovereign immunity. Cognizant of the temptation set before the Government to immunize both itself and its employee, the Court in Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), held that the Attorney General's certification is subject to judicial review.

IMPEACHMENT
Impeachable Offenses
--Judicial Review of Impeachments
[P. 591, add to text following n.784:]

Upon at last reaching the question, the Court has held that a claim to judicial review of an issue arising in an impeachment trial in the Senate presents a nonjusticiable question, a ``political question.'' \11\ Specifically, the Court held that a claim that the Senate had not followed the proper meaning of the word ``try'' in the impeachment clause, a special committee being appointed to take testimony and to make a report to the full Senate, complete with a full transcript, on which the Senate acted, could not be reviewed. But the analysis of the Court applies to all impeachment clause questions, thus seemingly putting off-limits to judicial review the whole process.

\11\ Nixon v. United States, 506 U.S. 224 (1993). Nixon at the time of his conviction and removal from office was a federal district judge in Mississippi.

ARTICLE III

JUDICIAL POWER
Characteristics and Attributes of Judicial Power
[P. 618, add to text following n.126:]

Judicial power confers on federal courts the power to decide a case, to render a judgment conclusively resolving a case. Judicial power is the authority to render dispositive judgments, and Congress violates the separation of powers when it purports to alter final judgments of Article III courts.\1\ In this controversy, the Court had unexpectedly fixed on a shorter statute of limitations to file certain securities actions than that believed to be the time in many jurisdictions. Resultantly, several suits that had been filed later than the determined limitations had been dismissed and had become final because they were not appealed. Congress enacted a statute, which, while not changing the limitations period prospectively, retroactively extended the time for suits dismissed and provided for the reopening of the final judgments rendered in the dismissals of suits.

\1\ Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995). The Court was careful to delineate the difference between attempting to alter a final judgment, one rendered by a court and either not appealed or affirmed on appeal, and legislatively amending a statute so as to change the law as it existed at the time a court issued a decision that was on appeal or otherwise still alive at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers the prior

interpretation. Id. at 226-27.

Article III creates or authorizes Congress to create not a collection of unconnected courts, but a judicial department composed of ``inferior courts'' and ``one Supreme Court.'' ``Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.'' Id. at 227.

Holding the congressional act invalid, the Court held it impermissible for Congress to disturb a final judgment. ``Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.'' \2\ On the other hand, the Court ruled in Miller v. French \3\ that the Prison Litigation Reform Act's automatic stay of ongoing injunctions remedying violations of prisoners' rights did not amount to an unconstitutional legislative revision of a final judgment. Rather, the automatic stay merely alters ``the prospective effect'' of injunctions, and it is well established that such prospective relief ``remains subject to alteration due to changes in the underlying law.'' \4\

\2\ 514 U.S. at 227 (emphasis by Court).
\3\ 120 S. Ct. 2246 (2000).
\4\ 120 S. Ct. at 2257.

Finality of Judgment as an Attribute of Judicial Power
[P. 620, add to n.140:]

Notice the Court's discussion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225-26 (1995).

ANCILLARY POWERS OF FEDERAL COURTS
The Contempt Power
--Categories of Contempt
[P. 623, add to text following n.154:]

In International Union, UMW v. Bagwell,\5\ the Court formulated a new test for drawing the distinction between civil and criminal contempts, which has important consequences for the procedural rights to be accorded those cited. Henceforth, the imposition of non-compensatory contempt fines for the violation of any complex injunction will require criminal proceedings. This case, as have so many, involved the imposition of large fines (here, $52 million) upon a union in a strike situation for violations of an elaborate court injunction restraining union activity during the strike. The Court was vague with regard to the standards for determining when a court order is ``complex'' and thus requires the protection of criminal proceedings.\6\ Much prior doctrine remains, however, as in the distinction between remedial sanctions, which are civil, and punitive, which are criminal, and between in-court and out-of-court contempts.

\5\ 512 U.S. 821 (1994).
\6\ Id. at 832-38. Relevant is the fact that the alleged contempts did not occur in the presence of the court and that determinations of violations require elaborate and reliable factfinding. See esp. id. at 837-38.

--Due Process Limitations on Contempt Power: Right to Jury Trial
[P. 631, add to n.195:]

See also International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (refining the test for when contempt citations are criminal and thus require jury trials).

[P. 631, add to n.196:]

In International Union, UMW v. Bagwell, 512 U.S. 821, 837 n.5 (1994), the Court continued to reserve the question of the distinction between petty and serious contempt fines, because of the size of the fine in that case.

--Contempt by Disobedience of Orders

[P. 634, add to n.206:]

See also International Union, UMW v. Bagwell, 512 U.S. 821 (1994).

Power to Issue Writs: The Act of 1789

--Habeas Corpus: Congressional and Judicial Control

[P. 639, add to text following n.238:]

In Felker v. Turpin,\7\ the Court again passed up the opportunity to delineate Congress' permissive authority over habeas, finding that none of the provisions of the Antiterrorism and Effective Death Penalty Act \8\ raised questions of constitutional import.

\7\ 518 U.S. 651 (1996).

\8\ Pub. L. No. 104-132, Sec. Sec. 101-08, 110 Stat. 1214, 1217-26, amending, inter alia, 28 U.S.C. Sec. Sec. 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

Congressional Limitation of the Injunctive Power

[P. 642, add to text following n.264:]

Perhaps pressing its powers further than prior legislation, Congress enacted the Prison Litigation Reform Act of 1996.\9\ Essentially, the law imposes a series of restrictions on judicial remedies in prison-conditions cases. Thus, courts may not issue prospective relief that extends beyond that necessary to correct the violation of a federal right that they have found, that is narrowly drawn, is the least intrusive, and that does not give attention to the adverse impact on public safety. Preliminary injunctive relief is limited by the same standards. Consent decrees may not be approved unless they are subject to the same conditions, meaning that the court must conduct a trial and find violations, thus cutting off consent decrees. No prospective relief is to last longer than two years if any party or intervenor so moves. Finally, a previously issued decree that does not conform to the new standards imposed by the Act is subject to termination upon the motion of the defendant or an intervenor. After a short period (30 or 60 days, depending on whether there is ``good cause'' for a 30-day extension), such a motion operates as an automatic stay of the prior decree pending the court's decision on the merits. The Court upheld the termination and automatic stay provisions in Miller v. French,\10\ rejecting the contention that the automatic stay provision offends separation of powers principles by legislative revision of a final judgment. Rather, Congress merely established new standards for the enforcement of prospective relief, and the automatic stay provision ``helps to implement the change in the law.'' \11\

\9\ The statute was part of an Omnibus Appropriations Act signed by the President on April 26, 1996. Pub. L. 104-134, Sec. Sec. 801-10, 110 Stat. 1321-66-77, amending 18 U.S.C. Sec. 3626.

\10\ 120 S. Ct. 2246 (2000).

\11\ 120 S. Ct. at 2259.

JUDICIAL POWER AND JURISDICTION--CASES AND CONTROVERSIES

Substantial Interest: Standing

--Taxpayer Suits

[P. 657, add to n.335:]

Richardson's generalized grievance constriction does not apply when Congress confers standing on litigants. FEC v.

Akins, 524 U.S. 11 (1998). When Congress confers standing on ``any person aggrieved'' by the denial of information required to be furnished them, the statutory entitlement is sufficient, and it matters not that most people will be entitled and will thus suffer a ``generalized grievance.'' Id. at 21-25.

[P. 657, add to n.336:]

The Court's present position on Flast is set out severely in Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996), in which the Court largely plays down the ``serious and adversarial treatment'' prong of standing and strongly reasserts the separation-of-powers value of keeping courts within traditional bounds. The footnote is a response to Justice Souter's separate opinion utilizing Flast, id., 398-99, for a distinctive point.

--Constitutional Standards: Injury in Fact, Causation, and Redressability

[P. 658, insert the following after the word ``Now'' in sentence following n.345:]

political,\12\

\12\ Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

[P. 659, add to text following n.347:]

In FEC v. Akins,\13\ the Court found ``injury-in-fact'' present when plaintiff voters alleged that the Federal Election Commission had denied them information, to which they alleged an entitlement, respecting an organization that might or might not be a political action committee. Congress had afforded persons access to the Commission and had authorized ``any person aggrieved'' by the actions of the FEC to sue to challenge the action. That the injury was widely shared did not make the claimed injury a ``generalized grievance,'' the Court held, but rather in this case, as in others, it was a concrete harm to each member of the class. The case is a principal example of the ability of Congress to confer standing and to remove prudential constraints on judicial review.

\13\ 524 U.S. 11 (1998).

[P. 659, add to n.348 at end of string citation:]

Friends of the Earth v. Laidlaw Envtl. Servs., 120 S. Ct. 693 (2000).

[P. 659, add to text following n.348:]

Even citizens who bring qui tam actions under the False Claims Act, an action that entitles them to a percentage of any civil penalty assessed for violation, have been held to have standing, on the theory that the government has assigned a portion of its damages claim to the plaintiff, and the assignee of a claim has standing to assert the injury in fact suffered by the assignor.\14\

\14\ Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 120 S. Ct. 1858 (2000). The Court confirmed its conclusion by reference to the long tradition of qui tam actions, since the Constitution's restriction of judicial power to ``cases'' and ``controversies'' has been interpreted to mean ``cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'' Id. at 1863.

[P. 660, add to n.352:]

In Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Court denied standing because of the absence of redressability. An environmental group sued the company for failing to file timely reports required by

statute; by the time the complaint was filed, the company was in full compliance. Acknowledging that the entity had suffered injury in fact, the Court found that no judicial action would afford it a remedy.

[P. 661, add to text at end of section:]

Redressability can be present in an environmental citizen suit even when the remedy is civil penalties payable to the government. The civil penalties, the Court explained, ``carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs'] injuries by abating current violations and preventing future ones.'' \15\

\15\ Friends of the Earth v. Laidlaw Envtl. Servs., 120 S. Ct. 693, 707 (2000).

--Prudential Standing Rules

[P. 661, add to text following n.360:]

In a case permitting a plaintiff contractors' association to challenge an affirmative-action, set-aside program, the Court seemed to depart from several restrictive standing decisions in which it had held that the claims of attempted litigants were too ``speculative'' or too ``contingent.'' \16\ The association had sued, alleging that many of its members ``regularly bid on and perform construction work'' for the city and that they would have bid on the set-aside contracts but for the restrictions. The Court found the association had standing, because certain prior cases under the Equal Protection Clause established a relevant proposition. ``When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The `injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.'' \17\ The association, therefore, established standing by alleging that its members were able and ready to bid on contracts but that a discriminatory policy prevented them from doing so on an equal basis.\18\

\16\ Northeastern Fla. Ch., Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993). Thus, it appears that had the Court applied its standard in the current case, the results would have been different in such cases as Linda R. S. v. Richard D., 410 U.S. 614 (1973); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); and Allen v. Wright, 468 U.S. 737 (1984).

\17\ 508 U.S. at 666. The Court derived the proposition from another set of cases. Turner v. Fouche, 396 U.S. 346 (1970); Clements v. Fashing, 457 U.S. 957 (1982); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

\18\ 508 U.S. at 666. But see, in the context of ripeness, Reno v. Catholic Social Servs., Inc., 509 U.S. 43 (1993), in which the Court, over the dissent's reliance on Jacksonville, id. at 81-2, denied the relevance of its distinction between entitlement to a benefit and equal treatment. Id. at 58 n.19.

[Pp. 661-62, add to n.360:]

Justice Scalia, who wrote the opinion in Lujan, reiterated the separation-of-powers objection to congressional conferral of standing in FEC v. Akins, 524 U.S. 11, 29, 36 (1998) (alleged infringement of President's

``take care'' obligation), but this time in dissent; the Court did not advert to this objection in finding that Congress had provided for standing based on denial of information to which the plaintiffs, as voters, were entitled.

[P. 662, add to n.362:]

See also Bennett v. Spear, 520 U.S. 154 (1997).

--Standing to Assert the Constitutional Rights of Others

[P. 663, add to n.370:]

The Court has expanded the rights of non-minority defendants to challenge the exclusion of minorities from petit and grand juries, both on the basis of the injury-in-fact to defendants and because the standards for being able to assert the rights of third parties were met. Powers v. Ohio, 499 U.S. 400 (1991); Campbell v. Louisiana, 523 U.S. 392 (1998).

--Standing of Members of Congress

[P. 668, add new paragraph at end of section:]

Member or legislator standing has been severely curtailed, although not quite abolished, in Raines v. Byrd.\19\ Several Members of Congress, who had voted against passage of the Line Item Veto Act, sued in their official capacities as Members of Congress to invalidate the law, alleging standing based on the theory that the statute adversely affected their constitutionally prescribed lawmaking power.\20\ Emphasizing its use of standing doctrine to maintain separation-of-powers principles, the Court adhered to its holdings that, in order to possess the requisite standing, a person must establish that he has a ``personal stake'' in the dispute and that the alleged injury suffered is particularized as to him.\21\ Neither requirement, the Court held, was met by these legislators. First, the Members did not suffer a particularized loss that distinguished them from their colleagues or from Congress as an entity. Second, the Members did not claim that they had been deprived of anything to which they were personally entitled. ``[A]ppellees' claim of standing is based on loss of political power, not loss of any private right, which would make the injury more concrete . . . . If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power.'' \22\

\19\ 521 U.S. 811 (1997).

\20\ The Act itself provided that ``[a]ny Member of Congress or any individual adversely affected'' could sue to challenge the law. 2 U.S.C. Sec. 692(a)(1). After failure of this litigation, the Court in the following Term, on suits brought by claimants adversely affected by the exercise of the veto, held the statute unconstitutional. Clinton v. City of New York, 524 U.S. 417 (1998).

\21\ 521 U.S. at 819.

\22\ 521 U.S. at 821.

So, there is no such thing as Member standing? Not necessarily so, because the Court turned immediately to preserving (at least a truncated version of) Coleman v. Miller,\23\ in which the Court had found that 20 of the 40 members of a state legislature had standing to sue to challenge the loss of the effectiveness of their votes as a result of a tie-breaker by the lieutenant governor. Although there are several possible explanations for the result in that case, the Court in Raines chose to fasten on a particularly narrow point. ``[O]ur holding in Coleman stands (at most, . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a

specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.'' \24\ Because these Members could still pass or reject appropriations bills, vote to repeal the Act, or exempt any appropriations bill from presidential cancellation, the Act did not nullify their votes and thus give them standing.\25\

\23\ 307 U.S. 433 (1939).
\24\ 521 U.S. at 823.
\25\ 521 U.S. at 824-26.

It will not pass notice that the Court's two holdings do not cohere. If legislators have standing only to allege personal injuries suffered in their personal capacities, how can they have standing to assert official-capacity injury in being totally deprived of the effectiveness of their votes? A period of dispute in the D.C. Circuit seems certain to follow.

--Standing to Challenge Nonconstitutional Governmental Action

[P. 669, add to n.401:]

See also National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998), in which the Court found that a bank had standing to challenge an agency ruling expanding the role of employer credit unions to include multi-employer credit unions, despite a statutory limit that any such union could be of groups having a common bond of occupation or association. The Court held that a plaintiff did not have to show it was the congressional purpose to protect its interests. It is sufficient if the interest asserted is ``arguably within the zone of interests to be protected . . . by the statute.'' Id. at 492 (internal quotation marks and citation omitted). But the Court divided 5 to 4 in applying the test. And see Bennett v. Spear, 520 U.S. 154 (1997).

[P. 670, add to n.405:]

But see Bennett v. Spear, 520 U.S. 154 (1997) (fact that ``citizen suit'' provision of Endangered Species Act is directed at empowering suits to further environmental concerns does not mean that suitor who alleges economic harm from enforcement of Act lacks standing); FEC v. Akins, 524 U.S. 11 (1998) (expansion of standing based on denial of access to information).

The Requirement of a Real Interest

--Declaratory Judgments

[P. 674, add to n.436:]

See also Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

--Ripeness

[P. 676, add to n.449:]

For recent examples of lack of ripeness, see Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Texas v. United States, 523 U.S. 296 (1998).

[P. 678, add to n.457:]

In the context of ripeness to challenge agency regulations, as to which there is a presumption of available judicial remedies, the Court has long insisted that federal courts should be reluctant to review such regulations unless the effects of administrative action challenged have been felt in a concrete way by the challenging parties, i.e., unless the controversy is ``ripe.'' See, of the older cases, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967). More recent cases include Reno v. Catholic Social Servs., Inc., 509 U.S. 43 (1993); Lujan v. National Wildlife Fed'n., 497 U.S. 871, 891 (1990).

--Mootness

[P. 679, add to n.462:]

Munsingwear had long stood for the proposition that the appropriate practice of the Court in a civil case that had become moot while on the way to the Court or after certiorari had been granted was to vacate or reverse and remand with directions to dismiss. But, in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), the Court held that when mootness occurs because the parties have reached a settlement, vacatur of the judgment below is ordinarily not the best practice; instead, equitable principles should be applied so as to preserve a presumptively correct and valuable precedent, unless a court concludes that the public interest would be served by vacatur.

[PP. 679, add to n.463:]

Consider the impact of Cardinal Chemical Co. v. Morton Int'l, Inc., 508 U.S. 83 (1993).

[P. 680, add to n.466:]

Following Aladdin's Castle, the Court in Northeastern Fla. Ch., Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 660-63 (1993), held that when a municipal ordinance is repealed but replaced by one sufficiently similar so that the challenged action in effect continues, the case is not moot. But see id. at 669 (Justice O'Connor dissenting) (modification of ordinance more significant and case is mooted).

[P. 680, add to n.467:]

In Arizonans For Official English v. Arizona, 520 U.S. 43 (1997), a state employee attacking an English-only work requirement had standing at the time she brought the suit, but she resigned following a decision in the trial court, thus mooting the case before it was taken to the appellate court, which should not have acted to hear and decide it.

[P. 680, add to n.469:]

But compare Spencer v. Kemna, 523 U.S. 1 (1998).

[P. 682, add to n.476 following Super Tire citation:]

Friends of the Earth v. Laidlaw Envtl. Servs., 120 S. Ct. 693, 708-10 (2000).

--Retroactivity Versus Prospectivity

[P. 686, add to n.503:]

For additional elaboration on ``new law,'' see O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). But compare Bousley v. Brooks, 523 U.S. 614 (1998).

[P. 687, add to text following n.509:]

Apparently, the Court now has resolved this dispute, although the principal decision is a close 5 to 4 result. In Harper v. Virginia Dep't of Taxation,\26\ the Court adopted the principle of the Griffith decision in criminal cases and disregarded the Chevron Oil approach in civil cases. Henceforth, in civil cases, the rule is: ``When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.'' \27\ Four Justices continued to adhere to Chevron Oil, however,\28\ so that with one Justice each retired from the different sides one may not regard the issue as definitively settled.\29\

\26\ 509 U.S. 86 (1993).

\27\ Id. at 97. While the conditional language in this passage might suggest that the Court was leaving open the possibility that in some cases it might rule purely prospectively, not even applying its decision to the parties before it, other language belies that possibility. ``This rule extends Griffith's ban against `selective application of new rules.' '' [Citing 479 U.S. at 323]. Inasmuch as Griffith rested in part on the principle that ``the nature

of judicial review requires that [the Court] adjudicate specific cases,'' Griffith, 479 U.S. at 322, deriving from Article III's case or controversy requirement for federal courts and forbidding federal courts from acting legislatively, the ``Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'' 509 U.S. at 97 (quoting American Trucking, 496 U.S. at 214 (Justice Stevens dissenting)). The point is made more clearly in Justice Scalia's concurrence, in which he denounces all forms of nonretroactivity as ``the handmaid of judicial activism.'' Id. at 105.

\28\ Id. at 110 (Justice Kennedy, with Justice White, concurring); 113 (Justice O'Connor, with Chief Justice Rehnquist, dissenting). However, these Justices disagreed in this case about the proper application of Chevron Oil.

\29\ But see Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (setting aside a state court refusal to give retroactive effect to a U.S. Supreme Court invalidation of that State's statute of limitations in certain suits, in an opinion by Justice Breyer, Justice Blackmun's successor); Ryder v. United States, 515 U.S. 177, 184-85 (1995) (``whatever the continuing validity of Chevron Oil after'' Harper and Reynoldsville Casket).

Political Questions
--The Doctrine Reappears
[P. 696, add to text following n.569:]

A challenge to the Senate's interpretation of and exercise of its impeachment powers was held to be nonjusticiable; there was a textually demonstrable commitment of the issue to the Senate, and there was a lack of judicially discoverable and manageable standards for resolving the issue.\30\

\30\ Nixon v. United States, 506 U.S. 224 (1993). The Court pronounced its decision as perfectly consonant with Powell v. McCormack. Id. at 236-38.

JUDICIAL REVIEW
Limitations on the Exercise of Judicial Review
--Stare Decisis in Constitutional Law
[P. 712, add to n.639:]

Recent discussions of and both applications of and refusals to apply stare decisis may be found in Hohn v. United States, 524 U.S. 236, 251-52 (1998), and id. at 1981-83 (Justice Scalia dissenting); State Oil Co. v. Khan, 522 U.S. 3, 20-2 (1997); Agostini v. Felton, 521 U.S. 203, 235-36 (1997), and id. at 523-54 (Justice Souter dissenting); United States v. IBM Corp., 517 U.S. 843, 854-56 (1996) (noting principles of following precedent and declining to consider overturning an old precedent when parties have not advanced arguments on the point), with which compare id. at 863 (Justice Kennedy dissenting) (arguing that the United States had presented the point and that the old case ought to be overturned); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231-35 (1996) (plurality opinion) (discussing stare decisis, citing past instances of overrulings, and overruling 1990 decision), with which compare the dissents, id. at 242, 264, 271; Seminole Tribe of Florida v. Florida, 517 U.S. 44, 61-73 (1996) (discussing policy of stare decisis, why it should not be followed with respect to a 1989 decision, and overruling that precedent), with which compare the dissents, id. at 76, 100. Justices Scalia and Thomas have argued for various departures from precedent. E.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200-01 (1995) (Justice Scalia concurring) (negative commerce jurisprudence); Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604, 631 (1996) (Justice Thomas concurring

in part and dissenting in part) (rejecting framework of Buckley v. Valeo and calling for overruling of part of case). Compare id. at 626 (Court notes those issues not raised or argued).

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

--Pendent Jurisdiction

[P. 721, add to n.702:]

See also Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994); Peacock v. Thomas, 516 U.S. 349 (1996) (both cases using the new vernacular of ``ancillary jurisdiction'').

[P. 722, add to n.713:]

In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1998), the Court, despite the absence of language making Sec. 1367 applicable, held that the statute gave district courts jurisdiction over state-law claims in cases originating in state court and then removed to federal court.

Cases of Admiralty and Maritime Jurisdiction

--Admiralty and Maritime Cases

[P. 734, add to n.780:]

And see Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), a tort claim arising out of damages allegedly caused by negligently driving piles from a barge into the riverbed, which weakened a freight tunnel that allowed flooding of the tunnel and the basements of numerous buildings along the Chicago River. The Court found that admiralty jurisdiction could be invoked. The location test was satisfied, because the barge, even though fastened to the river bottom, was a ``vessel'' for admiralty tort purposes; the two-part connection test was also satisfied, inasmuch as the incident had a potential to disrupt maritime commerce and the conduct giving rise to the incident had a substantial relationship to traditional maritime activity.

--Admiralty and Federalism

[P. 743, add to n.842:]

But, in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), a case involving a death in territorial waters from a jet ski accident, the Court held that Moragne does not provide the exclusive remedy in cases involving the death in territorial waters of a ``nonseafarer''--a person who is neither a seaman covered by the Jones Act nor a longshore worker covered by the LHWCA.

Cases to Which the United States Is a Party

--Immunity of the United States From Suit

[P. 747, add to n.863:]

See FDIC v. Meyer, 510 U.S. 471 (1994) (FSLIC's ``sue-and-be-sued'' clause waives sovereign immunity; but a Bivens implied cause of action for constitutional torts cannot be used directly against FSLIC).

Suits Between Two or More States

--Cases of Which the Court has Declined Jurisdiction

[P. 755, add to n.909:]

But in Mississippi v. Louisiana, 506 U.S. 73 (1992), the Court's reluctance to exercise original jurisdiction ran afoul of the ``uncompromising language'' of 28 U.S.C. Sec. 1251(a) giving the Court ``original and exclusive jurisdiction'' of these kinds of suits.

Controversies Between Citizens of Different States

--The Law Applied in Diversity Cases

[P. 772, add to text following n.1013:]

Some confusion has been injected into consideration of which law to apply--state or federal--in the absence of a federal statute or a Federal Rule of Civil Procedure.\31\ In an action for damages, the federal courts were faced with the issue of the application either of a state statute, which gave the appellate division of the state courts the authority to determine if an award is excessive or inadequate if it deviates materially from what would be

reasonable compensation, or of a federal judicially-created practice of review of awards as so exorbitant that it shocked the conscience of the court. The Court determined that the state statute was both substantive and procedural, which would result in substantial variations between state and federal damage awards depending on whether the state or the federal approach was applied; it then followed the mode of analysis exemplified by those cases emphasizing the importance of federal courts reaching the same outcome as would the state courts,\32\ rather than what had been the prevailing standard, in which the Court balanced state and federal interests to determine which law to apply.\33\ Emphasis upon either approach to considerations of applying state or federal law reflects a continuing difficulty of accommodating ``the constitutional power of the states to regulate the relations among their citizens . . . [and] the constitutional power of the federal government to determine how its courts are to be operated.'' \34\ Additional decisions will be required to determine which approach, if either, prevails.

\31\ Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). The decision was 5 to 4, so that the precedent may or may not be stable for future application.

\32\ E.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

\33\ E.g., Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

\34\ 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure (2d ed. 1996), Sec. 4511, at 311.

[P. 773, add to n.1016:]

But see O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory Reconsidered

[P. 788, add to n.1105:]

A restrained reading of McCardle is strongly suggested by Felker v. Turpin, 518 U.S. 651 (1996). A 1996 congressional statute giving to federal courts of appeal a ``gate-keeping'' function over the filing of second or successive habeas petitions limited further review, including denying the Supreme Court appellate review of circuit court denials of motions to file second or successive habeas petitions. Pub. L. No. 104-132, Sec. 106, 110 Stat. 1214, 1220, amending 28 U.S.C. Sec. 2244(b). Upholding the limitation, which was nearly identical to the congressional action at issue in McCardle and Yerger, the Court held that its jurisdiction to hear appellate cases had been denied, but just as in Yerger the statute did not annul the Court's jurisdiction to hear habeas petitions filed as original matters in the Supreme Court. No constitutional issue was thus presented.

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

--Abstention

[Pp. 798-99, add to n.1161:]

But in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), an exercise in Burford abstention, the Court held that federal courts have power to dismiss or remand cases based on abstention principles only where relief being sought is equitable or otherwise discretionary but may not do so in common-law actions for damages.

[P. 803, change heading to:]

Conflicts of Jurisdiction: Federal Court Interference with State Courts

--Habeas Corpus: Scope of the Writ

[P. 816, add to n.1256:]

See also O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). But compare Bousley v. Brooks, 523 U.S. 614 (1998).

[P. 818, add to n.1268:]

In Bousley v. Brooks, 523 U.S. 614 (1998), a federal post-conviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted more narrowly the elements of the offense than had the trial court in Bousley's case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate ``actual innocence'' so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

[P. 818, add to text following n.1270:]

The Court continues, with some modest exceptions, to construe habeas jurisdiction quite restrictively, but it has now been joined by new congressional legislation that is also restrictive. In Herrera v. Collins,\35\ the Court appeared, though ambiguously, to take the position that, while it requires a showing of actual innocence to permit a claimant to bring a successive or abusive petition, a claim of innocence is not alone sufficient to enable a claimant to obtain review of his conviction on habeas. Petitioners are entitled in federal habeas courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of one's conviction or detention, and the execution of one claiming actual innocence would not itself violate the Constitution.\36\

\35\ 506 U.S. 390 (1993).

\36\ Id. at 398-417. However, in a subsequent part of the opinion, the Court purports to reserve the question whether ``a truly persuasive demonstration of `actual innocence' made after trial would render the execution of a defendant unconstitutional,'' and it imposed a high standard for making this showing. Id. at 417-19. Justices Scalia and Thomas would have unequivocally held that ``[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.'' Id. at 427-28 (Concurring). However, it is not at all clear that all the Justices joining the Court believe innocence to be nondispositive on habeas. Id. at 419 (Justices O'Connor and Kennedy concurring), 429 (Justice White concurring).

But, in Schlup v. Delo,\37\ the Court adopted the plurality opinion of Kuhlmann v. Wilson and held that, absent a sufficient showing of ``cause and prejudice,'' a claimant filing a successive or abusive petition must, as an initial matter, make a showing of ``actual innocence'' so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. One standard, found in some of the cases, was championed by the dissenters; ``to show `actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.'' \38\ The Court adopted a second standard, under which the petitioner must demonstrate that ``a constitutional violation has probably resulted in the conviction of one who is actually innocent.'' To meet this burden, a claimant ``must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'' \39\

\37\ 513 U.S. 298 (1995).

\38\ Id. at 334 (Chief Justice Rehnquist dissenting, with Justices Kennedy and Thomas), 342 (Justice Scalia

dissenting, with Justice Thomas). This standard was drawn from Sawyer v. Whitney, 505 U.S. 333 (1995).

\39\ 513 U.S. at 327. This standard was drawn from Murray v. Carrier, 477 U.S. 478 (1986).

In the Antiterrorism and Effective Death Penalty Act of 1996,\40\ Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts ``gate keepers'' in permitting or denying the filing of such petitions, with bars to appellate review of these decisions, provisions that in part were upheld in Felker v. Turpin.\41\ An important new restriction on the authority of federal habeas courts is that found in the new law, which provides that a habeas court shall not grant a writ to any person in custody pursuant to a judgment of a state court ``with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]'' \42\

\40\ Pub. L. 104-132, Title I, 110 Stat. 1217-21, amending 28 U.S.C. Sec. Sec. 2244, 2253, 2254, and Rule 22 of the Federal Rules of Appellate Procedure. For a narrowly decided case weakening somewhat the congressional provisions on ``gate-keeping,'' see Hohn v. United States, 524 U.S. 236 (1998).

\41\ 518 U.S. 651 (1996).

\42\ The amended 28 U.S.C. Sec. 2254(d) (emphasis supplied). On the constitutionality and application of this provision, see the various opinions in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998), cert. denied, 525 U.S. 1090 (1999).

ARTICLE IV

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

All Privileges and Immunities of Citizens in the Several States

[P. 874, add to n.194:]

For the application of this test, see Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296-99 (1998).

Taxation

[P. 877, in text following n.215, add:]

The Court returned to the privileges-and-immunities restrictions upon disparate state taxation of residents and nonresidents in Lunding v. New York Tax Appeals Tribunal.\1\ In this case, the State denied nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments. While observing that approximate equality between residents and nonresidents was required by the clause, the Court acknowledged that precise equality was neither necessary nor in most instances possible. But it was required of the challenged State that it demonstrate a ``substantial reason'' for the disparity, and the discrimination must bear a ``substantial relationship'' to that reason.\2\ A State, under this analysis, may not deny nonresidents a general tax exemption provided to residents that would reduce their tax burdens, but it could limit specific expense deductions based on some relationship between the expenses and their in-state

property or income. Here, the State flatly denied the exemption. Moreover, the Court rejected various arguments that had been presented, finding that most of those arguments, while they might support targeted denials or partial denials, simply reiterated the State's contention that it need not afford any exemptions at all.

\1\ 522 U.S. 287 (1998).
\2\ 522 U.S. at 298.

DOCTRINE OF THE EQUALITY OF STATES
[P. 885, add to text following n.276:]

Similarly, Indian treaty rights to hunt, fish, and gather on lands ceded to the Federal Government were not extinguished by statehood. These ``usufructuary'' rights were subject to reasonable state regulation, and hence were not irreconcilable with state sovereignty over natural resources.\3\

\3\ Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204-05 (1999) (overruling Ward v. Race Horse, 163 U.S. 504 (1896)).

Property Rights of States to Soil Under Navigable Waters
[P. 887, delete last sentence of section]

ARTICLE VI

NATIONAL SUPREMACY
Obligation of State Courts Under the Supremacy Clause
[P. 921, add to n.20:]

The Court's re-emphasis upon ``dual federalism'' has not altered this principle. See, e.g., Printz v. United States, 521 U.S. 898, 905-10 (1997).

Supremacy Clause Versus the Tenth Amendment
[P. 930, add to text at end of carryover paragraph:]

Expanding upon its anti-commandeering rule, the Court in Printz v. United States \1\ established ``categorically'' the rule that ``[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.'' \2\ At issue in Printz was a provision of the Brady Handgun Violence Prevention Act, which required, pending the development by the Attorney General of a national system by which criminal background checks on prospective firearms purchasers could be conducted, the chief law enforcement officers of state and local governments to conduct background checks to ascertain whether applicants were ineligible to purchase handguns. Confronting the absence of any textual basis for a ``categorical'' rule, the Court looked to history, which in its view demonstrated a paucity of congressional efforts to impose affirmative duties upon the States.\3\ More important, the Court relied on the ``structural Constitution'' to demonstrate that the Constitution of 1787 had not taken from the States ``a residuary and inviolable sovereignty,'' \4\ that it had, in fact and theory, retained a system of ``dual sovereignty'' \5\ reflected in many things but most notably in the constitutional conferral ``upon Congress of not all governmental powers, but only discrete, enumerated ones,'' which was expressed in the Tenth Amendment. Thus, while it had earlier rejected the commandeering of legislative assistance, the Court now made clear that administrative officers and resources were also fenced off from federal power.

\1\ 521 U.S. 898 (1997).
\2\ 521 U.S. at 933 (internal quotation marks omitted) (quoting New York v. United States, 505 U.S. 144, 188 (1992)).
\3\ 521 U.S. at 904-18. Notably, the Court expressly exempted from this rule the continuing role of the state courts in the enforcement of federal law. Id. at 905-08.
\4\ 521 U.S. at 919 (quoting The Federalist No. 39 (Madison).
\5\ 521 U.S. at 918.

The scope of the rule thus expounded was unclear. Particularly, Justice O'Connor in concurrence observed that Congress retained the power to enlist the States through contractual arrangements and on a voluntary basis. More pointedly, she stated that ``the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.'' \6\

\6\ 521 U.S. at 936 (citing 42 U.S.C. Sec. 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice)).

A partial answer was provided in Reno v. Condon,\7\ in which the Court upheld the Driver's Privacy Protection Act against a charge that it offended the anti-commandeering rule of New York and Printz. The Act in general limits disclosure and resale without a driver's consent of personal information contained in the records of state motor vehicle departments, and requires disclosure of that information for specified government record-keeeping purposes. While conceding that the Act ``will require time and effort on the part of state employees,'' the Court found this imposition permissible because the Act regulates state activities directly rather than requiring states to regulate private activities.\8\

\7\ 120 S. Ct. 666 (2000).
\8\ 120 S. Ct. at 672.

The Doctrine of Federal Exemption From State Taxation
--Taxation of Government Contractors
[P. 935, add to n.118:]
Arizona Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) (the same rule applies when the contractual services are rendered on an Indian reservation).
--Taxation of Salaries of Employees of Federal Agencies
[P. 937, add to n.123:]
For application of the Act to salaries of federal judges, see Jefferson County v. Acker, 527 U.S. 423 (1999) (upholding imposition of a local occupational tax).

FIRST AMENDMENT

RELIGION
An Overview
--Court Tests Applied to Legislation Affecting Religion
[Pp. 973-74, change text following n.25 to read:]

and in several instances have not been applied at all by the Court.

[P. 974, add to n.26 following Lee v. Weisman citation:]

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (upholding provision of sign-language interpreter to deaf student attending parochial school); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994) (invalidating law creating special school district for village composed exclusively of members of one religious sect); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (upholding the extension of a university subsidy of student publications to a student religious publication).

[P. 974, change text following n.26 to read:]

Nonetheless, the Court employed the Lemon tests in its most recent Establishment Clause decisions,\1\ and it remains the case that those tests have served as the primary standard of Establishment Clause validity for the past three decades. However, other tests have also been formulated and used. Justice Kennedy has proffered ``coercion'' as an alternative test for violations of the Establishment Clause,\2\ and the Court has used that test as the basis for decision from time to time.\3\ But that test has been criticized on the grounds it would eliminate a principal distinction between the Establishment Clause and the Free Exercise Clause and make the former a ``virtual nullity.'' \4\ Justice O'Connor has suggested ``endorsement'' as a clarification of the Lemon test, i.e., that the Establishment Clause is violated if the government intends its action to endorse or disapprove of religion or if a ``reasonable observer'' would perceive the government's action as such an endorsement or disapproval \5\; and the Court also has used this test for some of its decisions.\6\ But others have criticized the endorsement test as too amorphous to provide certain guidance.\7\ Justice O'Connor has also suggested that it may be inappropriate to try to shoehorn all Establishment Clause cases into one test and has called instead for recognition that different contexts may call for different approaches.\8\ In its two most recent Establishment Clause decisions, it might be noted, the Court employed all three tests in one decision \9\ and relied primarily on the Lemon tests in the other.\10\

\1\ Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the Lemon tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools); Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266 (2000) (holding unconstitutional under the Lemon tests as well as under the coercion and endorsement tests a school district policy permitting high school students to decide by majority vote whether to have a student offer a prayer over the public address system prior to home football games); and Mitchell v. Helms, 120 S. Ct. 2530 (2000) (upholding under the Lemon tests a federally funded program providing instructional materials and equipment to public and private elementary and secondary schools, including sectarian schools).

\2\ County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy concurring in part and dissenting in part).

\3\ Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2216 (2000).

\4\ Lee v. Weisman, 505 U.S. 577, 621 (Justice Souter concurring). See also County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 623 (1989) (Justice O'Connor concurring in part and concurring in the judgment).

\5\ Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (Justice O'Connor concurring); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 625 (1989) (Justice O'Connor concurring); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 712 (1994) (Justice O'Connor

concurring).

\6\ Wallace v. Jaffrey, 472 U.S. 38 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573; Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); and Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2216 (2000).

\7\ County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy concurring in the judgment in part and dissenting in part); and Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995) (Justice Scalia concurring).

\8\ Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 718-723 (1994) (Justice O'Connor concurring in part and concurring in the judgment).

\9\ Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266 (2000).

\10\ Mitchell v. Helms, 120 S. Ct. 2530 (2000).

In interpreting and applying the Free Exercise Clause, the Court has consistently held religious beliefs to be absolutely immune from governmental interference.\11\ But it has used a number of standards to review government action restrictive of religiously motivated conduct, ranging from formal neutrality \12\ to clear and present danger \13\ to strict scrutiny.\14\ For cases of intentional governmental discrimination against religion, the Court still employs strict scrutiny.\15\ But for most other free exercise cases it has now reverted to a standard of formal neutrality. ``[T]he right of free exercise,'' it recently stated, ``does not relieve an individual of the obligation to comply with a `valid and neutral law of general applicability on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' '' \16\

\11\ Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878); Cantwell v. Connecticut, 310 U.S. 296 (1940); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

\12\ Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878); Braunfeld v. Brown, 366 U.S. 599 (1961).

\13\ Cantwell v. Connecticut, 310 U.S. 296 (1940).

\14\ Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

\15\ Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

\16\ Employment Div. v. Smith, 494 U.S. 872, 879 (1990), quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Justice Stevens concurring in the judgment).

Establishment of Religion
--Financial Assistance to Church-Related Institutions
[P. 979, replace the paragraph that begins after n.49 following its first two sentences:]

Since that time the Court has gradually adopted a more accommodating approach. It has upheld direct aid programs that have been of only marginal benefit to the religious mission of the recipient elementary and secondary schools, tax benefit and scholarship aid programs where the schools have received the assistance as the result of the independent decisions of the parents or students who initially receive the aid, and in its most recent decisions direct aid programs which substantially benefit the educational function of such schools. Indeed, in its most recent decisions the Court has overturned several of the most restrictive school aid precedents from its earlier jurisprudence. Throughout, the Court has allowed greater discretion with respect to aid programs benefiting

religiously affiliated colleges and social services agencies.

[P. 979, add between the words ``requirement'' and ``to'' in the first sentence of the second paragraph:]

of the Lemon tripartite test

[P. 979, replace the text and accompanying footnotes between footnotes 50 and 60:]

The primary secular effect and no excessive entanglement aspects of the Lemon test, however, have proven much more divisive. As a consequence, the Court's applications of these tests have not always been consistent, and the rules guiding their application have not always been easy to decipher. Moreover, in its most recent decisions the Court has substantially modified the strictures these tests have previously imposed on public aid to pervasively sectarian entities.

In applying the primary effect and excessive entanglement tests, the Court has drawn a distinction between public aid programs that directly aid sectarian entities and those that do so only indirectly. Aid provided directly, the Court has said, must be limited to secular use lest it have a primary effect of advancing religion. The Establishment Clause ``absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.'' \17\ The government may provide direct support to the secular services and programs sponsored by religious entities, but it cannot directly subsidize such organizations' religious activities or proselytizing.\18\ Thus, the Court has struck down as unconstitutional a program providing grants for the maintenance and repair of sectarian elementary and secondary school facilities, because the grants had no restrictions to prevent their use for such purposes as defraying the costs of building or maintaining chapels or classrooms in which religion is taught,\19\ and a program subsidizing field trip transportation for children attending sectarian elementary and secondary schools, because field trips are inevitably interwoven with the schools' educational functions.\20\

\17\ Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385 (1985).

\18\ Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Mitchell v. Helms, 120 S. Ct. 2530 (2000).

\19\ Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

\20\ Wolman v. Walter, 433 U.S. 229 (1977).

But the Court has not imposed a secular use limitation on aid programs that benefit sectarian entities only indirectly, i.e., as the result of decisions by someone other than the government itself. The initial beneficiaries of the public aid must be determined on the basis of religiously neutral criteria, and they must have a genuine choice about whether to use the aid at sectarian or nonsectarian entities. But where those standards have been met, the Court has upheld indirect aid programs even though the sectarian institutions that ultimately benefit may use the aid for religious purposes. Thus, the Court has upheld a state program allowing taxpayers to take a deduction from their gross income for educational expenses, including tuition, incurred in sending their children to public or private schools, because the deduction was ``available for educational expenses incurred by all parents'' and the aid became available to sectarian schools ``only as a result of

numerous, private choices of individual parents of school-age children.'' \21\ It has upheld for the same reasons a vocational rehabilitation program that made a grant to a blind person for training at a Bible college for a religious vocation \22\ and another program that provided a sign-language interpreter for a deaf student attending a sectarian secondary school.\23\ In contrast, the Court has struck down tax benefit and educational voucher programs where the initial beneficiaries have been limited largely to the universe of parents of children attending sectarian schools and where the aid, as a consequence, has been virtually certain to go to the sectarian schools.\24\

\21\ Mueller v. Allen, 463 U.S. 388, 397-399 (1983).

\22\ Witters v. Washington Dep't of Social Services, 474 U.S. 481 (1986). In this decision the Court also cited as important the factor that the program was not likely to provide ``any significant portion of the aid expended under the . . . program'' for religious education. Id. at 488.

\23\ Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

\24\ Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) and Sloan v. Lemon, 413 U.S. 825 (1973).

In applying the primary effect and excessive entanglement tests, the Court has also drawn a distinction between religious institutions that are pervasively sectarian and those that are not. Organizations that are permeated by a religious purpose and character in all that they do have often been held by the Court to be constitutionally ineligible for direct public aid. Direct aid to religion-dominated institutions inevitably violates the primary effect test, the Court has said, because such aid generally cannot be limited to secular use in such entities and, as a consequence, it has a primary effect of advancing religion.\25\ Moreover, any effort to limit the use of public aid by such entities to secular use inevitably falls afoul of the excessive entanglement test, according to the Court, because the risk of diversion of the aid to religious use is so great that it necessitates an intrusive government monitoring.\26\ But direct aid to religious entities that are not pervasively sectarian, the Court has held, is constitutionally permissible, because the secular functions of such entities can be distinguished from their religious ones for purposes of public aid and because the risk of diversion of the aid to religious use is attenuated and does not require an intrusive government monitoring. As a practical matter, this distinction has had its most serious consequences for programs providing aid directly to sectarian elementary and secondary schools, because the Court has, until recently, presumed such schools to be pervasively sectarian and direct aid, as a consequence, to be severely limited.\27\ The Court has presumed to the contrary with respect to religiously-affiliated colleges, hospitals, and social services providers; and as a consequence it has found direct aid programs to such entities to be permissible.\28\

\25\ See, e.g., Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (grants for the maintenance and repair of sectarian school facilities); Meek v. Pittenger, 421 U.S. 349 (1975) (loan of secular instructional materials and equipment); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (hiring of parochial school teachers to provide after-school instruction to the students attending such schools).

\26\ See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971) (subsidies for teachers of secular subjects) and Aguilar v. Felton, 473 U.S. 402 (1985) (provision of

remedial and enrichment services by public school teachers to eligible children attending sectarian elementary and secondary schools on the premises of those schools).

\27\ See cases cited in the preceding two footnotes.

\28\ Bradfield v. Roberts, 175 U.S. 291 (1899) (public subsidy of the construction of a wing of a Catholic hospital on condition that it be used to provide care for the poor upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (program of grants to colleges, including religiously-affiliated ones, for the construction of academic buildings upheld); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976) (program of general purpose grants to colleges in the state, including religiously-affiliated ones, upheld); and Bowen v. Kendrick, 487 U.S. 589 (1988) (program of grants to public and private nonprofit organizations, including religious ones, for the prevention of adolescent pregnancies upheld).

In its most recent decisions the Court has modified both the primary effect and excessive entanglement prongs of the Lemon test as they apply to aid programs directly benefiting sectarian elementary and secondary schools; and in so doing it has overturned several prior decisions imposing tight constraints on such aid. In Agostini v. Felton \29\ the Court, in a 5 to 4 decision, abandoned the presumptions that public school teachers giving instruction on the premises of sectarian elementary and secondary schools will be so affected by the religiosity of the environment that they will inculcate religion and that, consequently, an excessively entangling monitoring of their services is constitutionally necessary. In Mitchell v. Helms,\30\ in turn, it abandoned the presumptions that such schools are so pervasively sectarian that their secular educational functions cannot be differentiated from their religious educational functions and that direct aid to their educational functions, consequently, violates the Establishment Clause. In reaching these conclusions and upholding the aid programs in question, the Court overturned its prior decision in Aguilar v. Felton \31\ and parts of its decisions in Meek v. Pittenger,\32\ Wolman v. Walter,\33\ and Grand Rapids School District v. Ball.\34\

\29\ 521 U.S. 203 (1997).
\30\ 120 S. Ct. 2530 (2000).
\31\ 473 U.S. 402 (1985).
\32\ 421 U.S. 349 (1975).
\33\ 433 U.S. 229 (1977).
\34\ 473 U.S. 373 (1985).

Thus, the Court's jurisprudence concerning public aid to sectarian organizations has evolved over time, particularly as it concerns public aid to sectarian elementary and secondary schools. That evolution has given some uncertainty to the rules that apply to any given form of aid; and in both Agostini v. Felton \35\ and Mitchell v. Helms \36\ the Court left open the possibility of a further evolution in its thinking. Nonetheless, the cases give substantial guidance.

\35\ 521 U.S. 203 (1994).
\36\ 120 S. Ct. 2530 (2000).

[P. 985, add to text following n.81:]

The Court's more recent decisions, however, have rejected the reasoning and overturned the results of several of these decisions. In two rulings the Court reversed course with respect to the constitutionality of public school

personnel providing educational services on the premises of pervasively sectarian schools. First, in Zobrest v. Catalina Foothills School District \37\ the Court held the public subsidy of a sign-language interpreter for a deaf student attending a parochial school to create no primary effect or entanglement problems. The payment did not relieve the school of an expense that it would otherwise have borne, the Court stated, and the interpreter had no role in selecting or editing the content of any of the lessons. Reviving the child benefit theory of its earlier cases, the Court said that ``[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as `handicapped' under the IDEA, without regard to the `sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends.''

\37\ 509 U.S. 1 (1993).

Secondly, and more pointedly, the Court in Agostini v. Felton \38\ overturned both the result and the reasoning of its decision in Aguilar v. Felton \39\ striking down the Title I program as administered in New York City as well as the analogous parts of its decisions in Meek v. Pittenger \40\ and Grand Rapids School District v. Ball.\41\ The assumptions on which those decisions had rested, the Court explicitly stated, had been ``undermined'' by its more recent decisions. Decisions such as Zobrest and Witters v. Washington Department of Social Services,\42\ it said, had repudiated the notions that the placement of a public employee in a sectarian school creates an ``impermissible symbolic link'' between government and religion, that ``all government aid that directly aids the educational function of religious schools'' is constitutionally forbidden, that public teachers in a sectarian school necessarily pose a serious risk of inculcating religion, and that ``pervasive monitoring of [such] teachers is required.'' The proper criterion under the primary effect prong of the Lemon test, the Court asserted, is religious neutrality, i.e., whether ``aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'' \43\ Finding the Title I program to meet that test, the Court concluded that ``accordingly, we must acknowledge that Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law.'' \44\

\38\ 521 U.S. 203 (1997).
\39\ 473 U.S. 402 (1985).
\40\ 421 U.S. 349 (1975).
\41\ 473 U.S. 373 (1985).
\42\ 474 U.S. 481 (1986).
\43\ In Agostini the Court nominally eliminated entanglement as a separate prong of the Lemon test. ``[T]he factors we use to assess whether an entanglement is `excessive,' '' the Court stated, ``are similar to the factors we use to examine `effect.' '' ``Thus,'' it concluded, ``it is simplest to recognize why entanglement is significant and treat it--as we did in Walz--as an aspect of the inquiry into a statute's effect.'' Agostini v. Felton, supra, at 232, 233.
\44\ Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the Court's ruling, contending that the Establishment Clause mandates a ``flat ban on [the] subsidization'' of religion (521 U.S. at 243) and that the Court's contention that recent cases had undermined the reasoning of Aguilar was a ``mistaken reading'' of the cases. Id. at 248. Justice Breyer joined in the second dissenting argument.

Most recently, in Mitchell v. Helms \45\ the Court abandoned the presumptions that religious elementary and secondary schools are so pervasively sectarian that they are constitutionally ineligible to participate in public aid programs directly benefiting their educational functions and that direct aid to such institutions must be subject to an intrusive and constitutionally fatal monitoring. At issue in the case was a federal program providing funds to local educational agencies to provide instructional materials and equipment such as computer hardware and software, library books, movie projectors, television sets, VCRs, laboratory equipment, maps, and cassette recordings to public and private elementary and secondary schools. Virtually identical programs had previously been held unconstitutional by the Court in Meek v. Pittenger \46\ and Wolman v. Walter.\47\ But in this case the Court overturned those decisions and held the program to be constitutional.

\45\ 120 S. Ct. 2530 (2000).
\46\ 421 U.S. 349 (1975).
\47\ 433 U.S. 229 (1977).

The Justices could agree on no majority opinion in Mitchell but instead joined in three different opinions. The opinions of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, and of Justice O'Connor, joined by Justice Breyer, found the program constitutional. They agreed that to pass muster under the primary effect prong of the Lemon test direct public aid has to be secular in nature and distributed on the basis of religiously neutral criteria. They also agreed, in contrast to past rulings, that sectarian elementary and secondary schools should not be deemed constitutionally ineligible for direct aid on the grounds their secular educational functions are ``inextricably intertwined'' with their religious educational functions, i.e., that they are pervasively sectarian. But their rationales for the program's constitutionality then diverged. For Justice Thomas it was sufficient that the instructional materials were secular in nature and were distributed according to neutral criteria. It made no difference whether the schools used the aid for purposes of religious indoctrination or not. But that was not sufficient for Justice O'Connor. She adhered to the view that direct public aid has to be limited to secular use by the recipient institutions. She further asserted that a limitation to secular use could be honored by the teachers in the sectarian schools and that the risk that the aid would be used for religious purposes was not so great as to require an intrusive and entangling government monitoring.\48\

\48\ Justice O'Connor also cited several other factors as ``sufficient'' to ensure the program's constitutionality, without saying whether they were ``constitutionally necessary''--that the aid supplemented rather than supplanted the school's educational functions, that no funds ever reached the coffers of the sectarian schools, and that there were various administrative regulations in place providing for some degree of monitoring of the schools' use of the aid.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented on the grounds the Establishment Clause bars ``aid supporting a sectarian school's religious exercise or the discharge of its religious mission.'' Adhering to the ``substantive principle of no aid'' first

articulated in the Everson case, he contended that direct aid to pervasively sectarian institutions inevitably results in the diversion of the aid for purposes of religious indoctrination. He further argued that the aid in this case had been so diverted.

As the opinion upholding the program's constitutionality on the narrowest grounds, Justice O'Connor's opinion provides the most current guidance on the standards governing the constitutionality of aid programs directly benefiting sectarian elementary and secondary schools.

[P. 987, replace the first sentence of the first full paragraph:]

The limits of the Nyquist holding were clarified in 1983.

[P. 988, add to n.92:]

Similar reasoning led the Court to rule that provision of a sign-language interpreter to a deaf student attending a parochial school is permissible as part of a neutral program offering such services to all students regardless of what school they attend. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). The interpreter, the Court noted additionally, merely transmits whatever material is presented, and neither adds to nor subtracts from the school's sectarian environment. Id. at 13.

--Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading

[P. 995, revise n.121 to read:]

505 U.S. 577 (1992).

[P. 996, add to text at end of section:]

In Santa Fe Independent School District v. Doe \49\ the Court held a school district's policy permitting high school students to vote on whether to have an ``invocation and/or prayer'' delivered prior to home football games by a student elected for that purpose to violate the Establishment Clause. It found the policy to violate each one of the tests it has formulated for Establishment Clause cases. The preference given for an ``invocation'' in the text of the school district's policy, the long history of pre-game prayer led by a student ``chaplain'' in the school district, and the widespread perception that ``the policy is about prayer,'' the Court said, made clear that its purpose was not secular but was to preserve a popular state-sponsored religious practice in violation of the first prong of the Lemon test. Moreover, it said, the policy violated the coercion test by forcing unwilling students into participating in a religious exercise. Some students--the cheerleaders, the band, football players--had to attend, it noted, and others were compelled to do so by peer pressure. ``The constitutional command will not permit the District `to exact religious conformity from a student as the price' of joining her classmates at a varsity football game,'' the Court held. Finally, it said, the speech sanctioned by the policy was not private speech but government-sponsored speech that would be perceived as a government endorsement of religion. The long history of pre-game prayer, the bias toward religion in the policy itself, the fact that the message would be ``delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property'' and over the school's public address system, the Court asserted, all meant that the speech was not genuine private speech but would be perceived as ``stamped with the school's seal of approval.'' The Court concluded that ``the policy is invalid on its face because it establishes an improper majoritarian election on

religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.''

\49\ 120 S. Ct. 2266 (2000).

--Access of Religious Groups to School Property

[P. 997, add to text following n.130:]

Similarly, public schools may not rely on the Establishment Clause as grounds to discriminate against religious groups in after-hours use of school property otherwise available for non-religious social, civic, and recreational purposes; \50\ nor may public colleges exclude student religious organizations from benefits otherwise provided to a full spectrum of student ``news, information, opinion, entertainment, or academic communications media groups.'' \51\ These cases make clear that the Establishment Clause does not necessarily trump the First Amendment's protection of freedom of speech; in regulating private speech in a public forum, government may not justify discrimination against religious viewpoints as necessary to avoid creating an ``establishment'' of religion.

\50\ Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993). The Court explained that there was ``no realistic danger that the community would think that the District was endorsing religion,'' and that the three-part Lemon test would not have been violated. Id. at 395. Concurring opinions by Justice Scalia, joined by Justice Thomas, and by Justice Kennedy, criticized the Court's reference to Lemon. ``Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again,'' Justice Scalia lamented. Id. at 398.

\51\ Rosenberger v. University of Virginia, 515 U.S. 819, 824 (1995).

--Religion in Governmental Observances

[P. 1002, add new heading following n.163:]

Religious Displays on Government Property

[P. 1004, add new paragraph following n.174:]

In Capitol Square Review and Advisory Board v. Pinette,\52\ the Court distinguished privately sponsored from governmentally sponsored religious displays on public property. There the Court ruled that Ohio violated free speech rights by refusing to allow the Ku Klux Klan to display an unattended cross during the Christmas season in a publicly owned plaza outside the Ohio Statehouse. Because the plaza was a public forum in which the State had allowed a broad range of speakers and a variety of unattended displays, the State could regulate the expressive content of such speeches and displays only if the restriction was necessary, and narrowly drawn, to serve a compelling state interest. The Court recognized that compliance with the Establishment Clause can be a sufficiently compelling reason to justify content-based restrictions on speech, but saw no need to apply this principle when permission to display a religious symbol is granted through the same procedures, and on the same terms, required of other private groups seeking to convey non-religious messages.

\52\ 515 U.S. 753 (1995). The Court was divided 7 to 2 on the merits of Pinette, a vote that obscured continuing disagreement over the proper analytical approach. The portions of Justice Scalia's opinion that formed the opinion of the Court were joined by Chief Justice Rehnquist and by

Justices O'Connor, Kennedy, Souter, Thomas, and Breyer. A separate part of Justice Scalia's opinion, joined only by the Chief Justice and by Justices Kennedy and Thomas, disputed the assertions of Justices O'Connor, Souter, and Breyer that the ``endorsement'' test should be applied. Dissenting Justice Stevens thought that allowing the display on the Capitol grounds did carry ``a clear image of endorsement,'' and Justice Ginsburg's brief opinion seemingly agreed with that conclusion.

--Miscellaneous

[P. 1005, add to text at end of section:]

Using somewhat similar reasoning, the Court in Board of Education of Kiryas Joel Village v. Grumet,\53\ invalidated a New York law creating a special school district for an incorporated village composed exclusively of members of one small religious sect. The statute failed ``the test of neutrality,'' the Court concluded, since it delegated power ``to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism.'' It was the ``anomalously case-specific nature of the legislature's exercise of authority'' that left the Court ``without any direct way to review such state action'' for conformity with the neutrality principle. Because the village did not receive its governmental authority simply as one of many communities eligible under a general law, the Court explained, there was no way of knowing whether the legislature would grant similar benefits on an equal basis to other religious and non-religious groups.

\53\ 512 U.S. 687 (1994). Only four Justices (Souter, Blackmun, Stevens, and Ginsburg) thought that the Grendel's Den principle applied; in their view the distinction that the delegation was to a village electorate rather than to a religious body ``lack[ed] constitutional significance'' under the peculiar circumstances of the case.

FREE EXERCISE OF RELIGION

[P. 1007, add to n.188:]

Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 706-07 (1994) (``accommodation is not a principle without limits;'' one limitation is that ``neutrality as among religions must be honored'').

--The Jehovah's Witnesses Cases

[P. 1010, add to n.201:]

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (Santeria faith).

--Free Exercise Exemption From General Governmental Requirements

[P. 1018, add new footnote following comma after word ``treatment'' in third sentence of paragraph beginning after n.253:]

This much was made clear by Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), striking down a city ordinance that prohibited ritual animal sacrifice but that allowed other forms of animal slaughter.

[P. 1018, add to text at end of third sentence of same paragraph:]

That the Court views the principle as a general one, not limited to criminal laws, seems evident from its restatement in Church of the Lukumi Babalu Aye v. City of Hialeah: ``our cases establish the general proposition that a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'' \54\

\54\ 508 U.S. 520, 531 (1993).

[P. 1019, add new paragraphs following n.257:]

Because of the broad ramifications of Smith, the political processes were soon utilized in an attempt to provide additional legislative protection for religious exercise. In the Religious Freedom Restoration Act of 1993 (RFRA),\55\ Congress sought to supersede Smith and substitute a statutory rule of decision for free exercise cases. The Act provided that laws of general applicability--federal, state, and local--may substantially burden free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. The purpose, Congress declared in the Act itself, was ``to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened.'' \56\ But this legislative effort was partially frustrated in 1997 when the Court in City of Boerne v. Flores \57\ held the Act to be unconstitutional as applied to the States, 6 to 3. In applying RFRA to the States Congress had utilized its power under Sec. 5 of the Fourteenth Amendment to enact ``appropriate legislation'' to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the Due Process Clause. But the Court held that RFRA exceeded Congress' power under Sec. 5, because the measure did not simply enforce a constitutional right but substantively altered that right. ``Congress,'' the Court said, ``does not enforce a constitutional right by changing what the right is.'' \58\ Moreover, it said, RFRA ``reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved . . . [and] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.'' \59\ ``RFRA,'' the Court concluded, ``contradicts vital principles necessary to maintain separation of powers and the federal balance.'' \60\

\55\ Pub. L. No. 103-141, 107 Stat. 1488 (1993); 42 U.S.C. Sec. Sec. 2000bb to 2000bb-4.

\56\ Pub. L. No. 103-141, Sec. 2(b)(1) (citations omitted). Congress also avowed a purpose of providing ``a claim or defense to persons whose religious exercise is substantially burdened by government.'' Sec. 2(b)(2).

\57\ 521 U.S. 507 (1997).

\58\ 521 U.S. at 519.

\59\ 521 U.S. at 533-34.

\60\ 521 U.S. at 536.

Boerne does not close the books on Smith, however. It remains an open issue whether RFRA remains valid as applied to the Federal Government, and Congress has already used powers other than Sec. 5 to try to re-apply a strict scrutiny standard to the States.\61\ These issues ensure continuing litigation over the appropriate test for free exercise cases.\62\

\61\ Late in the second session of the 106th Congress, the House and the Senate passed, and President Clinton signed into law, the ``Religious Land Use and Institutionalized Persons Act of 2000.'' The Act utilizes Congress' spending power and its power over interstate commerce to impose a strict scrutiny test on state and local zoning and landmarking laws and regulations which impose a substantial burden on an individual's or institution's

exercise of religion. It utilizes the same powers to impose a strict scrutiny test on state and local governments for any substantial burdens they impose on the exercise of religion by persons in state or locally run institutions such as prisons, mental hospitals, juvenile detention facilities, and nursing homes. See Pub. L. No. 106-274 (2000).

\62\ See, e.g., In re Young, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998) (lower court held RFRA to be constitutional as applied to federal bankruptcy law).

FREEDOM OF EXPRESSION--SPEECH AND PRESS
Adoption and the Common Law Background
[P. 1025, add to text at end of section:]

The First Amendment by its terms applies only to laws enacted by Congress, and not to the actions of private persons.\63\ This leads to a ``state action'' (or ``governmental action'') limitation similar to that applicable to the Fourteenth Amendment.\64\ The limitation has seldom been litigated in the First Amendment context, but there is no obvious reason why analysis should differ markedly from Fourteenth Amendment state action analysis. Both contexts require ``cautious analysis of the quality and degree of Government relationship to the particular acts in question.'' \65\ In holding that the National Railroad Passenger Corporation (Amtrak) is a governmental entity for purposes of the First Amendment, the Court declared that ``[t]he Constitution constrains governmental action `by whatever instruments or in whatever modes that action may be taken.' . . . [a]nd under whatever congressional label.'' \66\ The relationship of the government to broadcast licensees affords other opportunities to explore the breadth of ``governmental action.'' \67\

\63\ Through interpretation of the Fourteenth Amendment, the prohibition extends to the States as well. See discussion on incorporation, main text, pp. 957-64.

\64\ See discussion on state action, main text, pp. 1786-1802.

\65\ CBS v. Democratic Nat'l Comm., 412 U.S. 94, 115 (1973) (opinion of Chief Justice Burger).

\66\ Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 392 (1995) (quoting Ex parte Virginia, 100 U.S. 339, 346-47 (1880)). The Court refused to be bound by the statement in Amtrak's authorizing statute that the corporation is ``not . . . an agency or establishment of the United States Government.'' This assertion can be effective ``only for purposes of matters that are within Congress' control,'' the Court explained. ``[I]t is not for Congress to make the final determination of Amtrak's status as a governmental entity for purposes of determining the constitutional rights of citizens affected by its actions.'' 513 U.S. at 392.

\67\ In CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court held that a broadcast licensee could refuse to carry a paid editorial advertisement. Chief Justice Burger, joined only by Justices Stewart and Rehnquist in that portion of his opinion, reasoned that a licensee's refusal to accept such an ad did not constitute ``governmental action'' for purposes of the First Amendment. ``The First Amendment does not reach acts of private parties in every instance where the Congress or the [Federal Communications] Commission has merely permitted or failed to prohibit such acts.'' Id. at 119.

The Doctrine of Prior Restraint
--Obscenity and Prior Restraint
[P. 1033, add to n.69:]

But cf. Alexander v. United States, 509 U.S. 544 (1993)

(RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses, based on the predicate acts of selling four magazines and three videotapes, does not constitute a prior restraint and is not invalid as ``chilling'' protected expression that is not obscene).

Freedom of Belief

--Flag Salute Cases

[P. 1054, add to n.177:]

The First Amendment does not preclude the Government from ``compel[ling] financial contributions that are used to fund advertising,'' provided such contributions do not finance ``political or ideological'' views. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471, 472 (1997) (upholding Secretary of Agriculture's marketing orders that assessed fruit producers to cover the expenses of generic advertising of California fruit). Nor does the First Amendment preclude a public university from charging its students an activity fee that is used to support student organizations that engage in extracurricular speech, provided the money is allocated to those groups by use of viewpoint-neutral criteria. Board of Regents of the Univ. of Wisconsin System v. Southworth, 120 S. Ct. 1346 (2000) (upholding fee except to the extent a student referendum substituted majority determinations for viewpoint neutrality in allocating funds).

--Imposition of Consequences for Holding Certain Beliefs

[P. 1054, add to n.181 following citation to Barclay v. Florida:]

Wisconsin v. Mitchell, 508 U.S. 476 (1993) (criminal sentence may be enhanced because the defendant intentionally selected his victim on account of the victim's race),

Right of Association

[P. 1061, add new paragraph to text at end of section:]

When application of a public accommodations law was viewed as impinging on an organization's ability to present its message, the Court found a First Amendment violation. Massachusetts could not require the private organizers of Boston's St. Patrick's Day parade to allow a group of gays and lesbians to march as a unit proclaiming its members' gay and lesbian identity, the Court held in Hurley v. Irish-American Gay Group.\68\ To do so would require parade organizers to promote a message they did not wish to promote. The Roberts and New York City cases were distinguished as not involving ``a trespass on the organization's message itself.'' \69\ Those cases stood for the proposition that the State could require equal access for individuals to what was considered the public benefit of organization membership. But even if individual access to the parade might similarly be mandated, the Court reasoned, the gay group ``could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.'' \70\

\68\ 515 U.S. 557 (1995).
\69\ 515 U.S. at 580.
\70\ 515 U.S. at 580-81.

In Boy Scouts of America v. Dale,\71\ the Court held that application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as an adult member violated the organization's First Amendment associational rights. Citing Hurley, the Court held that ``[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate

public or private viewpoints.'' \72\ The Boy Scouts, the Court found, engages in expressive activity in seeking to transmit a system of values, which include being ``morally straight'' and ``clean.'' \73\ The Court ``accept[ed] the Boy Scouts' assertion'' that the organization teaches that homosexual conduct is not morally straight.\74\ The Court also gave ``deference to [the] association's view of what would impair its expression.'' \75\ Allowing a gay rights activist to serve in the Scouts would ``force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.'' \76\

\71\ 120 S. Ct. 2446 (2000).
\72\ 120 S. Ct. at 2451.
\73\ 120 S. Ct. at 2452.
\74\ 120 S. Ct. at 2453.
\75\ 120 S. Ct. at 2453.
\76\ 120 S. Ct. at 2454.

--Political Association
[P. 1063, add to text before first full paragraph on page:]

In 1996 the Court extended Elrod and Branti to protect independent government contractors.\77\

\77\ O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (allegation that city removed petitioner's company from list of those offered towing business on a rotating basis, in retaliation for petitioner's refusal to contribute to mayor's campaign, and for his support of mayor's opponent, states a cause of action under the First Amendment). See also Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (termination or non-renewal of a public contract in retaliation for the contractor's speech on a matter of public concern can violate the First Amendment).

Particular Governmental Regulations Which Restrict Expression
[P. 1081, change subheading to:]
--Government as Employer: Political and Other Outside Activities
[P. 1084, add new paragraph to end of section:]

The Hatch Act cases were distinguished in United States v. National Treasury Employees Union,\78\ in which the Court struck down an honoraria ban as applied to lower-level employees of the Federal Government. The honoraria ban suppressed employees' right to free expression while the Hatch Act sought to protect that right, and also there was no evidence of improprieties in acceptance of honoraria by members of the plaintiff class of federal employees.\79\ The Court emphasized further difficulties with the ``crudely crafted'' honoraria ban: it was limited to expressive activities and had no application to other sources of outside income, it applied when neither the subjects of speeches and articles nor the persons or groups paying for them bore any connection to the employee's job responsibilities, and it exempted a ``series'' of speeches or articles without also exempting individual articles and speeches. These ``anomalies'' led the Court to conclude that the ``speculative benefits'' of the ban were insufficient to justify the burdens it imposed on expressive activities.\80\

\78\ 513 U.S. 454 (1995).
\79\ The plaintiff class consisted of all Executive Branch employees below grade GS-16. Also covered by the ban were senior executives, Members of Congress, and other

federal officers, but the possibility of improprieties by these groups did not justify application of the ban to ``the vast rank and file of federal employees below grade GS-16.'' \80\ 513 U.S. at 477.

--Government as Employer: Free Expression Generally

[P. 1089, add to text following n.113:]

The protections applicable to government employees have been extended to independent government contractors, the Court announcing that ``the Pickering balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection.'' \81\

\81\ Board of County Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996).

[P. 1089, add to n.116:]

In Waters v. Churchill, 511 U.S. 661 (1994), the Court grappled with what procedural protections may be required by the First Amendment when public employees are dismissed on speech-related grounds, but reached no consensus.

--Government as Regulator of the Electoral Process: Elections

[P. 1095, add to text following n.143:]

Minnesota, however, could prohibit a candidate from appearing on the ballot as the candidate of more than one party.\82\ The Court wrote that election ``[r]egulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions.'' \83\ Minnesota's ban on ``fusion'' candidates was not severe, as it left a party that could not place another party's candidate on the ballot free to communicate its preference for that candidate by other means, and the ban was justified by ``valid state interests in ballot integrity and political stability.'' \84\

\82\ Timmons v. Twin City Area New Party, 520 U.S. 351 (1997).

\83\ 520 U.S. at 358 (internal quotation marks omitted).

\84\ 520 U.S. at 369-70.

[P. 1097, add to n.150:]

See also Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996) (the First Amendment bars application of the Party Expenditure Provision of the Federal Election Campaign Act, 2 U.S.C. Sec. 441a(d)(3), to expenditures that the political party makes independently, without coordination with the candidate).

[P. 1098, add to text following n.155:]

In Nixon v. Shrink Missouri Government PAC,\85\ the Court held that Buckley v. Valeo ``is authority for state limits on contributions to state political candidates,'' but state limits ``need not be pegged to Buckley's dollars.'' \86\ The Court in Nixon justified the limits on contributions on the same grounds that it had in Buckley: ``preventing corruption and the appearance of it that flows from munificent campaign contributions.'' \87\ Further, Nixon did ``not present a close call requiring further definition of whatever the State's evidentiary obligation may be'' to justify the contribution limits, as ``there is little reason to doubt that sometimes large contributions

will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.'' \88\ As for the amount of the contribution limits, Missouri's fluctuated in accordance with the consumer price index, and, when suit was filed, ranged from $275 to $1,075, depending on the state office or size of constituency. The Court upheld these limits, writing that, in Buckley, it had ``rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate.'' \89\ The relevant inquiry, rather, was ``whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.'' \90\

\85\ 120 S. Ct. 897 (2000).
\86\ 120 S. Ct. at 901.
\87\ 120 S. Ct. at 905.
\88\ 120 S. Ct. at 907-08.
\89\ 120 S. Ct. at 909.
\90\ 120 S. Ct. at 909.

[P. 1098, add to n.157:]

The Court subsequently struck down a Colorado statute that required ballot-initiative proponents, if they pay circulators, to file reports disclosing circulators' names and addresses and the total amount paid to each circulator. Buckley v. American Constitutional Law Found., 525 U.S. 182 (1999). Although the Court upheld a requirement that proponents' names and the total amount they have spent to collect signatures be disclosed, as this served ``as a control or check on domination of the initiative process by affluent special interest groups'' (id. at 202), it found that ``[t]he added benefit of revealing the names of paid circulators and the amounts paid to each circulator . . . is hardly apparent and has not been demonstrated.'' Id. at 203. The Court also struck down a requirement that circulators be registered voters, as the state's interest in ensuring that circulators would be amenable to subpoenas was served by the requirement that they be residents--a requirement on which the Court had no occasion to rule.

--Government and Power of the Purse

[P. 1113, add to text following n.236:]

In National Endowment for the Arts v. Finley, the Supreme Court upheld the constitutionality of a federal statute requiring the NEA, in awarding grants, to ``tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.'' \91\ The Court acknowledged that, if the statute were ``applied in a manner that raises concern about the suppression of disfavored viewpoints,'' \92\ then such application might be unconstitutional. The statute on its face, however, is constitutional because it ``imposes no categorical requirement,'' being merely ``advisory.'' \93\ ``Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding . . . . The `very assumption' of the NEA is that grants will be awarded according to the `artistic worth of competing applications,' and absolute neutrality is simply `inconceivable.' '' \94\ The Court also found that the terms of the statute, ``if they appeared in a criminal statute or regulatory scheme, . . . could raise substantial vagueness concerns . . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.'' \95\

\91\ 524 U.S. 569, 572 (1998).

\92\ 524 U.S. at 587.
\93\ 524 U.S. at 581. Justice Scalia, in a concurring opinion joined by Justice Thomas, claimed that this interpretation of the statute ``gutt[ed] it.'' Id. at 590. He believed that the statute ``establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.'' Id.
\94\ 524 U.S. at 585.
\95\ 524 U.S. at 588-89.

Governmental Regulation of Communications Industries
--Commercial Speech
[P. 1116, add to n.12:]

Shapero was distinguished in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), a 5 to 4 decision upholding a prohibition on targeted direct-mail solicitations to victims and their relatives for a 30-day period following an accident or disaster. ``Shapero dealt with a broad ban on all direct mail solicitations'' (id. at 629), the Court explained, and was not supported, as Florida's more limited ban was, by findings describing the harms to be prevented by the ban. Dissenting Justice Kennedy disagreed that there was a valid distinction, pointing out that in Shapero the Court had said that ``the mode of communication [mailings versus potentially more abusive in-person solicitation] makes all the difference,'' and that mailings were at issue in both Shapero and Florida Bar. 515 U.S. at 637 (quoting Shapero, 486 U.S. at 475).

[P. 1116, add to text following n.13:]

, or prohibit a certified public accountant from holding herself out as a certified financial planner.\96\

\96\ Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994) (also ruling that Accountancy Board could not reprimand the CPA, who was also a licensed attorney, for truthfully listing her CPA credentials in advertising for her law practice).

[P. 1116, add to text following n.14:]

The Court later refused, however, to extend this principle to in-person solicitation by certified public accountants, explaining that CPAs, unlike attorneys, are not professionally ``trained in the art of persuasion,'' and that the typical business executive client of a CPA is ``far less susceptible to manipulation'' than was the accident victim in Ohralik.\97\ To allow enforcement of such a broad prophylactic rule absent identification of a serious problem such as ambulance chasing, the Court explained, would dilute commercial speech protection ``almost to nothing.'' \98\

\97\ Edenfield v. Fane, 507 U.S. 761, 775 (1993).
\98\ 507 U.S. at 777.

[P. 1117, delete last two sentences of paragraph continued from p. 1116, and substitute the following:]

The Court has developed a four-pronged test to measure the validity of restraints upon commercial expression.

[P. 1117, add to n.19 following San Francisco Arts & Athletics citation:]

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (government's interest in curbing strength wars among brewers is substantial, but interest in facilitating state regulation of alcohol is not substantial). Contrast United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state

restrictions on lotteries. ``Unlike the situation in Edge Broadcasting,'' the Coors Court explained, ``the policies of some States do not prevent neighboring States from pursuing their own alcohol-related policies within their respective borders.'' 514 U.S. at 486.

[P. 1118, add to n.20 following Bolger citation:]

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government's interest in curbing strength wars among brewers, given the inconsistencies and ``overall irrationality'' of the regulatory scheme); Edenfield v. Fane, 507 U.S. 761 (1993) (Florida's ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients).

[P. 1118, add to text following n.20:]

Instead, the regulation must ``directly advance'' the governmental interest. The Court resolves this issue with reference to aggregate effects, and does not limit its consideration to effects on the challenging litigant.\99\

\99\ United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993) (``this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity'').

[P. 1118, add to n.21 following Bolger citation:]

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (there are less intrusive alternatives--e.g., direct limitations on alcohol content of beer--to prohibition on display of alcohol content on beer label).

[P. 1118, add to n.22:]

In a 1993 opinion the Court elaborated on the difference between ``reasonable fit'' and least restrictive alternative. ``A regulation need not be `absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction . . . , that is certainly a relevant consideration in determining whether the `fit' between ends and means is reasonable.'' City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993).

[P. 1118, delete remainder of section after n.22, and add the following:]

The ``reasonable fit'' standard has some teeth, the Court made clear in City of Cincinnati v. Discovery Network, Inc.,\100\ striking down a city's prohibition on distribution of ``commercial handbills'' through freestanding newsracks located on city property. The city's aesthetic interest in reducing visual clutter was furthered by reducing the total number of newsracks, but the distinction between prohibited ``commercial'' publications and permitted ``newspapers'' bore ``no relationship whatsoever'' to this legitimate interest.\101\ The city could not, the Court ruled, single out commercial speech to bear the full onus when ``all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault.'' \102\ By contrast, the Court upheld a federal law that prohibited broadcast of lottery advertisements by a broadcaster in a State that prohibits lotteries, while allowing broadcast of such ads by stations in States that sponsor lotteries. There was a ``reasonable fit'' between the restriction and the asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring States that promote lotteries.\103\ The prohibition ``directly served'' the congressional interest, and could be

applied to a broadcaster whose principal audience was in an adjoining lottery State, and who sought to run ads for that State's lottery.\104\

\100\ 507 U.S. 410 (1993). See also Edenfield v. Fane, 507 U.S. 761 (1993), decided the same Term, relying on the ``directly advance'' third prong of Central Hudson to strike down a ban on in-person solicitation by certified public accountants.

\101\ 507 U.S. at 424.

\102\ 507 U.S. at 426. The Court also noted the ``minute'' effect of removing 62 ``commercial'' newsracks while 1,500 to 2,000 other newsracks remained in place. Id. at 418.

\103\ United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

\104\ 508 U.S. at 428.

In 1999 the Court struck down a provision of the same statute as applied to advertisements for private casino gambling that are broadcast by radio and television stations located in a State where such gambling is legal.\105\ The Court emphasized the interrelatedness of the four parts of the Central Hudson test; e.g., though the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable ``fit.'' In this case, ``[t]he operation of [18 U.S.C.] Sec. 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.'' \106\ ``[T]he regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all.'' \107\

\105\ Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999).

\106\ 527 U.S. at 190.

\107\ 527 U.S. at 195.

In a 1986 decision the Court had asserted that ``the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'' \108\ Subsequently, however, the Court has eschewed reliance on Posadas,\109\ and it seems doubtful that the Court would again embrace the broad principle that government may ban all advertising of an activity that it permits but has power to prohibit. Indeed, the Court's very holding in 44 Liquormart, Inc. v. Rhode Island,\110\ striking down the State's ban on advertisements that provide truthful information about liquor prices, is inconsistent with the general proposition. A Court plurality in 44 Liquormart squarely rejected Posadas, calling it ``erroneous,'' declining to give force to its ``highly deferential approach,'' and proclaiming that a State ``does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the Posadas majority was willing to tolerate.'' \111\ Four other Justices concluded that Posadas was inconsistent with the ``closer look'' that the Court has since required in applying the principles of Central Hudson.\112\

\108\ Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-46 (1986). For discussion

of the case, see P. Kurland, Posadas de Puerto Rico v. Tourism Company: `` 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,'' 1986 Sup. Ct. Rev. 1.

\109\ In Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on Posadas, pointing out that the statement in Posadas had been made only after a determination that the advertising could be upheld under Central Hudson. The Court found it unnecessary to consider the greater-includes-lesser argument in United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993), upholding through application of Central Hudson principles a ban on broadcast of lottery ads.

\110\ 517 U.S. 484 (1996).

\111\ 517 U.S. at 510 (opinion of Stevens, joined by Justices Kennedy, Thomas, and Ginsburg). The Stevens opinion also dismissed the Posadas ``greater-includes-the-lesser argument'' as ``inconsistent with both logic and well-settled doctrine,'' pointing out that the First Amendment ``presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.'' Id. at 511-12.

\112\ 517 U.S. at 531-32 (concurring opinion of O'Connor, joined by Chief Justice Rehnquist and by Justices Souter and Breyer).

The ``different degree of protection'' accorded commercial speech has a number of consequences. Somewhat broader times, places, and manner regulations are to be tolerated.\113\ The rule against prior restraints may be inapplicable,\114\ and disseminators of commercial speech are not protected by the overbreadth doctrine.\115\

\113\ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). But in Linmark Associates v. Township of Willingboro, 431 U.S. 85, 93-94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting ``For Sale'' signs on residential lawns. First, ample alternative channels of communication were not available, and, second, the ban was seen as a content limitation.

\114\ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 n.24 (1976); Central Hudson Gas & Electric Co. v. Public Serv. Comm'n, 447 U.S. 557, 571 n.13 (1980).

\115\ Bates v. State Bar of Arizona, 433 U.S. 350, 379-81 (1977); Central Hudson Gas & Electric Co. v. Public Serv. Comm'n, 447 U.S. 557, 565 n.8 (1980).

Different degrees of protection may also be discerned among different categories of commercial speech. The first prong of the Central Hudson test means that false, deceptive, or misleading advertisements need not be permitted; government may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent deception.\116\ But even truthful, non-misleading commercial speech may be regulated, and the validity of such regulation is tested by application of the remaining prongs of the Central Hudson test. The test itself does not make further distinctions based on the content of the commercial message or the nature of the governmental interest (that interest need only be ``substantial''). Recent decisions suggest, however, that further distinctions may exist. Measures aimed at preserving ``a fair bargaining process'' between consumer and advertiser \117\ may be more likely to pass the test \118\ than regulations designed to implement

general health, safety, or moral concerns.\119\ As the governmental interest becomes further removed from protecting a fair bargaining process, it may become more difficult to establish the absence of less burdensome regulatory alternatives and the presence of a ``reasonable fit'' between the commercial speech restriction and the governmental interest.\120\

\116\ Bates v. State Bar of Arizona, 433 U.S. 350, 383-84 (1977); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Requirements that advertisers disclose more information than they otherwise choose to are upheld ``as long as [they] are reasonably related to the State's interest in preventing deception of consumers,'' the Court explaining that ``[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right'' requiring strict scrutiny of the disclosure requirement. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 & n.14 (1985) (upholding requirement that attorney's contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs).

\117\ 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (opinion of Justice Stevens, joined by Justices Kennedy and Ginsburg).

\118\ See, e.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 (1978) (upholding ban on in-person solicitation by attorneys due in part to the ``potential for overreaching'' when a trained advocate ``solicits an unsophisticated, injured, or distressed lay person'').

\119\ Compare United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding federal law supporting state interest in protecting citizens from lottery information) and Florida Bar v. Went For It, Inc., 515 U.S. 618, 631 (1995) (upholding a 30-day ban on targeted, direct-mail solicitation of accident victims by attorneys, not because of any presumed susceptibility to overreaching, but because the ban ``forestall[s] the outrage and irritation with the . . . legal profession that the [banned] solicitation . . . has engendered'') with Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down federal statute prohibiting display of alcohol content on beer labels) and 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down state law prohibiting display of retail prices in ads for alcoholic beverages).

\120\ Justice Stevens has criticized the Central Hudson test because it seemingly allows regulation of any speech propounded in a commercial context regardless of the content of that speech. ``[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead.'' Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (concurring opinion). The Justice repeated these views in 1996: ``when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.'' 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (a portion of the opinion joined by Justices Kennedy and Ginsburg). Justice Thomas, similarly, wrote that, in cases ``in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the Central Hudson test should not be applied because such an `interest' is per se illegitimate . . . .'' Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (internal quotation marks omitted).

--Radio and Television
[P. 1126, delete last paragraph on page]
--Governmentally Compelled Right of Reply to Newspapers
[P. 1127, add to n.65:]

See also Hurley v. Irish-American Gay Group, 515 U.S. 557 (1995) (State may not compel parade organizer to allow participation by a parade unit proclaiming message that organizer does not wish to endorse).

[P. 1127, add new section following n.65:]

Regulation of Cable Television.--The Court has recognized that cable television ``implicates First Amendment interests,'' since a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering.\121\ Moreover, ``settled principles of . . . First Amendment jurisprudence'' govern review of cable regulation; cable is not limited by ``scarce'' broadcast frequencies and does not require the same less rigorous standard of review that the Court applies to regulation of broadcasting.\122\ Cable does, however, have unique characteristics that justify regulations that single out cable for special treatment.\123\ The Court in Turner Broadcasting System v. FCC \124\ upheld federal statutory requirements that cable systems carry local commercial and public television stations. Although these ``must-carry'' requirements ``distinguish between speakers in the television programming market,'' they do so based on the manner of transmission and not on the content the messages conveyed, and hence are content-neutral.\125\ The regulations could therefore be measured by the ``intermediate level of scrutiny'' set forth in United States v. O'Brien.\126\ Two years later, however, a splintered Court could not agree on what standard of review to apply to content-based restrictions of cable broadcasts. Striking down a requirement that cable operators must, in order to protect children, segregate and block programs with patently offensive sexual material, a Court majority in Denver Area Educational Telecommunications Consortium v. FCC \127\ found it unnecessary to determine whether strict scrutiny or some lesser standard applies, as the restriction was deemed invalid under any of the alternative tests. There was no opinion of the Court on the other two holdings in the case,\128\ and a plurality \129\ rejected assertions that public forum analysis,\130\ or a rule giving cable operators' editorial rights ``general primacy'' over the rights of programmers and viewers,\131\ should govern.

\121\ City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986) (leaving for future decision how the operator's interests are to be balanced against a community's interests in limiting franchises and preserving utility space); Turner Broadcasting System v. FCC, 512 U.S. 622, 636 (1994).

\122\ Turner Broadcasting System v. FCC, 512 U.S. 622, 638-39 (1994).

\123\ 512 U.S. at 661 (referring to the ``bottleneck monopoly power'' exercised by cable operators in determining which networks and stations to carry, and to the resulting dangers posed to the viability of broadcast television stations). See also Leathers v. Medlock, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).

\124\ 512 U.S. 622 (1994).

\125\ 512 U.S. at 645. ``Deciding whether a particular regulation is content based or content neutral is not always a simple task,'' the Court confessed. Id. at 642. Indeed, dissenting Justice O'Connor, joined by Justices Scalia, Ginsburg, and Thomas, viewed the rules as content-

based. Id. at 674-82.

\126\ 391 U.S. 367, 377 (1968). The Court remanded Turner for further factual findings relevant to the O'Brien test. On remand, the district court upheld the must-carry provisions, and the Supreme Court affirmed, concluding that it ``cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination.'' Turner Broadcasting System v. FCC, 520 U.S. 180, 224 (1997).

\127\ 518 U.S. 727, 755 (1996) (invalidating Sec. 10(b) of the Cable Television Consumer Protection and Competition Act of 1992).

\128\ Upholding Sec. 10(a) of the Act, which permits cable operators to prohibit indecent material on leased access channels; and striking down Sec. 10(c), which permits a cable operator to prevent transmission of ``sexually explicit'' programming on public access channels. In upholding Sec. 10(a), Justice Breyer's plurality opinion cited FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and noted that cable television ``is as `accessible to children' as over-the-air broadcasting, if not more so.'' 518 U.S. at 744.

\129\ This section of Justice Breyer's opinion was joined by Justices Stevens, O'Connor, and Souter. 518 U.S. at 749.

\130\ Justice Kennedy, joined by Justice Ginsburg, advocated this approach. 518 U.S. at 791, and took the plurality to task for its ``evasion of any clear legal standard.'' Id. at 784.

\131\ Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, advocated this approach.

Subsequently, in United States v. Playboy Entertainment Group, Inc.,\132\ the Supreme Court made clear, as it had not in Denver Consortium, that strict scrutiny applies to content-based speech restrictions on cable television. The Court struck down a federal statute designed to ``shield children from hearing or seeing images resulting from signal bleed,'' which refers to blurred images or sounds that come through to non-subscribers.\133\ The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to scramble fully or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an FCC regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court apparently assumed that the government had a compelling interest in protecting at least some children from sexually oriented signal bleed, but found that Congress had not used the least restrictive means to do so. Congress in fact had enacted another provision that was less restrictive and that served the government's purpose. This other provision requires that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or otherwise fully block any channel to which a subscriber does not subscribe.

\132\ 120 S. Ct. 1878 (2000).

\133\ 120 S. Ct. at 1883.

Government Restraint of Content of Expression
--Group Libel, Hate Speech

[P. 1136, add to n.111:]

On the other hand, the First Amendment does permit enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. Wisconsin v. Mitchell, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing,

the Court noted. Id. at 485. The Court distinguished R.A.V. as involving a limitation on ``speech'' rather than conduct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias inspired crimes (e.g., they are more likely to provoke retaliatory crimes). Id. at 487-88. See generally Laurence H. Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 Sup. Ct. Rev. 1.

--Obscenity

[P. 1152, add to n.14:]

None of these strictures applies, however, to forfeitures imposed as part of a criminal penalty. Alexander v. United States, 509 U.S. 544 (1993) (upholding RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses). Justice Kennedy, dissenting in Alexander, objected to the ``forfeiture of expressive material that had not been adjudged to be obscene.'' Id. at 578.

--Non-obscene But Sexually Explicit and Indecent Expression

[P. 1161, add to n.61:]

Similar rules apply in regulation of cable TV. In Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a ``compelling'' governmental interest (but refusing to determine whether strict scrutiny applies), nonetheless struck down a requirement that cable operators segregate and block indecent programming on leased access channels. The segregate-and-block restrictions, which included a requirement that a request for access be in writing, and which allowed for up to 30 days' delay in blocking or unblocking a channel, were not sufficiently protective of adults' speech and viewing interests to be considered either narrowly or reasonably tailored to serve the government's compelling interest in protecting children. In United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878 (2000), the Supreme Court, explicitly applying strict scrutiny to a content-based speech restriction on cable TV, struck down a federal statute designed to ``shield children from hearing or seeing images resulting from signal bleed.'' Id. at 1883.

The Court seems to be becoming less absolute in viewing the protection of all minors (regardless of age) from all indecent material (regardless of its educational value and parental approval) to be a compelling governmental interest. In striking down the Communications Decency Act of 1996, the Court would ``neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all `indecent' and `patently offensive' messages communicated to a 17-year-old--no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute.'' Reno v. American Civil Liberties Union, 521 U.S. 844, 878 (1997). In Playboy Entertainment Group, 120 S. Ct. at 1892, the Court wrote: ``Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech.'' The Court also would ``not discount the possibility that a graphic image could have a negative impact upon a young child'' (id. at 1893), thereby suggesting again that it may take age into account when applying strict scrutiny.

[P. 1161, add to text following n.61:]

In Reno v. American Civil Liberties Union,\134\ the Court struck down two provisions of the Communications Decency Act of 1996 (CDA), one of which would have

prohibited use of an ``interactive computer service'' to display indecent material ``in a manner available to a person under 18 years of age.'' \135\ This prohibition would, in effect, have banned indecent material from all Internet sites except those accessible by adults only. Although intended ``to deny minors access to potentially harmful speech . . . , [the CDA's] burden on adult speech,'' the Court wrote, ``is unacceptable if less restrictive alternatives would be at least as effective . . . . [T]he Government may not `reduc[e] the adult population . . . to . . . only what is fit for children.' '' \136\

\134\ 521 U.S. 844 (1997).

\135\ The other provision the Court struck down would have prohibited indecent communications, by telephone, fax, or e-mail, to minors.

\136\ 521 U.S. at 874-75. The Court did not address whether, if less restrictive alternatives would not be as effective, the Government would then be permitted to reduce the adult population to only what is fit for children.

In Reno, the Court distinguished FCC v. Pacifica Foundation,\137\ in which it had upheld the FCC's restrictions on indecent radio and television broadcasts, because (1) ``[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet,'' (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts ``would justify a criminal prosecution,'' and (3) radio and television, unlike the Internet, have, ``as a matter of history . . . `received the most limited First Amendment protection,' . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.'' \138\

\137\ 438 U.S. 726 (1978).

\138\ 521 U.S. at 867.

[P. 1161, start a new paragraph of text with the material that previously followed n.61, and change the opening words of that new paragraph from ``Also, government may'' to ``The government may also''.]

[P. 1163, add to text following n.74:]

In Erie v. Pap's A.M.,\139\ the Supreme Court again upheld the application of a statute prohibiting public nudity to an ``adult'' entertainment establishment. Although there was again only a plurality opinion, parts of that opinion were joined by five justices. These five adopted Justice Souter's position in Barnes, that the statute satisfied the O'Brien test because it was intended ``to combat harmful secondary effects,'' such as ``prostitution and other criminal activity.'' \140\ Justice Souter, however, though joining the plurality opinion, also dissented in part. He continued to believe that secondary effects were an adequate justification for banning nude dancing, but did not believe ``that the city has made a sufficient evidentiary showing to sustain its regulation,'' and therefore would have remanded the case for further proceedings.\141\ He acknowledged his ``mistake'' in Barnes in failing to make the same demand for evidence.\142\

\139\ 120 S. Ct. 1382 (2000).

\140\ 120 S. Ct. at 1392, 1393.

\141\ 120 S. Ct. at 1402.
\142\ 120 S. Ct. at 1405.

The plurality opinion found that the effect of Erie's public nudity ban ``on the erotic message . . . is de minimis'' because Erie allowed dancers to perform wearing only pasties and G-strings.\143\ It may follow that ``requiring dancers to wear pasties and G-strings may not greatly reduce . . . secondary effects, but O'Brien requires only that the regulation further the interest of combating such effects,'' not that it further it to a particular extent.\144\ The plurality opinion did not address the question of whether statutes prohibiting public nudity could be applied to serious theater, but its reliance on secondary effects suggests that they could not.

\143\ 120 S. Ct. at 1393. The plurality said that, though nude dancing is ``expressive conduct,'' ``we think that it falls only within the outer ambit of the First Amendment's protection.'' Id. at 1391. The opinion also quotes Justice Stevens to the same effect with regard to erotic materials generally. Id. at 1393. In United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878, 1893 (2000), however, the Court wrote that it ``cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech [``signal bleed'' of sexually oriented cable programming] is not very important.''
\144\ 120 S. Ct. at 1397.

Speech Plus--The Constitutional Law of Leafleting, Picketing, and Demonstrating

--The Public Forum

[P. 1167, add to n.98 following citation to Niemotko v. Maryland:]

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (denial of permission to Ku Klux Klan, allegedly in order to avoid Establishment Clause violation, to place a cross in plaza on grounds of state capitol); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (University's subsidy for printing costs of student publications, available for student ``news, information, opinion, entertainment, or academic communications,'' could not be withheld because of the religious content of a student publication); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (school district rule prohibiting after-hours use of school property for showing of a film presenting a religious perspective on child-rearing and family values, but allowing after-hours use for non-religious social, civic, and recreational purposes).

[P. 1169, add to n.106:]

Candidate debates on public television are an example of this third type of public forum: the ``nonpublic forum.'' Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998). ``Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine [i.e., public broadcasters ordinarily are entitled to the editorial discretion to engage in viewpoint discrimination], candidate debates present the narrow exception to this rule.'' Id. at 675. A public broadcaster, therefore, may not engage in viewpoint discrimination in granting or denying access to candidates. Under the third type of forum analysis, however, it may restrict candidate access for ``a reasonable, viewpoint-neutral'' reason, such as a candidate's ``objective lack of support.'' Id. at 683.

--Public Issue Picketing and Parading

[P. 1179, add to text at end of section:]

More recently, disputes arising from anti-abortion protests outside abortion clinics have occasioned another

look at principles distinguishing lawful public demonstrations from proscribable conduct. In Madsen v. Women's Health Center,\145\ the Court refined principles governing issuance of ``content-neutral'' injunctions that restrict expressive activity.\146\ The appropriate test, the Court stated, is ``whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest.'' \147\ Regular time, place, and manner analysis (requiring that regulation be narrowly tailored to serve a significant governmental interest) ``is not sufficiently rigorous,'' the Court explained, because injunctions create greater risk of censorship and discriminatory application, and because of the established principle ``that an injunction should be no broader than necessary to achieve its desired goals.'' \148\ Applying its new test, the Court upheld an injunction prohibiting protesters from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within 36 feet of an abortion clinic. Similarly upheld were noise restrictions designed to ensure the health and well-being of clinic patients. Other aspects of the injunction, however, did not pass the test. Inclusion of private property within the 36-foot buffer was not adequately justified, nor was inclusion in the noise restriction of a ban on ``images observable'' by clinic patients. A ban on physically approaching any person within 300 feet of the clinic unless that person indicated a desire to communicate burdened more speech than necessary. Also, a ban on demonstrating within 300 feet of the residences of clinic staff was not sufficiently justified, the restriction covering a much larger zone than an earlier residential picketing ban that the Court had upheld.\149\

\145\ 512 U.S. 753 (1994).

\146\ The Court rejected the argument that the injunction was necessarily content-based or viewpoint-based because it applied only to anti-abortion protesters. ``An injunction by its very nature applies only to a particular group (or individuals) . . . . It does so, however, because of the group's past actions in the context of a specific dispute.'' There had been no similarly disruptive demonstrations by pro-abortion factions at the abortion clinic. 512 U.S. at 762.

\147\ 512 U.S. at 765.

\148\ 512 U.S. at 765.

\149\ Referring to Frisby v. Schultz, 487 U.S. 474 (1988).

In Schenck v. Pro-Choice Network of Western New York,\150\ the Court applied Madsen to another injunction that placed restrictions on demonstrating outside an abortion clinic. The Court upheld the portion of the injunction that banned ``demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities''--what the Court called ``fixed buffer zones.'' \151\ It struck down a prohibition against demonstrating ``within fifteen feet of any person or vehicles seeking access to or leaving such facilities''--what it called ``floating buffer zones.'' \152\ The Court cited ``public safety and order'' \153\ in upholding the fixed buffer zones, but it found that the floating buffer zones ``burden more speech than is necessary to serve the relevant governmental interests'' \154\ because they make it ``quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction.'' \155\ The Court also upheld a provision specifying that ``once sidewalk counselors who had entered the buffer zones were required to `cease and desist' their counseling, they had to retreat 15

feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones.'' \156\

\150\ 519 U.S. 357 (1997).
\151\ 519 U.S. at 366 n.3.
\152\ 519 U.S. at 366 n.3.
\153\ 519 U.S. at 376.
\154\ 519 U.S. at 377.
\155\ 519 U.S. at 378.
\156\ 519 U.S. at 367.

In Hill v. Colorado,\157\ the Court upheld a Colorado statute that makes it unlawful, within 100 feet of the entrance to any health care facility, to ``knowingly approach'' within eight feet of another person, without that person's consent, ``for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.'' \158\ This decision is notable because it upheld a statute, and not, as in Madsen and Schenck, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that ``reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners. . . .'' \159\ The restrictions are content-neutral because they regulate only the places where some speech may occur, and because they apply equally to all demonstrators, regardless of viewpoint. Although the restrictions do not apply to all speech, the ``kind of cursory examination'' that might be required to distinguish casual conversation from protest, education, or counseling is not ``problematic.'' \160\ The law is narrowly tailored to achieve the state's interests. The eight-foot restriction does not significantly impair the ability to convey messages by signs, and ordinarily allows speakers to come within a normal conversational distance of their targets. Because the statute allows the speaker to remain in one place, persons who wish to hand out leaflets may position themselves beside entrances near the path of oncoming pedestrians, and consequently are not deprived of the opportunity to get the attention of persons entering a clinic.

\157\ 120 S. Ct. 2480 (2000).
\158\ 120 S. Ct. at 2484.
\159\ 120 S. Ct. at 2488.
\160\ 120 S. Ct. at 2492.

Different types of issues were presented by Hurley v. Irish-American Gay Group,\161\ in which the Court held that a state's public accommodations law could not be applied to compel private organizers of a St. Patrick's Day parade to accept in the parade a unit that would proclaim a message that the organizers did not wish to promote. Each participating unit affects the message conveyed by the parade organizers, the Court observed, and application of the public accommodations law to the content of the organizers' message contravened the ``fundamental rule . . . that a speaker has the autonomy to choose the content of his own message.'' \162\

\161\ 515 U.S. 557 (1995).
\162\ 515 U.S. at 573.

--Leafleting, Handbilling, and the Like
[P. 1181, add to text after n.168:]

Talley's anonymity rationale was strengthened in McIntyre v. Ohio Elections Commission,\163\ invalidating Ohio's prohibition on the distribution of anonymous campaign literature. There is a ``respected tradition of anonymity in the advocacy of political causes,'' the Court noted, and neither of the interests asserted by Ohio justified the limitation. The State's interest in informing the electorate was ``plainly insufficient,'' and, while the more weighty interest in preventing fraud in the electoral process may be accomplished by a direct prohibition, it may not be accomplished indirectly by an indiscriminate ban on a whole category of speech. Ohio could not apply the prohibition, therefore, to punish anonymous distribution of pamphlets opposing a referendum on school taxes.\164\

\163\ 514 U.S. 334 (1995).

\164\ In Buckley v. American Constitutional Law Found., 525 U.S. 182 (1999), the Court struck down a Colorado statute requiring initiative-petition circulators to wear identification badges. It found that ``the restraint on speech in this case is more severe than was the restraint in McIntyre'' because ``[p]etition circulation is a less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition. . . . [T]he badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest.'' Id. at 199.

[P. 1181, substitute for first full paragraph on page:]

The handbilling cases were distinguished in City Council v. Taxpayers for Vincent,\165\ in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. While a city's concern over visual blight could be addressed by an anti-littering ordinance that did not restrict the expressive activity of distributing handbills, in the case of utility pole signs ``it is the medium of expression itself'' that creates the visual blight. Hence, the city's prohibition, unlike a prohibition on distributing handbills, was narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.\166\ Ten years later, however, the Court unanimously invalidated a town's broad ban on residential signs that permitted only residential identification signs, ``for sale'' signs, and signs warning of safety hazards.\167\ Prohibiting homeowners from displaying political, religious, or personal messages on their own property ``almost completely foreclosed a venerable means of communication that is both unique and important,'' and that is ``an unusually cheap and convenient form of communication'' without viable alternatives for many residents.\168\ The ban was thus reminiscent of total bans on leafleting, distribution of literature, and door-to-door solicitation that the Court had struck down in the 1930s and 1940s. The prohibition in Vincent was distinguished as not removing a ``uniquely valuable or important mode of communication,'' and as not impairing citizens' ability to communicate.\169\

\165\ 466 U.S. 789 (1984).

\166\ Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

\167\ City of Ladue v. Gilleo, 512 U.S. 43 (1994).

\168\ 512 U.S. at 54, 57.

\169\ 512 U.S. at 54. The city's legitimate interest in reducing visual clutter could be addressed by ``more

temperate'' measures, the Court suggested. Id. at 58.

SECOND AMENDMENT

[P. 1193, add to n.1:]

Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461 (1995); William Van Alystyne, The Second Amendment and the Personal Right to Bear Arms, 43 Duke L.J. 1236 (1994).

[P. 1194, add to n.7:]

See also Hickman v. Block, 81 F.3d 98 (9th Cir.) (plaintiff lacked standing to challenge denial of permit to carry concealed weapon, because Second Amendment is a right held by States, not by private citizens), cert. denied 519 U.S. 912 (1996); United States v. Gomez, 92 F.3d 770, 775 n.7 (9th Cir. 1996) (interpreting federal prohibition on possession of firearm by a felon as having a justification defense ``ensures that [the provision] does not collide with the Second Amendment''); United States v. Wright, 117 F.3d 1265 (11th Cir.), cert. denied 522 U.S. 1007 (1997) (member of Georgia unorganized militia unable to establish that his possession of machineguns and pipe bombs bore any connection to the preservation or efficiency of a well regulated militia).

[P. 1194, add to text at end of section:]

Pointing out that interest in the ``character of the Second Amendment right has recently burgeoned,'' Justice Thomas, concurring in the Court's invalidation (on other grounds) of the Brady Handgun Violence Prevention Act, questioned whether the Second Amendment bars federal regulation of gun sales, and suggested that the Court might determine ``at some future date . . . whether Justice Story was correct . . . that the right to bear arms `has justly been considered, as the palladium of the liberties of a republic.' '' \1\

\1\ Printz v. United States, 521 U.S. 898, 937-39 (1997) (quoting 3 Commentaries Sec. 1890, p. 746 (1833)). Justice Scalia, in extra-judicial writing, has sided with the individual rights interpretation of the Amendment. See Antonin Scalia, A Matter of Interpretation, Federal Courts and the Law, 136-37 n.13 (A. Gutmann, ed., 1997) (responding to Professor Tribe's critique of ``my interpretation of the Second Amendment as a guarantee that the federal government will not interfere with the individual's right to bear arms for self-defense'').

FOURTH AMENDMENT

SEARCH AND SEIZURE
History and Scope of the Amendment
--The Interest Protected

[P. 1206, add to n.38 before Rakas v. Illinois citation, and add parenthetical to Rakas citation:]

But cf. Minnesota v. Carter, 525 U.S. 83 (1998) (a person present in someone else's apartment for only a few hours for the purpose of bagging cocaine for later sale has no legitimate expectation of privacy); Cf. Rakas v. Illinois, 439 U.S. 128 (1978) (auto passengers demonstrated no legitimate expectation of privacy in glove compartment or under seat of auto).

[P. 1206, add to end of n.38:]

Property rights are still protected by the Amendment,

however. A ``seizure'' of property can occur when there is some meaningful interference with an individual's possessory interests in that property, and regardless of whether there is any interference with the individual's privacy interest. Soldal v. Cook County, 506 U.S. 56 (1992) (a seizure occurred when sheriff's deputies assisted in the disconnection and removal of a mobile home in the course of an eviction from a mobile home park). The reasonableness of a seizure, however, is an additional issue that may still hinge on privacy interests. United States v. Jacobsen, 466 U.S. 109, 120-21 (1984) (DEA agents reasonably seized package for examination after private mail carrier had opened the damaged package for inspection, discovered presence of contraband, and informed agents).

[P. 1206, add to n.39:]

Bond v. United States, 120 S. Ct. 1462, 1465 (2000).

--Searches and Inspections in Noncriminal Cases

[P. 1214, add to text following n.82:]

In another unusual case, the Court held that a sheriff's assistance to a trailer park owner in disconnecting and removing a mobile home constituted a ``seizure'' of the home.\1\

\1\ Soldal v. Cook County, 506 U.S. 56, 61 (1992) (home ``was not only seized, it literally was carried away, giving new meaning to the term `mobile home' '').

Searches and Seizures Pursuant to Warrant

--Probable Cause

[P. 1218, add to n.98:]

Similarly, the preference for proceeding by warrant leads to a stricter rule for appellate review of trial court decisions on warrantless stops and searches than is employed to review probable cause to issue a warrant. Ornelas v. United States, 517 U.S. 690 (1996) (determinations of reasonable suspicion to stop and probable cause to search without a warrant should be subjected to de novo appellate review).

--Execution of Warrants

[P. 1226, delete first sentence of section and substitute the following:]

The Fourth Amendment's ``general touchstone of reasonableness . . . governs the method of execution of the warrant.'' \2\ Until recently, however, most such issues have been dealt with by statute and rule.\3\

\2\ United States v. Ramirez, 523 U.S. 65, 71 (1998).

\3\ Rule 41(c), Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall be served in the daytime, unless the magistrate ``for reasonable cause shown'' directs in the warrant that it be served at some other time. See Jones v. United States, 357 U.S. 493, 498-500 (1958); Gooding v. United States, 416 U.S. 430 (1974). A separate statutory rule applies to narcotics cases. 21 U.S.C. Sec. 879(a).

[P. 1227, add to text following sentence containing n.158:]

In Wilson v. Arkansas,\4\ the Court determined that the common law ``knock and announce'' rule is an element of the Fourth Amendment reasonableness inquiry. The ``rule'' is merely a presumption, however, that yields under various circumstances, including those posing a threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. The test, articulated two years later in Richards

v. Wisconsin,\5\ is whether police have ``a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime.'' In Richards, the Court held that there is no blanket exception to the rule whenever officers are executing a search warrant in a felony drug investigation; instead, a case-by-case analysis is required to determine whether no-knock entry is justified under the circumstances.\6\

\4\ 514 U.S. 927 (1995).

\5\ 520 U.S. 385, 394 (1997).

\6\ The fact that officers may have to destroy property in order to conduct a no-knock entry has no bearing on the reasonableness of their decision not to knock and announce. United States v. Ramirez, 523 U.S. 65 (1998).

[P. 1227, delete sentence containing n.159:]

[P. 1227, add to text following n.161:]

Because police actions in execution of a warrant must be related to the objectives of the authorized intrusion, and because privacy of the home lies at the core of the Fourth Amendment, police officers violate the Amendment by bringing members of the media or other third parties into a home during execution of a warrant if presence of those persons was not in aid of execution of the warrant.\7\

\7\ Wilson v. Layne, 526 U.S. 603 (1999). Accord, Hanlon v. Berger, 526 U.S. 808 (1999) (media camera crew ``ride-along'' with Fish and Wildlife Service agents executing a warrant to search respondent's ranch for evidence of illegal taking of wildlife).

Valid Searches and Seizures Without Warrants

--Detention Short of Arrest: Stop-and-Frisk

[P. 1230, add to n.12:]

Maryland v. Wilson, 519 U.S. 408, 413 (1997) (after validly stopping car, officer may order passengers as well as driver out of car; ``the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger'').

[P. 1230, add to text following n.12:]

If, in the course of a weapons frisk, ``plain touch'' reveals presence of an object that the officer has probable cause to believe is contraband, the officer may seize that object.\8\ The Court viewed the situation as analogous to that covered by the ``plain view'' doctrine: obvious contraband may be seized, but a search may not be expanded to determine whether an object is contraband.\9\ Also impermissible is physical manipulation, without reasonable suspicion, of a bus passenger's carry-on luggage stored in an overhead compartment.\10\

\8\ Minnesota v. Dickerson, 508 U.S. 366 (1993).

\9\ 508 U.S. at 375, 378-79. In Dickerson the Court held that seizure of a small plastic container that the officer felt in the suspect's pocket was not justified; the officer should not have continued the search, manipulating the container with his fingers, after determining that no weapon was present.

\10\ Bond v. United States, 120 S. Ct. 1462 (2000) (bus passenger has reasonable expectation that, while other passengers might handle his bag in order to make room for their own, they will not ``feel the bag in an exploratory manner'').

[P. 1231, add to n.16:]

Illinois v. Wardlow, 120 S. Ct. 673 (2000) (unprovoked flight from high crime area upon sight of police produces ``reasonable suspicion'').

[P. 1231, add, after n.16, to end of sentence containing n.16:]

, although the Court has held that an uncorroborated, anonymous tip is insufficient basis for a Terry stop, and that there is no ``firearms'' exception to the reasonable suspicion requirement.\11\

\11\ Florida v. J.L., 120 S. Ct. 1375 (2000) (reasonable suspicion requires that a tip be reliable in its assertion of illegality, not merely in its identification of someone).

--Search Incident to Arrest

[P. 1235, add to text following n.37:]

If there is no custodial arrest, as in the case of a routine traffic stop, the threat to officer safety is ``a good deal less,'' and the scope of a permissible search is also more limited.\12\

\12\ Knowles v. Iowa, 525 U.S. 113, 117 (1998) (officers may order driver and passengers out of car, and may conduct Terry-type pat down upon reasonable suspicion that they may be armed and dangerous).

[P. 1237, change n.48 to read:]

437 U.S. 385, 390-91 (1978). Accord, Flippo v. West Virginia, 120 S. Ct. 7 (1999) (per curiam).

--Vehicular Searches

[P. 1239, add to n.62:]

An automobile's ``ready mobility [is] an exigency sufficient to excuse failure to obtain a search warrant once probable cause is clear''; there is no need to find the presence of ``unforeseen circumstances'' or other additional exigency. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996). Accord, Maryland v. Dyson, 527 U.S. 465 (1999) (per curiam).

[P. 1239, delete text accompanying n.63, and substitute the following:]

and they may not make random stops of vehicles on the roads, but instead must base stops of individual vehicles on probable cause or some ``articulable and reasonable suspicion'' \13\ of traffic or safety violation or some other criminal activity.\14\

\13\ Delaware v. Prouse, 440 U.S. 648, 663 (1979) (discretionary random stops of motorists to check driver's license and registration papers and safety features of cars constitute Fourth Amendment violation); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (violation for roving patrols on lookout for illegal aliens to stop vehicles on highways near international borders when only ground for suspicion is that occupants appear to be of Mexican ancestry). In Prouse, the Court cautioned that it was not precluding the States from developing methods for spot checks, such as questioning all traffic at roadblocks, that involve less intrusion or that do not involve unconstrained exercise of discretion. 440 U.S. at 663.

\14\ An officer who observes a traffic violation may stop a vehicle even if his real motivation is to investigate for evidence of other crime. Whren v. United States, 517 U.S. 806 (1996). The existence of probable cause to believe that a traffic violation has occurred establishes the

constitutional reasonableness of traffic stops regardless of the actual motivation of the officers involved, and regardless of whether it is customary police practice to stop motorists for the violation observed.

[P. 1240, add to text following n.66:]

Although officers who have stopped a car to issue a routine traffic citation may conduct a Terry-type search, even including a pat down of driver and passengers if there is reasonable suspicion that they are armed and dangerous, they may not conduct a full-blown search of the car.\15\

\15\ Knowles v. Iowa, 525 U.S. 113 (1998) (invalidating an Iowa statute permitting a full-blown search incident to a traffic citation).

[P. 1240, add new footnote at end of first sentence in first full paragraph:]

The same rule applies if it is the vehicle itself that is forfeitable contraband; police, acting without a warrant, may seize the vehicle from a public place. Florida v. White, 526 U.S. 559 (1999).

[P. 1240, change sentence ending with n.70 to read:

Police in undertaking a warrantless search of an automobile may not extend the search to the persons of the passengers therein \16\ unless there is a reasonable suspicion that the passengers are armed and dangerous, in which case a Terry pat down is permissible.\17\

\16\ United States v. Di Re, 332 U.S. 581 (1948); Ybarra v. Illinois, 444 U.S. 85, 94-96 (1979).

\17\ Knowles v. Iowa, 525 U.S. Ct. 113, 118 (1999).

[P. 1240, change sentences beginning after n.71 to read:]

Luggage and other closed containers found in automobiles may also be subjected to warrantless searches based on probable cause, regardless of whether the luggage or containers belong to the driver or to a passenger, and regardless of whether it is the driver or a passenger who is under suspicion.\18\ The same rule now applies whether . . . .''

\18\ Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (``police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search'').

--Consent Searches

P. 1242, add to n.82:]

Ohio v. Robinette, 519 U.S. 33 (1996) (officer need not always inform a detained motorist that he is free to go before consent to search auto may be deemed voluntary).

--Drug Testing

[P. 1249, substitute for paragraph beginning after n.128:]

Emphasizing the ``special needs'' of the public school context, reflected in the ``custodial and tutelary'' power that schools exercise over students, and also noting schoolchildren's diminished expectation of privacy, the Court in Vernonia School District v. Acton \19\ upheld a school district's policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics. The Court redefined the term ``compelling'' governmental interest. The phrase does not describe a ``fixed, minimum quantum of governmental concern,'' the Court explained, but rather ``describes an interest which

appears important enough to justify the particular search at hand.'' \20\ Applying this standard, the Court concluded that ``deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen.'' \21\ On the other hand, the interference with privacy interests was not great, the Court decided, since schoolchildren are routinely required to submit to various physical examinations and vaccinations. Moreover, ``[l]egitimate privacy expectations are even less [for] student athletes,'' since they normally suit up, shower, and dress in locker rooms that afford no privacy, and since they voluntarily subject themselves to physical exams and other regulations above and beyond those imposed on non-athletes.\22\ The Court ``caution[ed] against the assumption that suspicionless drug testing will readily pass muster in other contexts,'' identifying as ``the most significant element'' in Vernonia the fact that the policy was implemented under the government's responsibilities as guardian and tutor of schoolchildren.\23\

\19\ 515 U.S. 646 (1995).
\20\ Id. at 661.
\21\ Id.
\22\ Id. at 657.
\23\ Id. at 665.

No ``special needs'' justified Georgia's requirement that candidates for state office certify that they had passed a drug test, the Court ruled in Chandler v. Miller.\24\ Rather, the Court concluded that Georgia's requirement was ``symbolic'' rather than ``special.'' There was nothing in the record to indicate any actual fear or suspicion of drug use by state officials, the required certification was not well designed to detect illegal drug use, and candidates for state office, unlike the customs officers held subject to drug testing in Von Raab, are subject to ``relentless'' public scrutiny.

\24\ 520 U.S. 305 (1997).

Enforcing the Fourth Amendment: The Exclusionary Rule
--Narrowing Application of the Exclusionary Rule
[P. 1267, add to n.211:]

Similarly, the exclusionary rule does not require suppression of evidence that was seized incident to an arrest that was the result of a clerical error by a court clerk. Arizona v. Evans, 514 U.S. 1 (1995).

[P. 1267, add to text following n.213:]

The rule is inapplicable in parole revocation hearings.\25\

\25\ Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998).

--Operation of the Rule: Standing
[P. 1270, add to n.229 following citation to Rakas v. Illinois:]

United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests).

FIFTH AMENDMENT

DOUBLE JEOPARDY
Development and Scope
[P. 1282, n.59, delete citation to One Lot Emerald Cut Stones case]
[P. 1283, n.60, delete citation to 89 Firearms case and add:]

Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (tax on possession of illegal drugs, ``to be collected only after any state or federal fines or forfeitures have been satisfied,'' constitutes punishment for purposes of double jeopardy).

[P. 1283, add to text following n.60:]

Ordinarily, however, civil in rem forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis,\1\ and the same is true of civil commitment following expiration of a prison term.\2\

\1\ United States v. Ursery, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. Sec. 981 and 21 U.S.C. Sec. 881, of property used in drug and money laundering offenses, are not punitive). The Court in Ursery applied principles that had been set forth in Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam) (forfeiture of jewels brought into United States without customs declaration); and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. Sec. 924(d), of firearms ``used or intended to be used in'' firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the ``clearest proof'' that the sanction is ``so punitive'' as to transform it into a criminal penalty. 89 Firearms, supra, 465 U.S. at 366.

\2\ Kansas v. Hendricks, 521 U.S. 346, 369-70 (1997) (commitment under State's Sexually Violent Predator Act).

Reprosecution Following Acquittal
--Acquittal by Jury
[P. 1290, add footnote to end of first sentence in section:]

What constitutes a jury acquittal may occasionally be uncertain. In Schiro v. Farley, 510 U.S. 222 (1994), the Court ruled that a jury's action in leaving the verdict sheet blank on all but one count did not amount to an acquittal on those counts, and that consequently conviction on the remaining count, alleged to be duplicative of one of the blank counts, could not constitute double jeopardy. In any event, the Court added, no successive prosecution violative of double jeopardy could result from an initial sentencing proceeding in the course of an initial prosecution.

Reprosecution Following Conviction
--Sentence Increases
P. 1296, add to n.131:]

In Monge v. California, 524 U.S. 721 (1998), the Court refused to extend the ``narrow'' Bullington exception outside the area of capital punishment.

[P. 1297, add new paragraph to text following n.133:]

The Court is also quite deferential to legislative classification of recidivism sentencing enhancement factors as relating only to sentencing and as not constituting elements of an ``offense'' that must be proved beyond a

reasonable doubt. Ordinarily, therefore, sentence enhancements cannot be construed as additional punishment for the previous offense, and the Double Jeopardy Clause is not implicated. ``Sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime of conviction.'' \3\

\3\ United States v. Watts, 519 U.S. 148, 154 (1997) (relying on Witte v. United States, 515 U.S. 389 (1995), and holding that a sentencing court may consider earlier conduct of which the defendant was acquitted, so long as that conduct is proved by a preponderance of the evidence). See also Almendarez-Torres v. United States, 523 U.S. 224 (1998) (Congress' decision to treat recidivism as a sentencing factor does not violate due process); Monge v. California, 524 U.S. 721 (1998) (retrial is permissible following appellate holding of failure of proof relating to sentence enhancement). Justice Scalia, whose dissent in Almendarez-Torres argued that there was constitutional doubt over whether recidivism factors that increase a maximum sentence must be treated as a separate offense for double jeopardy purposes (523 U.S. at 248), answered that question affirmatively in his dissent in Monge. 524 U.S. at 740-41.

``For the Same Offence''

--Legislative Discretion as to Multiple Sentences

[P. 1299, add to n.142:]

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

--Successive Prosecutions for the Same Offense

[P. 1300, substitute for the two sentences immediately following n.150:]

In 1990, the Court modified the Brown approach, stating that the appropriate focus is on same conduct rather than same evidence.\4\ That interpretation held sway only three years, however, before being repudiated as ``wrong in principle [and] unstable in application.'' \5\

\4\ Grady v. Corbin, 495 U.S. 508 (1990) (holding that the State could not prosecute a traffic offender for negligent homicide because it would attempt to prove conduct for which the defendant had already been prosecuted--driving while intoxicated and failure to keep to the right of the median). A subsequent prosecution is barred, the Court explained, if the government, to establish an essential element of an offense, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. at 521.

\5\ United States v. Dixon, 509 U.S. 688, 709 (1993) (applying Blockburger test to determine whether prosecution for a crime, following conviction for criminal contempt for violation of a court order prohibiting that crime, constitutes double jeopardy).

[P. 1301, add to n.154:]

The fact that Felix constituted a ``large exception'' to Grady was one of the reasons the Court cited in overruling Grady. United States v. Dixon, 509 U.S. 688, 709-10 (1993).

[P. 1301, add to text following n.154:]

For double jeopardy purposes, a defendant is ``punished . . . only for the offense of which [he] is convicted''; a later prosecution or later punishment is not barred simply because the underlying criminal activity has

been considered at sentencing for a different offense.\6\ Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the ``same'' prior offense, but instead is a stiffened penalty for the later crime.\7\

\6\ Witte v. United States, 515 U.S. 389 (1995) (consideration of defendant's alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).

\7\ Monge v. California, 524 U.S. 721, 728 (1998).

SELF-INCRIMINATION

Development and Scope

[P. 1306, add to text following n.177:]

Incrimination is not complete once guilt has been adjudicated, and hence the privilege may be asserted during the sentencing phase of trial.\8\

\8\ Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (``We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned''); Mitchell v. United States, 526 U.S. 314 (1999) (non-capital sentencing).

[P. 1307, add to n.180:]

Two Justices recently challenged the interpretation limiting application to ``testimonial'' disclosures, claiming that the original understanding of the word ``witness'' was not limited to someone who gives testimony, but included someone who gives any kind of evidence. United States v. Hubbell, 120 S. Ct. 2037, 2050 (2000) (Justice Thomas, joined by Justice Scalia, concurring).

[P. 1307, delete n.181 and add to text following sentence that contained n.181:]

A person may be compelled to produce specific documents even though they contain incriminating information.\9\ If, however, the existence of specific documents is not known to the government, and the act of production informs the government about the existence, custody, or authenticity of the documents, then the privilege is implicated.\10\ Application of these principles resulted in a holding that the Independent Counsel could not base a prosecution on incriminating evidence identified and produced as the result of compliance with a broad subpoena for all information relating to the individual's income, employment, and professional relationships.\11\

\9\ Fisher v. United States, 425 U.S. 391 (1976). Compelling a taxpayer by subpoena to produce documents produced by his accountants from his own papers does not involve testimonial self-incrimination and is not barred by the privilege. ``[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.'' Id. at 408 (emphasis by Court). Even further removed from the protection of the privilege is seizure pursuant to a search warrant of business records in the handwriting of the defendant. Andresen v. Maryland, 427 U.S. 463 (1976). A court order compelling a target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal is not testimonial in nature, since the factual assertions are required of the banks and not of the target. Doe v. United

States, 487 U.S. 201 (1988).

\10\ In United States v. Doe, 465 U.S. 605 (1984), the Court distinguished Fisher, upholding lower courts' findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer's possession, and that they are authentic. Similarly, a juvenile court's order to produce a child implicates the privilege, because the act of compliance ``would amount to testimony regarding [the subject's] control over and possession of [the child].'' Baltimore Dep't of Social Services v. Bouknight, 493 U.S. 549, 555 (1990).

\11\ United States v. Hubbell, 120 S. Ct. 2037 (2000).

[P. 1309, add to n.190:]

In determining whether a state prisoner is entitled to federal habeas corpus relief because the prosecution violated due process by using his post-Miranda silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946)--whether the due process error ``had substantial and injurious effect or influence in determining the jury's verdict--not the stricter ``harmless beyond a reasonable doubt'' standard of Chapman v. California, 386 U.S. 18, 24 (1967), applicable on direct review. Brecht v. Abrahamson, 507 U.S. 619 (1993).

[P. 1311, add to text at end of section:]

There is no ``cooperative internationalism'' that parallels the cooperative federalism and cooperative prosecution on which application against States is premised, and consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.\12\

\12\ United States v. Balsys, 524 U.S. 666 (1998).

The Power to Compel Testimony and Disclosure
--Immunity

[P. 1315, add to n.224:]

See also United States v. Hubbell, 120 S. Ct. 2037 (2000) (because the statute protects against derivative use of compelled testimony, a prosecution cannot be based on incriminating evidence revealed only as the result of compliance with an extremely broad subpoena).

Confessions: Police Interrogation, Due Process, and Self-Incrimination
--Miranda v. Arizona

[P. 1332, delete all of first paragraph after first sentence, and add the following new paragraphs:]

For years, the constitutional status of the Miranda warnings was clouded in uncertainty. Had the Court announced a constitutional rule, or merely set forth supervisory rules that could be superseded by statutory rules? The fact that Miranda itself applied the rules to a state court proceeding, and that the Court in subsequent cases consistently applied the warnings to state proceedings, was strong evidence of constitutional moorings. In 1968, however, Congress enacted a statute designed to set aside Miranda in the federal courts and to reinstate the traditional voluntariness test.\13\ The statute lay unimplemented, for the most part, due to constitutional doubts about it. The Court also created exceptions to the Miranda warnings over the years, and referred to the warnings as ``prophylactic'' \14\ and ``not themselves rights protected by the Constitution.'' \15\ There were even hints that some Justices might be willing to overrule the decision.

\13\ Pub. L. No. 90-351, Sec. 701(a), 82 Stat. 210, 18 U.S.C. Sec. 3501. See S. Rep. No. 1097, 90th Cong., 2d Sess. 37-53 (1968). An effort to enact a companion measure applicable to the state courts was defeated.

\14\ New York v. Quarles, 467 U.S. 549, 653 (1984).

\15\ Michigan v. Tucker, 417 U.S. 433, 444 (1974).

In Dickerson v. United States,\16\ the Court resolved the basic issue, holding that Miranda was a constitutional decision that could not be overturned by statute, and consequently that 18 U.S.C. Sec. 3501 was unconstitutional. Application of Miranda warnings to state proceedings necessarily implied a constitutional base, the Court explained, since federal courts ``hold no supervisory authority over state judicial proceedings.'' \17\ Moreover, Miranda itself had purported to ``give concrete constitutional guidance to law enforcement agencies and courts to follow.'' \18\ That the Miranda rules are constitution-based does not mean that they are ``immutable,'' however. The Court repeated its invitation for legislative action that would be ``at least as effective'' in protecting a suspect's right to remain silent during custodial interrogation. Section 3501, however, merely reinstated the ``totality-of-the-circumstances'' rule held inadequate in Miranda, so that provision could not be considered as effective as the Miranda warnings.

\16\ 120 S. Ct. 2326 (2000).

\17\ 120 S. Ct. at 2333.

\18\ 120 S. Ct. at 2334 (quoting from Miranda, 384 U.S. at 441-42).

The Dickerson Court also rejected a request to overrule Miranda. ``Whether or not we would agree with Miranda's reasoning and its resulting rule, were we addressing the issue in the first instance,'' Chief Justice Rehnquist wrote for a seven-Justice majority, ``the principles of stare decisis weigh heavily against overruling it now.'' There was no special justification for overruling the decision; subsequent cases had not undermined the decision's doctrinal underpinnings, but rather had ``reaffirm[ed]'' its ``core ruling.'' Moreover, Miranda warnings had ``become so embedded in routine police practice [that they] have become part of our national culture.'' \19\

\19\ 120 S. Ct. at 2336.

[P. 1332, substitute for paragraph that carries over to P. 1333:]

Although the Court had suggested in 1974 that most Miranda claims could be disallowed in federal habeas corpus cases,\20\ such a course was squarely rejected in 1993. The Stone v. Powell \21\ rule, precluding federal habeas corpus review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal habeas review of a state prisoner's claim that his conviction had been obtained in violation of Miranda safeguards, the Court ruled in Withrow v. Williams.\22\ The Miranda rule differs from the Mapp v. Ohio \23\ exclusionary rule denied enforcement in Stone, the Court explained. While both are prophylactic rules, Miranda unlike Mapp, safeguards a fundamental trial right, the privilege against self-incrimination. Miranda also protects against the use at trial of unreliable statements, hence, unlike Mapp, relates to the correct ascertainment of guilt.\24\ A further consideration was that eliminating review of Miranda claims would not significantly

reduce federal habeas review of state convictions, since most Miranda claims could be recast in terms of due process denials resulting from admission of involuntary confessions.\25\

\20\ In Michigan v. Tucker, 417 U.S. 433, 439 (1974), the Court had suggested a distinction between a constitutional violation and a violation of ``the prophylactic rules developed to protect that right.'' The actual holding in Tucker, however, had turned on the fact that the interrogation had preceded the Miranda decision and that warnings--albeit not full Miranda warnings--had been given.

\21\ 428 U.S. 465 (1976).

\22\ 507 U.S. 680 (1993).

\23\ 367 U.S. 643 (1961).

\24\ 507 U.S. at 691-92.

\25\ Id. at 693.

[P. 1334, add to text following n.324:]

Whether a person is ``in custody'' is an objective test assessed in terms of how a reasonable person in the suspect's shoes would perceive his or her freedom to leave; a police officer's subjective and undisclosed view that a person being interrogated is a suspect is not relevant for Miranda purposes.\26\

\26\ Stansbury v. California, 511 U.S. 318 (1994).

[P. 1338, add to text following n.344:]

After a suspect has knowingly and voluntarily waived his Miranda rights, police officers may continue questioning until and unless the suspect clearly requests an attorney.\27\

\27\ Davis v. United States, 512 U.S. 452 (1994) (suspect's statement that ``maybe I should talk to a lawyer,'' uttered after Miranda waiver and after an hour and a half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said ``no, I don't want a lawyer'').

The Operation of the Exclusionary Rule

--Supreme Court Review

[P. 1341, add to text at end of section:]

In Withrow v. Williams,\28\ the Court held that the rule of Stone v. Powell,\29\ precluding federal habeas corpus review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal habeas review of a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda.

\28\ 507 U.S. 680 (1993).

\29\ 428 U.S. 465 (1976). See main text, pp. 1265-66.

DUE PROCESS

Substantive Due Process

--Discrimination

[P. 1358, add to n.75 following Richardson v. Belcher citation:]

FCC v. Beach Communications, 508 U.S. 307 (1993) (exemption from cable TV regulation of facilities that serve

only dwelling units under common ownership).

--Retroactive Taxes

[P. 1364, substitute for last paragraph in section:]

Although the Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,\30\ those decisions have recently been distinguished, and their precedential value limited.\31\ In United States v. Carlton, the Court declared that ``[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation''--retroactive application of legislation must be shown to be ``justified by a rational legislative purpose.'' \32\ Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress' purpose was ``neither illegitimate nor arbitrary,'' the Court noted, since Congress had acted ``to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss.'' Also, ``Congress acted promptly and established only a modest period of retroactivity.'' The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since ``[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.'' \33\

\30\ Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927), modified, 276 U.S. 594 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927). See also Heiner v. Donnan, 285 U.S. 312 (1932) (invalidating as arbitrary and capricious a conclusive presumption that gifts made within two years of death were made in contemplation of death).

\31\ Untermyer was distinguished in United States v. Hemme, 476 U.S. 558, 568 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive. All three cases were distinguished in United States v. Carlton, 512 U.S. 26, 30 (1994), as having been ``decided during an era characterized by exacting review of economic legislation under an approach that `has long since been discarded.' '' The Court noted further that Untermyer and Blodgett had been limited to situations involving creation of a wholly new tax, and that Nichols had involved a retroactivity period of 12 years. Id.

\32\ 512 U.S. 26, 30 (1994) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

\33\ 512 U.S. at 33.

--Deprivation of Property: Retroactive Legislation

[P. 1365, add to n.130:]

Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 636-41 (1993) (imposition of multiemployer pension plan withdrawal liability on an employer is not irrational, even though none of its employees had earned vested benefits by the time of withdrawal). In Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), the challenge was to a statutory requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that had placed its mining operations in a wholly owned subsidiary three decades earlier, before labor agreements included an express promise of lifetime benefits. In a fractured opinion, the justices ruled 5 to 4 that the scheme's severe retroactive effect offended the Constitution, though differing on the governing

clause. Four of the majority justices based the judgment solely on takings law, while opining that ``there is a question'' whether the statute violated due process as well. The remaining majority justice, and the four dissenters, viewed substantive due process as the sole appropriate framework for resolving the case, but disagreed on whether a violation had occurred.

[P. 1366, add to n.138:]

The Court has addressed similar issues under breach of contract theory. United States v. Winstar Corp., 518 U.S. 839 (1996).

NATIONAL EMINENT DOMAIN POWER

When Property Is Taken

--Regulatory Takings

[P. 1387, add to n.277 after initial citation:]

Accord, Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645-46 (1993).

[P. 1387, add to text at end of sentence containing n.277:]

However, where a statute imposes severe and ``substantially disproportionate'' retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in Eastern Enterprises v. Apfel \34\ struck down the Coal Miner Retiree Health Benefit Act's requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that spun off its mining operation in 1965 before collective bargaining agreements included an express promise of lifetime benefits.

\34\ 524 U.S. 498 (1998). The split doctrinal basis of Eastern Enterprises undercuts its precedent value, and that of Connolly and Concrete Pipe, for takings law. A majority of the justices (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework where, as in Eastern Enterprises, the gravamen of the complaint is the unfairness and irrationality of the statute, rather than its economic impact.

[P. 1391, delete remainder of paragraph after n.299 and substitute the following:]

``If [the government] wants an easement across the Nollans' property, it must pay for it.'' \35\ Because the Nollan Court found no essential nexus between the permit condition and the asserted government interest, it did not address whether there is any additional requirement when such a nexus does exist, as is often the case with land dedications and other permit conditions.\36\ Seven years later, however, the Court announced in Dolan v. City of Tigard \37\ that exaction conditions attached to development permits must be related to the impact of the proposed development not only in nature but also in degree. Government must establish a ``rough proportionality'' between such conditions and the developmental impacts at which they are aimed.\38\ The Court ruled in Dolan that the city's conditioning of a building permit for expansion of a hardware store on the store owner's dedication of a portion of her land for a floodplain/recreational easement and for an adjacent pedestrian/bicycle pathway amounted to a taking. The requisite nexus existed between the city's interest in flood control and imposition of the floodplain easement, and between the interest in minimizing traffic congestion and the required bike path dedication, but the Court found that the city had not established a rough proportionality of degree. The floodplain/recreational easement not only prevented the property owner from building in the floodplain--a legitimate constraint--but also deprived her of the right to exclude others. And the city had not

adequately demonstrated that the bike path was necessitated by the additional vehicle and bicycle trips that would be generated by the applicant's development.\39\

\35\ 483 U.S. at 842.

\36\ Justice Scalia, author of the Court's opinion in Nollan, amplified his views in a concurring and dissenting opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), explaining that ``common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of'' the social evil (e.g., congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that ``should be borne by the public as a whole.'' 485 U.S. at 20, 22.

\37\ 512 U.S. 374 (1994).

\38\ 512 U.S. at 391. Justice Stevens' dissent criticized the Court's ``abandon[ment of] the traditional presumption of constitutionality and imposi[tion of] a novel burden of proof on [the] city.'' Id. at 405. The Court responded by distinguishing between challenges to generally applicable zoning regulations, where the burden appropriately rests on the challenging party, and imposition of property exactions through adjudicative proceedings, where ``the burden properly rests on the city.'' Id. at 391 n.8. As for the standard of proof, the Court looked to state law and rejected the two extremes--a generalized statement of connection deemed ``too lax'' to protect the Fifth Amendment right to just compensation, and a ``specific and uniquely attributable'' test deemed too exacting. Instead, the Court chose an ``intermediate position'' requiring a showing of ``reasonable relationship,'' but recharacterized it as ``rough proportionality'' in order to avoid confusion with ``rational basis.'' Id. at 391.

\39\ The city had quantified the traffic increases that could be expected from the development, but had merely speculated that construction of the bike path ``could offset'' some of that increase. While ``[n]o precise mathematical calculation is required,'' the Court concluded, ``the city must make some effort to quantify its findings in support of the dedication.'' Id. at 395-96.

Nollan and Dolan occasioned considerable debate over the breadth of what became known as the ``heightened scrutiny'' test. The stakes were plainly high, in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In City of Monterey v. Del Monte Dunes at Monterey, Ltd.,\40\ the Court unanimously confined the Dolan rough proportionality test--and, by implication, the Nollan nexus test--to the exaction context that gave rise to those cases. For certain, then, is that City of Monterey bars application of rough proportionality to outright denials of development. Still unclear, however, is whether the Court meant to place outside Dolan exactions of a purely monetary nature, in contrast with the dedication conditions involved in Nollan and Dolan.\41\

\40\ 526 U.S. 687 (1999).

\41\ City of Monterey also appears to give a lax interpretation to the ``substantially advances a legitimate government interest'' test of Agins, by endorsing jury instructions interpreting ``substantially advance'' to

require only a ``reasonable relationship.'' 526 U.S. at 704. Such a reading of City of Monterey, however, puts it squarely at odds with Nollan, 483 U.S. at 834 n.3, where the Court earlier stressed that ``substantially advance'' imposes a stricter standard than the due process one of rational basis.

[P. 1393, add to text following n.306:]

Outside the land-use context, however, the Court has now recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy.\42\

\42\ Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (statute imposing generalized monetary liability); Babbitt v. Youpee, 519 U.S. 234 (1997) (amended statutory requirement that small fractional interests in allotted Indian lands escheat to tribe, rather than pass on to heirs); Hodel v. Irving, 481 U.S. 704 (1987) (pre-amendment version of escheat statute).

[P. 1394, change n.312 to read:]

Hodel v. Irving, 481 U.S. 704 (1987) (complete abrogation of the right to pass on to heirs fractionated interests in lands constitutes a taking); Babbitt v. Youpee, 519 U.S. 234 (1997) (same result based on ``severe'' restriction of the right).

[P. 1394, add to text after n.312:]

Nor must property have realizable net value to fall under the Takings Clause.\43\

\43\ Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) (interest on client funds in state Interest on Lawyers Trust Account program is property of client within meaning of Takings Clause, though funds could not generate net interest in absence of program).

[P. 1395, delete remainder of paragraph after n.314 and substitute the following new paragraph:]

Failure to incur such administrative (and judicial) delays can result in dismissal of an as-applied taking claim based on ripeness doctrine, an area of takings law that the Court has developed extensively since Penn Central. In the leading decision of Williamson County Regional Planning Commission v. Hamilton Bank,\44\ the Court announced the canonical two-part ripeness test for takings actions brought in federal court against state and local agencies. First, for an as-applied challenge, the property owner must obtain from the regulating agency a ``final, definitive position'' regarding how it will apply its regulation to the owner's land. Second, the owner must exhaust any possibilities for obtaining compensation from state fora before coming to federal court. Thus, the claim in Williamson County was found unripe because the plaintiff had failed to seek a variance (first prong of test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong). Similarly, in MacDonald, Sommer & Frates v. County of Yolo,\45\ a final decision was found lacking where the landowner had been denied approval for one subdivision plan calling for intense development, but that denial had not foreclosed the possibility that a scaled-down (though still economic) version would be approved.\46\ In a somewhat different context, a taking challenge to a municipal rent control ordinance was considered ``premature'' in the absence of evidence that a tenant hardship provision had ever been applied to reduce what would otherwise be

considered a reasonable rent increase.\47\ Facial challenges dispense with the Williamson County final decision prerequisite, though at great risk to the plaintiff in that without pursuing administrative remedies, a claimant often lacks evidence that a statute has the requisite economic impact on his or her property.\48\

\44\ 473 U.S. 172 (1985).
\45\ 477 U.S. 340 (1986).
\46\ Most recently, the Court found the final-decision prerequisite met in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997). That threshold showing, said the Court, did not demand that a landowner first apply for approval of her sale of transferrable development rights (TDRs) where the parties agreed on the TDRs to which she was entitled and their value was simply an issue of fact. Suitum is also significant for reaffirming the two-prong Williamson County ripeness test, despite its rigorous application by lower federal courts to avoid reaching the merits in the majority of cases.
\47\ Pennell v. City of San Jose, 485 U.S. 1 (1988).
\48\ See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-97 (1981) (facial challenge to surface mining law rejected); United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (mere permit requirement does not itself take property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493-502 (1987) (facial challenge to anti-subsidence mining law rejected).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

[P. 1408, change heading to:]

--The Attributes and Function of the Jury

[P. 1410, add to text following n.64:]

Certain functions of the jury are likely to remain consistent between the federal and state court systems. For instance, the requirement that a jury find a defendant guilty beyond a reasonable doubt, which had already been established under the Due Process Clause,\1\ has been held to be a standard mandated by the Sixth Amendment.\2\ The Court further held that the Fifth Amendment Due Process Clause and the Sixth Amendment require that a jury find a defendant guilty of every element of the crime with which he is charged, including questions of mixed law and fact.\3\ Thus, a district court presiding over a case of providing false statements to a federal agency in violation of 18 U.S.C. Sec. 1001 erred when it took the issue of the ``materiality'' of the false statement away from the jury.\4\ Later, however, the Court backed off from this latter ruling, holding that failure to submit the issue of materiality to the jury in a tax fraud case can constitute harmless error.\5\

\1\ See In re Winship, 397 U.S. 358, 364 (1970).
\2\ Sullivan v. Louisiana, 508 U.S. 275 (1993).
\3\ United States v. Gaudin, 515 U.S. 506 (1995).
\4\ Gaudin, 515 U.S. at 523.
\5\ Neder v. United States, 527 U.S. 1 (1999).

--Criminal Proceedings to Which the Guarantee Applies

[P. 1411, add to text following n.68:]

A defendant who is prosecuted in a single

proceeding for multiple petty offenses, however, does not have a constitutional right to a jury trial, even if the aggregate of sentences authorized for the offense exceeds six months.\6\

\6\ Lewis v. United States, 518 U.S. 322 (1996).

[P. 1411, add to n.73:]

The distinction between criminal and civil contempt may be somewhat more elusive. International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (fines levied on the union were criminal in nature where the conduct did not occur in the court's presence, the court's injunction required compliance with an entire code of conduct, and the fines assessed were not compensatory).

Impartial Jury

[P. 1416, add to n.104:]

The same rule applies in the federal setting. United States v. Martinez-Salazar, 120 S. Ct. 774 (2000).

PLACE OF TRIAL--JURY OF THE VICINAGE

[P. 1419, add to text following n.128:]

Thus, a defendant cannot be tried in Missouri for money-laundering if the charged offenses occurred in Florida and there was no evidence that the defendant had been involved with the receipt or transportation of the proceeds from Missouri.\7\

\7\ United States v. Cabrales, 524 U.S. 1 (1998).

CONFRONTATION

[P. 1422, add to text following n.154:]

A prosecutor, however, can comment on a defendant's presence at trial, and call attention to the defendant's opportunity to tailor his or her testimony to comport with that of previous witnesses.\8\

\8\ Portuondo v. Agard, 120 S. Ct. 1119 (2000).

[P. 1423, add to n.158:]

Bruton was held applicable, however, where a blank space or the word ``deleted'' is substituted for the defendant's name in a co-defendant's confession, making such confession incriminating of the defendant on its face. Gray v. Maryland, 523 U.S. 185 (1998).

[P. 1423, add to n.160:]

Lilly v. Virginia, 527 U.S. 116 (1999).

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

--Gideon v. Wainwright

[P. 1435, n.217, delete citation and parenthetical to Baldasar v. Illinois appearing after last semi-colon, and insert the following:]

But see Nichols v. United States, 511 U.S. 738 (1994) (as Scott v. Illinois, 440 U.S. 367 (1979) provides that an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may be used as the basis for penalty enhancement upon a subsequent conviction).

--Effective Assistance of Counsel

[P. 1439, add to n.244:]

In Hill v. Lockhart, 474 U.S. 52 (1985), the Court applied the Strickland test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.

[P. 1439, delete last sentence at end of first full paragraph on page and add the following:]

In Lockhart v. Fretwell,\9\ the Court refined the Strickland test to require that not only would a different trial result be probable because of attorney performance, but that the trial result which did occur was fundamentally unfair or unreliable.\10\

\9\ 506 U.S. 364 (1993).

\10\ 506 U.S. at 368-70 (1993) (failure of counsel to raise a constitutional claim that was valid at time of trial did not constitute ``prejudice'' because basis of claim had since been overruled).

[P. 1440, n.247, delete citation to Lozada v. Deeds and accompanying sentence, and substitute the following:]

Also not constituting per se ineffective assistance is a defense counsel's failure to file a notice of appeal, or even to consult with the defendant about an appeal. Roe v. Flores-Ortega, 120 S. Ct. 1029 (2000).

--Self-Representation

[P. 1440, add to text at end of first paragraph of section:]

The right applies only at trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction.\11\

\11\ Martinez v. Court of App. of Cal., Fourth App. Dist., 120 S. Ct. 684 (2000). The Sixth Amendment itself ``does not include any right to appeal.'' 120 S. Ct. at 690.

SEVENTH AMENDMENT

TRIAL BY JURY IN CIVIL CASES

Application of the Amendment

--Cases ``at Common Law''

[P. 1455, add to n.29:]

Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) (jury trial required for copyright action with close analogue at common law, even though the relief sought is not actual damages but statutory damages based on what is ``just).''

[P. 1455, add to text following n.30:]

Where there is no direct historical antecedent dating to the adoption of the amendment, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries.\1\

\1\ Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (interpretation and construction of terms underlying patent claims may be reserved entirely for the court).

--Procedures Limiting Jury's Role

[P. 1461, add to n.59:]

A federal appellate court may also review a district court's denial of a motion to set aside an award as excessive under an abuse of discretion standard. Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) (New York State law which requires a review of jury awards to determine if they ``deviate materially from reasonable compensation'' may be adopted by federal district, but not appellate, court exercising diversity jurisdiction).

--Directed Verdicts

[P. 1461, add new footnote at end of sentence beginning after n.61:]

But see Hetzel v. Prince William County, 523 U.S. 208 (1998) (when an appeals court affirms liability but orders level of damages to be reconsidered, the plaintiff has a Seventh Amendment right either to accept the reduced award

or to have a new trial).

EIGHTH AMENDMENT

EXCESSIVE FINES
[P. 1471, add to text following n.35:]

The Court has held, however, that the Excessive Fines Clause can be applied in civil forfeiture cases.\1\

\1\ In Austin v. United States, 509 U.S. 602 (1993), the Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

[P. 1471, delete paragraph after n.35, and add the following:]

In 1998, however, the Court discerned a previously unseen vitality in the strictures of this clause. In United States v. Bajakajian,\2\ the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture \3\ in this particular case would violate the Excessive Fines Clause and that the amount forfeited was grossly disproportionate to the gravamen of defendant's offense. In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.\4\

\2\ 524 U.S. 321 (1998).

\3\ The Court held that a criminal forfeiture, which is imposed at the time of sentencing, should be considered a fine, because it serves as a punishment for the underlying crime. 524 U.S. at 328. The Court distinguished this from civil forfeiture, which, as an in rem proceeding against property, would generally not function as a punishment of the criminal defendant. 524 U.S. at 330-32.

\4\ In Bajakajian, the lower court found that the currency in question was not derived from illegal activities, and that the defendant, who had grown up a member of the Armenian minority in Syria, had failed to report the currency out of distrust of the government. 524 U.S. at 325-26. The Court found it relevant that the defendant did not appear to be among the class of persons for whom the statute was designed, i.e., a money launderer or tax evader, and that the harm to the government from the defendant's failure to report the currency was minimal. 524 U.S. at 338.

CRUEL AND UNUSUAL PUNISHMENTS
--Capital Punishment
[P. 1478, add to n.69:]

Consequently, a judge may be given significant discretion to override a jury sentencing recommendation, as long as the court's decision is adequately channeled to

prevent arbitrary results. Harris v. Alabama, 513 U.S. 504 (1995) (Eighth Amendment not violated where judge is only required to ``consider'' a capital jury's sentencing recommendation).

[P. 1480, add to n.76:]

But see Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[P. 1480, add to n.77:]

Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase ``exhibited utter disregard for human life'' to require that the defendant be a ``cold-blooded, pitiless slayer'' cures vagueness).

[P. 1480, add to n.81 after citation to Spaziano v. Florida:]

See Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses).

[P. 1481, add to n.82:]

Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment).

[P. 1483, add new footnote at end of second sentence of paragraph beginning after n.93:]

See, e.g., Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[P. 1483, add new footnote at end of third sentence of paragraph beginning after n.93:]

Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[P. 1484, add to n.98:]

A court is not required give a jury instruction expressly directing the jury to consider mitigating circumstance, as long as the instruction actually given affords the jury the discretion to take such evidence into consideration. Buchanan v. Angelone, 522 U.S. 269 (1998). By the same token, a court did not offend the Constitution by directing the jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to the jury's question about proper construction of mitigating circumstances. Weeks v. Angelone, 120 S. Ct. 727 (2000).

[P. 1484, add to text following n.100:]

Due process considerations can also come into play; if the state argues for the death penalty based on the defendant's future dangerousness, due process requires that the jury be informed if the alternative to a death sentence is a life sentence without possibility of parole.\5\

\5\ Simmons v. South Carolina, 512 U.S. 154 (1994). But see Ramdass v. Angelone, 120 S. Ct. 2113 (2000) (refusing to apply Simmons because the defendant was not technically parole ineligible at time of sentencing).

[P. 1484, add to n.103:]

Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor.

Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995) (per curiam).

[P. 1487, add to text following n.116:]

In addition, the Court has held that, absent an independent constitutional violation, habeas corpus relief for prisoners who assert innocence based on newly discovered evidence should generally be denied.\6\ Third, a different harmless error rule is applied when constitutional errors are alleged in habeas proceedings. The Chapman v. California \7\ rule applicable on direct appeal, requiring the State to prove beyond a reasonable doubt that a constitutional error is harmless, is inappropriate for habeas review, the Court concluded, given the ``secondary and limited'' role of federal habeas proceedings.\8\ The appropriate test is that previously used only for non-constitutional errors: ``whether the error `has substantial and injurious effect or influence in determining the jury's verdict.' '' \9\ A fourth rule was devised to . . . .

\6\ Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an ``extraordinarily high'' threshold of proof of innocence to warrant federal habeas relief).

\7\ 386 U.S. 18 (1967).

\8\ Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

\9\ Brecht v. Abrahamson, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Brecht was a non-capital case, but the rule was subsequently applied in a capital case. Calderon v. Coleman, 525 U.S. 141 (1998) (per curiam).

--Prisons and Punishment

[P. 1498, add to n.171:]

Helling v. McKinney, 509 U.S. 25 (1993) (prisoner who alleged exposure to secondhand ``environmental'' tobacco smoke stated a cause of action under the Eighth Amendment).

[P. 1498, add to n.174:]

Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994).

TENTH AMENDMENT

RESERVED POWERS

Effect of Provision on Federal Powers

--Federal Police Power

[P. 1514, add to text following n.42:]

Reversing this trend, the Court in 1995 in United States v. Lopez \1\ struck down a statute prohibiting possession of a gun at or near a school, rejecting an argument that possession of firearms in school zones can be punished under the Commerce Clause because it impairs the functioning of the national economy. Acceptance of this rationale, the Court said, would eliminate ``a[ny] distinction between what is truly national and what is truly local,'' would convert Congress' commerce power into ``a general police power of the sort retained by the States,'' and would undermine the ``first principle'' that the Federal Government is one of enumerated and limited powers.\2\ Application of the same principle led five years later to

the Court's decision in United States v. Morrison \3\ invalidating a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Congress may not regulate ``non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce,'' the Court concluded. ``[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.'' \4\

\1\ 514 U.S. 549 (1995).
\2\ 514 U.S. at 552, 567-68 (1995).
\3\ 120 S. Ct. 1740 (2000).
\4\ 120 S. Ct. at 1754.

--Federal Regulations Affecting State Activities and Instrumentalities

[P. 1518, add new paragraphs at end of section:]

Extending the principle applied in New York, the Court in Printz v. United States \5\ held that Congress may not ``circumvent'' the prohibition on commandeering a state's regulatory processes ``by conscripting the State's officers directly.'' \6\ Struck down in Printz were interim provisions of the Brady Handgun Violence Protection Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. ``The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.'' \7\

\5\ 521 U.S. 898 (1997).
\6\ 521 U.S. at 935.
\7\ Id.

In Reno v. Condon,\8\ the Court distinguished New York and Printz in upholding the Driver's Privacy Protection Act of 1994 (DPPA), a federal law that restricts the disclosure and resale of personal information contained in the records of state motor vehicles departments. The Court returned to a principle articulated in South Carolina v. Baker that distinguishes between laws which improperly seek to control the manner in which States regulate private parties, and those which merely regulate state activities directly.\9\ Here, the Court found that the DPPA ``does not require the States in their sovereign capacities to regulate their own citizens,'' but rather ``regulates the States as the owners of databases.'' \10\ The Court saw no need to decide whether a federal law may regulate the states exclusively, since the DPPA is a law of general applicability that regulates private resellers of information as well as states.\11\

\8\ 120 S. Ct. 666 (2000).
\9\ 484 U.S. 505, 514-15 (1988).
\10\ 120 S. Ct. at 672.
\11\ Id.

STATE IMMUNITY
Purpose and Early Interpretation
--Expansion of the Immunity of the States
[P. 1526, add to text following n.31:]

An in rem admiralty action may be brought, however, if the State is not in possession of the res.\1\

\1\ California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (application of the Abandoned Shipwreck Act) (distinguishing Ex parte New York and Treasure Salvors as involving in rem actions against property actually in possession of the State).

[P. 1527, add to n.32 after first citation:]
Breard v. Greene, 523 U.S. 371, 377 (1998) (foreign nation may not contest validity of criminal conviction after State's failure at time of arrest to comply with notice requirements of Vienna Convention on Consular Relations).
The Nature of the States' Immunity
[P. 1527, add to n.33:]
Seminole Tribe of Florida v. Florida, 517 U.S. 44, 64 (1996).
[P. 1528, add to n.43 after first sentence and accompanying citation:]
Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is ``the authority that makes the law'' creating the right of action. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Justice Souter dissenting).
[P. 1528, add to text following n.43:]

This view also has support in modern case law:'' . . . the State's immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .'' \2\

\2\ Alden v. Maine, 527 U.S. 706, 713 (1999).

[P. 1530, delete n.51 and accompanying text]
[P. 1530, delete second full paragraph on page]
[P. 1531, add to text at end of section:]

The Hans interpretation has been solidified with the Court's ruling in Seminole Tribe of Florida v. Florida,\3\ that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment, and with its ruling in Alden v. Maine that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in state courts as well as federal. Both of these cases, however, were 5 to 4 decisions, with the four dissenting Justices believing that Hans was wrongly decided.\4\

\3\ 517 U.S. 44 (1996).
\4\ Chief Justice Rehnquist wrote the opinion of the Court in Seminole Tribe, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Stevens dissented, as did Justice Souter, whose opinion was joined by Justices Ginsburg and Breyer. In Alden, Justice Kennedy wrote the opinion of the Court, joined by the Chief Justice, and by Justices O'Connor, Scalia, and Thomas. Justice Souter's dissenting opinion was joined by Justices Stevens, Ginsburg, and Breyer.

Suits Against States

--Consent to Suit and Waiver
[P. 1533, add to n.68:]

The fact that a state agency can be indemnified for the costs of litigation does not divest the agency of its Eleventh Amendment immunity. Regents of the University of California v. Doe, 519 U.S. 425 (1997).

--Congressional Withdrawal of Immunity
[P. 1535, delete last sentence of first paragraph and substitute the following new paragraphs:]

Pennsylvania v. Union Gas lasted less than seven years, the Court overruling it in Seminole Tribe of Florida v. Florida.\5\ Chief Justice Rehnquist, writing for a 5 to 4 majority, concluded that there is ``no principled distinction in favor of the States to be drawn between the Indian Commerce Clause [at issue in Seminole Tribe] and the Interstate Commerce Clause [relied upon in Union Gas].'' \6\ In the majority's view, Union Gas had deviated from a line of cases tracing back to Hans v. Louisiana \7\ that viewed the Eleventh Amendment as implementing the ``fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III.'' \8\ Because ``the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.'' \9\ Subsequent cases have confirmed this interpretation.\10\

\5\ 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

\6\ 517 U.S. at 63.

\7\ 134 U.S. 1 (1890).

\8\ 517 U.S. at 64 (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97-98 (1984).

\9\ 517 U.S. at 72-73. Justice Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in Hans v. Louisiana was a common law concept that ``had no constitutional status and was subject to congressional abrogation.'' 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This ``imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty.'' Id. at 160.

\10\ College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (The Trademark Remedy Clarification Act, an amendment to the Lanham Act, did not validly abrogate state immunity); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (amendment to patent laws abrogating state immunity from infringement suits is invalid); Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (abrogation of state immunity in the Age Discrimination in Employment Act is invalid).

Section 5 of the Fourteenth Amendment, of course, is another matter. Fitzpatrick v. Bitzer,\11\ ``based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-

existing balance between state and federal power achieved by Article III and the Eleventh Amendment,'' remains good law.\12\

\11\ 427 U.S. 445 (1976).
\12\ 517 U.S. at 65-66.

[Pp. 1535-36, delete remainder of paragraph following n.79 and add the following:]

This means that no legislative history will suffice at all.\13\ Indeed, at one time a plurality of the Court was of the apparent view that only if Congress refers specifically to state sovereign immunity and the Eleventh Amendment will its language be unmistakably clear.\14\ Thus, the Court held in Atascadero that general language subjecting to suit in federal court ``any recipient of Federal assistance'' under the Rehabilitation Act was insufficient to satisfy this test, not because of any question about whether States are ``recipients'' within the meaning of the provision but because ``given their constitutional role, the States are not like any other class of recipients of federal aid.'' \15\ As a result of these rulings, Congress began to utilize the ``magic words'' the Court appeared to insist on.\16\ More recently, however, the Court has accepted less precise language.\17\

\13\ See, particularly, Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (``legislative history generally will be irrelevant''), and Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 103-04 (1989).

\14\ Justice Kennedy for the Court in Dellmuth, supra, 491 U.S. at 231, expressly noted that the statute before the Court did not demonstrate abrogation with unmistakably clarity because, inter alia, it ``makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity.'' Justice Scalia, one of four concurring Justices, expressed an ``understanding'' that the Court's reasoning would allow for clearly expressed abrogation of immunity ``without explicit reference to state sovereign immunity or the Eleventh Amendment.'' Id. at 233.

\15\ Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). And see Dellmuth v. Muth, 491 U.S. 223 (1989).

\16\ Following Atascadero, in 1986 Congress provided that States were not to be immune under the Eleventh Amendment from suits under several laws barring discrimination by recipients of federal financial assistance. Pub. L. No. 99-506, Sec. 1003, 100 Stat. 1845 (1986), 42 U.S.C. Sec. 2000d-7. Following Dellmuth, Congress amended the statute to insert the explicit language. Pub. L. No. 101-476, Sec. 103, 104 Stat. 1106 (1990), 20 U.S.C. Sec. 1403. See also the Copyright Remedy Clarification Act, Pub. L. No. 101-553, Sec. 2, 104 Stat. 2749 (1990), 17 U.S.C. Sec. 511 (making States and state officials liable in damages for copyright violations).

\17\ Kimel v. Florida Board of Regents, 120 S. Ct. 631, 640-42 (2000). In Kimel, statutory language authorized age discrimination suits ``against any employer (including a public agency)'' and a public agency was defined to include ``the government of a State or political subdivision thereof.'' The Court found this language to be sufficiently clear evidence of intent to abrogate state sovereign immunity. The relevant portion of the opinion was written by Justice O'Connor, and joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Ginsberg, and Breyer.

[P. 1536, delete paragraph containing n.85 and substitute the following:]

Having previously reserved the question of whether federal statutory rights could be enforced in state courts,\18\ the Court in Alden v. Maine \19\ held that states could also assert Eleventh Amendment ``sovereign immunity'' in their own courts. Recognizing that the application of the Eleventh Amendment, which limits only the federal courts, was a ``misnomer'' \20\ as applied to state courts, the Court nonetheless concluded that the principles of common law sovereign immunity applied absent ``compelling evidence'' that the States had surrendered such by the ratification of the Constitution. Although this immunity is subject to the same limitations as apply in federal courts, the Court's decision effectively limited the application of significant portions of federal law to state governments.

\18\ Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 287 (1973).
\19\ 527 U.S. 706 (1999).
\20\ 527 U.S. at 713.

Suits Against State Officials

[P. 1540, add to n.105:]

In the process of limiting application of Young, a Court majority has recently referred to ``the Young fiction.'' Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997).

[P. 1541, add to n.112:]

In a case removed from state court, presence of a claim barred by the Eleventh Amendment does not destroy jurisdiction over non-barred claims. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998).

[P. 1544, add as first full paragraph on page (penultimate paragraph in section):]

In Idaho v. Coeur d'Alene Tribe,\21\ the Court further narrowed Ex parte Young. The implications of the case are difficult to predict, due to the narrowness of the Court's holding, the closeness of the vote (5 to 4), and the inability of the majority to agree on a rationale. The holding was that the Tribe's suit against state officials for a declaratory judgment and injunction to establish the Tribe's ownership and control of the submerged lands of Lake Coeur d'Alene is barred by the Eleventh Amendment. The Tribe's claim was based on federal law--Executive Orders issued in the 1870s, prior to Idaho Statehood. The portion of Justice Kennedy's opinion that represented the opinion of the Court concluded that the Tribe's ``unusual'' suit was ``the functional equivalent of a quiet title action which implicates special sovereignty interests.'' \22\ The case was ``unusual'' because state ownership of submerged lands traces to the Constitution through the ``equal footing doctrine,'' and because navigable waters ``uniquely implicate sovereign interests.'' \23\ This was therefore no ordinary property dispute in which the State would retain regulatory control over land regardless of title. Rather, grant of the ``far-reaching and invasive relief'' sought by the Tribe ``would diminish, even extinguish, the State's control over a vast reach of lands and waters long . . . deemed to be an integral part of its territory.'' \24\ A separate part of Justice Kennedy's opinion, joined only by Chief Justice Rehnquist, advocated more broadscale diminishment of Young. The two would apply case-by-case balancing, taking into account the availability of a state court forum to resolve the dispute and the importance of the federal right at issue. Concurring Justice O'Connor, joined by Justices Scalia and Thomas, rejected such balancing. Young was inapplicable, Justice O'Connor explained, because ``it simply cannot be said'' that a suit to divest the State of all regulatory power over submerged lands ``is not a suit against the State.'' \25\

\21\ 521 U.S. 261 (1997).
\22\ 521 U.S. at 281.
\23\ Id. at 284.
\24\ Id. at 282.
\25\ Id. at 296.

FOURTEENTH AMENDMENT

[P. 1568, change heading to:]
PRIVILEGES OR IMMUNITIES
P. 1571, add new paragraph to text following n.32:]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause, as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians resident less than a year to the level of benefits available in the State of their prior residence, the Court found a violation of the right of newly arrived citizens to be treated the same as other state citizens.\1\ Despite suggestions that this opinion will open the door to a ``guaranteed equal access to all public benefits,'' \2\ it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the State one chooses for permanent residence.\3\

\1\ Saenz v. Roe, 526 U.S. 489 (1999).
\2\ 526 U.S. at 525 (Thomas, J., dissenting).
\3\ The right of United States citizens to choose their State of residence is specifically protected by the first sentence of the Fourteenth Amendment--``All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . . .''

DUE PROCESS OF LAW
The Development of Substantive Due Process
--``Liberty''
[P. 1581, add to n.75:]
County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment's guarantee of substantive due process).
Health, Safety, and Morals
--Protecting Morality
[P. 1636, add to text following n.163:]

Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car.\4\

\4\ Bennis v. Michigan, 516 U.S. 442 (1996).

Procedure in Taxation
--Sufficiency of Remedy
[P. 1665, add to n.177:]
See also Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep't of Revenue, 522

U.S. 442 (1998) (per curiam) (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).

Substantive Due Process and Noneconomic Liberty

[P. 1666, add to n.184:]

The Court has subsequently made clear that these cases dealt with ``a complete prohibition of the right to engage in a calling,'' holding that ``a brief interruption'' did not constitute a constitutional violation. Conn v. Gabbert, 526 U.S. 286, 292 (2000).

--Abortion

[P. 1679, add to text at end of section:]

The passage of various state laws restricting so-called ``partial birth abortions'' gave observers an opportunity to see if the ``undue burden'' standard was in fact likely to lead to a major retrenchment in abortion regulation. In Stenberg v. Carhart,\5\ the Court reviewed a Nebraska statute which forbade ``partially delivering vaginally a living unborn child before killing the unborn child and completing the delivery.'' The Court noted that the prohibition appeared to apply to abortions performed throughout a pregnancy, and that the lone exception was for an abortion necessary to preserve the life of the mother.\6\ Thus the statute brought into question both the distinction maintained in Casey between pre-viability and post-viability abortions, and the oft-repeated language from Roe, which provides that abortion restrictions must contain exceptions for situations where there is a threat to either the life or health of a pregnant woman.\7\ The Court, however, reaffirmed these central tenets of its abortion decisions, striking down the Nebraska law because its possible application to pre-viability abortions was too broad and the exception for threats to the life of the mother was too narrow.

\5\ 120 S. Ct. 2597 (2000).

\6\ The Nebraska law provided that such procedures could be performed where ``necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.'' Neb. Rev. Stat. Ann. Sec. 28-328(1).

\7\ Roe v. Wade, 410 U.S. 113, 164 (1973).

--Family Relationships

[P. 1689, add to text at end of section:]

The Court has, however, imposed limits on the ability of a court to require that children be made available for visitation with grandparents and other third parties. In Troxel v. Granville,\8\ the Court evaluated a Washington State law which allowed ``any person'' to petition a court ``at any time'' to obtain visitation rights whenever visitation ``may serve the best interests'' of a child. Under this law, a child's grandparents were awarded more visitation with a child than was desired by the sole surviving parent. A plurality of the Court, noting the ``fundamental rights of parents to make decisions concerning the care, custody and control of their children,'' \9\ reversed this decision, noting the lack of deference to the parent's wishes and the contravention of the traditional presumption that a fit parent will act in the best interests of a child.

\8\ 120 S. Ct. 2054 (2000).

\9\ 120 S. Ct. at 2060.

[P. 1690, change heading to:]

--Liberty Interests of the Retarded, Mentally Ill or Abnormal: Civil Commitment and Treatment

[P. 1691, add paragraph to text after n.310:]

The Court's resolution of a case involving persistent sexual offenders suggests that state civil commitment systems, besides confining the dangerously mentally ill, may also act to incapacitate persons predisposed to engage in specific criminal behaviors. In Kansas v. Hendricks,\10\ the Court upheld a Kansas state law which allowed civil commitment without a showing of ``mental illness,'' so that a defendant diagnosed as a pedophile could be committed based on his having a ``mental abnormality'' which made him ``likely to engage in acts of sexual violence.'' Although the Court minimized the use of this expanded nomenclature,\11\ the concept of abnormality appears both more encompassing and less defined than the concept of illness. It is unclear how, or whether, the Court would distinguish this case from the indefinite civil commitment of other recidivists such as drug offenders.

\10\ 521 U.S. 346 (1997).

\11\ 521 U.S. at 359. But see Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that a State can not hold a person suffering from a personality disorder without clear and convincing proof of a mental illness).

--``Right to Die''

[P. 1693, add new paragraph at end of section:]

In Washington v. Glucksberg,\12\ however, the Supreme Court rejected an argument that the Due Process Clause provides a terminally ill individual the right to seek and obtain a physician's aid in committing suicide. Reviewing a challenge to a state statutory prohibition against assisted suicide, the Court noted that it moves with ``utmost care'' before breaking new ground in the area of liberty interests.\13\ The Court pointed out that suicide and assisted suicide have long been disfavored by the American judicial system, and courts have consistently distinguished between passively allowing death to occur and actively causing such death. The Court rejected the applicability of Cruzan and other liberty interest cases,\14\ noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected. By rejecting the notion that assisted suicide is constitutionally protected, the Court also appears to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia.\15\

\12\ 521 U.S. 702 (1997). In the companion case of Vacco v. Quill, 521 U.S. 793 (1997), the Court also rejected an argument that a State which prohibited assisted suicide but which allowed termination of medical treatment resulting in death unreasonably discriminated against the terminally ill in violation of the Equal Protection Clause of the Fourteenth Amendment.

\13\ 521 U.S. at 720.

\14\ E.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).

\15\ A passing reference by Justice O'Connor in a concurring opinion in Glucksberg and its companion case Vacco v. Quill may, however, portend a liberty interest in seeking pain relief, or ``palliative'' care. Glucksberg and Vacco 521 U.S. at 736-37 (Justice O'Connor, concurring).

PROCEDURAL DUE PROCESS: CIVIL

Power of the States to Regulate Procedure
--Costs, Damages, and Penalties
[P. 1698, add to n.34:]

See also Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution limiting judicial review of the amount of punitive damages awarded by a jury).

[P. 1698, add to text after n.34:]

The Court has indicated, however, that the amount of punitive damages is limited to what is reasonably necessary to vindicate a state's interest in deterring unlawful conduct.\16\ These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable misconduct.\17\

\16\ BMW v. Gore, 517 U.S. 559 (1996) (holding that a $2 million judgment for failing to disclose to a purchaser that a ``new'' car had been repainted was ``grossly excessive'' in relation to the State's interest, as only a few of the 983 similarly repainted cars had been sold in that same State). But see TXO Prod. Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause of the Fourteenth Amendment even though the jury awarded actual damages of only $19,000).

\17\ BMW v. Gore, 517 U.S. at 574-75 (1996).

Jurisdiction
[P. 1716, change heading to:]
--Actions In Rem: Proceeding Against Property
[P. 1717, add to n.144:]

Predeprivation notice and hearing may be required if the property is not the sort that, given advance warning, could be removed to another jurisdiction, destroyed, or concealed. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (notice to owner required before seizure of house by government).

The Procedure Which is Due Process
--The Interests Protected: Entitlements and Positivist Recognition
[P. 1726, add to n.194:]

But see American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (no liberty interest in worker's compensation claim where reasonableness and necessity of particular treatment had not yet been resolved).

[P. 1730, add to n.214 after citation to Connecticut Bd. of Pardons v. Dumschat:]

Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998).

[P. 1731, add to text following n.215:]

In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the State creates an ``atypical and significant'' deprivation.\18\

\18\ Sandin v. Conner, 515 U.S. 472, 484 (1995) (solitary confinement not atypical ``in relation to the ordinary incidents of prison life'').

--When is Process Due
[P. 1737, add to text following n.246:]

Where the adverse action is less than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient.\19\

\19\ Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

--The Requirements of Due Process

[P. 1741, add to n.269:]

See also Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayers who challenged a county's occupation tax had not been informed of the prior case and where their interests had not been adequately protected).

[P. 1741, add to text following n.270:]

Such notice, however, need not describe the legal procedures necessary to protect one's interest if such procedures are otherwise set out in published, generally available public sources.\20\

\20\ City of West Covina v. Perkins, 525 U.S. 234 (1999).

[P. 1741, add to n.272:]

Even where a court finds that a party was not prejudiced by the lack of a hearing, and where an appeal was provided, failure to give notice and hearing is a violation of due process. Nelson v. Adams, 120 S. Ct. 1579 (2000) (amendment of judgment to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

PROCEDURAL DUE PROCESS--CRIMINAL

The Elements of Due Process

--Clarity in Criminal Statutes: The Void-For-Vagueness Doctrine

[P. 1749, add to text following n.20:]

A loitering statute which is triggered by failure to obey a police dispersal order may not, however, leave a police officer absolute discretion to give such orders.\21\ Thus, a Chicago ordinance, which required police to disperse all persons in the company of ``criminal street gang members'' while in a public place with ``no apparent purpose,'' failed to meet the ``requirement that a legislature establish minimal guidelines to govern law enforcement.'' \22\ The Court noted that ``no apparent purpose'' is inherently subjective because its application depends on whether some purpose is ``apparent'' to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.

\21\ Kolender v. Lawson, 461 U.S. 352, 358 (1983).

\22\ City of Chicago v. Morales, 527 U.S. 41 (1999).

--Other Aspects of Statutory Notice

[P. 1750, add to text following n.24:]

Persons may be bound by a novel application of a statute, not supported by Supreme Court or other ``fundamentally similar'' case precedent, so long as the court can find that, under the circumstance, ``unlawfulness . . . is apparent'' to the defendant.\23\

\23\ United States v. Lanier, 520 U.S. 259, 271-72 (1997).

--Initiation of the Prosecution

[P. 1753, add to n.43:]

The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

--Fair Trial

[P. 1756, add to n.59:]

But see Montana v. Egelhoff, 518 U.S. 37 (1996) (State may bar defendant from introducing evidence of intoxication to prove lack of mens rea).

--Prosecutorial Misconduct

[P. 1760, add to n.76:]

See also Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no Due Process violation where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case).

[P. 1760, add to text after n.80:]

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a Brady inquiry by requiring a reviewing court to establish the appropriate level of materiality by classifying the situation under which the exculpating information was withheld. Secondly, it was not clear, if the fairness of the trial was at issue, why the circumstances of the failure to disclose should affect the evaluation of the impact that such information would have had on the trial. Ultimately, the Court addressed these issue in the case of United States v. Bagley.\24\

\24\ 473 U.S. 667 (1985).

In Bagley, the Court established a uniform test for materiality, choosing the most stringent requirement that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different.\25\ This materiality standard, found in contexts outside of Brady inquiries,\26\ is applied not only to exculpatory material, but also to material which would be relevant to the impeachment of witnesses.\27\ Thus, where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and of the punishment, finally concluding that there was no reasonable probability that the jury would have reached a different result.\28\

\25\ 473 U.S. at 682.

\26\ See United States v. Malenzuela-Bernal, 458 U.S. 858 (1982) (testimony made unavailable by Government deportation of witnesses); Strickland v. Washington, 466 U.S. 668 (1984) (incompetence of counsel).

\27\ 473 U.S. at 676-77.

\28\ Strickler v. Greene, 527 U.S. 263 (1999).

--Proof, Burden of Proof, and Presumptions

[P. 1761, add to n.83:]

See also Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt).

[P. 1762, add to n.87:]

But see Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define ``reasonable doubt'' as requiring a ``moral certainty'' or as equivalent to ``substantial doubt'' did not violate due process because other clarifying language was included.)

[Pp. 1763-64, delete last sentence and accompanying footnote

(96) of paragraph beginning on P. 1763 and substitute the following:]

Another important distinction which can substantially affect a prosecutor's burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. While a criminal conviction is generally established by a jury using the ``beyond a reasonable doubt'' standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient ``preponderance of the evidence'' standard. The Court has taken a formalistic approach to this issue, allowing States to essentially designate which facts fall under which of these two categories. For instance, the Court has held that whether a defendant ``visibly possessed a gun'' during a crime may be designated by a State as a sentencing factor, and determined by a judge based on the preponderance of evidence.\29\ Although the Court has generally deferred to the legislature's characterizations in this area, it limited this principle in Apprendi v. New Jersey by holding that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.\30\ This decision, however, arguably conflicts with related case law regarding, for instance, the use of aggravating sentencing factors by judges in imposing capital punishment,\31\ and is subject to at least one exception.\32\ Further, the decision might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

\29\ McMillan v. Pennsylvania, 477 U.S. 79 (1986).

\30\ 120 S. Ct. 2348, 2362-63 (2000) (interpreting New Jersey's ``hate crime'' law).

\31\ Walton v. Arizona, 497 U.S. 639 (1990).

\32\ This limiting principle does not apply to sentencing enhancements based on recidivism. Apprendi, 120 S. Ct. at 2361-62. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of 20 years). See also Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

--Sentencing

[P. 1765, add to n.104 after Spencer v. Texas citation:]

Parke v. Raley, 506 U.S. 20 (1992).

--The Problem of the Incompetent or Insane Defendant or Convict

[P. 1769, add to n.120:]

It is a violation of due process, however, for a State to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

--Rights of Prisoners

[P. 1773, add to n.150:]

Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. See Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the State ``enable [a] prisoner to discover grievances, and to litigate effectively'').

--Probation and Parole

[P. 1780, add to text at end of sentence carried over from P. 1779:]

The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.\33\

\33\ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998).

EQUAL PROTECTION OF THE LAWS
Scope and Application
--State Action
[P. 1796, add to text following n.52:]

Or, where a state worker's compensation statute was amended to allow, but not require, an insurer to suspend payment for medical treatment while the necessity of the treatment was being evaluated by an independent evaluator, this action was not fairly attributable to the State, and thus pre-deprivation notice of the suspension was not required.\34\

\34\ American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[P. 1797, add to text following n.60:]

to private insurance companies providing worker's compensation coverage,\35\

\35\ American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999)

Equal Protection: Judging Classifications by Law
--The Traditional Standard: Restrained Review
[P. 1805, add footnote to sentence appearing after n.107:]
Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).
TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER
Police Power Regulation
--Classification
[P. 1831, add to n.260 after paragraph headed ``Attorneys'':]
Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single owner.
Other Business and Employment Relations
--Labor Relations
[P. 1834, add footnote at end of first sentence of section:]
Central State Univ. v. American Ass'n of Univ. Professors, 526 U.S. 124 (1999) (upholding limitation on the authority of public university professors to bargain over instructional workloads).
EQUAL PROTECTION AND RACE
Juries
[P. 1855, add to n.79 after citation to Powers v. Ohio:]
Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury).
Permissible Remedial Utilizations of Racial Classifications
[P. 1868, delete last sentence and add to text at end of

section:]

The distinction between federal and state power to apply racial classifications proved ephemeral. The Court ruled in Adarand Constructors, Inc. v. Pena \36\ that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled Metro Broadcasting and, to the extent that it applied a review standard less stringent than strict scrutiny, Fullilove v. Klutznick. Strict scrutiny is to be applied regardless of the race of those burdened or benefited by the particular classification; there is no intermediate standard applicable to ``benign'' racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race ``should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection . . . has not been infringed.'' \37\

\36\ 515 U.S. 200 (1995). This was a 5 to 4 decision. Justice O'Connor's opinion of Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and--to the extent not inconsistent with his own concurring opinion--Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

\37\ 515 U.S. at 227 (emphasis original).

THE NEW EQUAL PROTECTION
Classifications Meriting Close Scrutiny
--Sex
[P. 1879, add to text after n.51:]

Even when the negative ``stereotype'' which is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In J.E.B. v. Alabama ex rel. T.B.,\38\ the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine the litigants' interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

\38\ 511 U.S. 127 (1994).

[P. 1881, add to n.58:]

See also Miller v. Albright, 523 U.S. 420 (1998) (opinion by Justice Stevens, joined by Justice Rehnquist) (equal protection not violated where paternity of a child of a citizen mother is established at birth, but child of citizen father must establish paternity by age 18).

[P. 1885, add to text after n.76:]

In a 1996 case, the Court required that a State demonstrate ``exceedingly persuasive justification'' for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school.\39\ The State argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an ``adversative model'' that featured minute regulation of behavior, would need to be unacceptably modified to facilitate the admission of women. While recognizing that

women's admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the State were not ``exceedingly persuasive,'' and thus the State did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the State at a private women's college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige, or alumni network.

\39\ United States v. Virginia, 518 U.S. 515 (1996).

Fundamental Interests: The Political Process
--Apportionment and Districting
[P. 1905, add to n.157 after citation for Summers v. Cenarrusa:]

But see Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10 percent intended to preserve political subdivision boundaries).

[P. 1906, add to n.161:]

Hunt v. Cromartie, 526 U.S. 541 (1999).

[P. 1906, add to text following n.161:]

Even if racial gerrymandering is intended to benefit minority voting populations, it is subject to strict scrutiny under the Equal Protection Clause if racial considerations are the dominant and controlling rationale in drawing district lines.\40\ Showing that a district's ``bizarre'' shape departs from traditional districting principles such as compactness, contiguity, and respect for political subdivision lines may serve to reinforce such a claim,\41\ although three Justices would not preclude the creation of ``reasonably compact'' majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act of 1965.\42\

\40\ Miller v. Johnson, 515 U.S. 900 (1995) (drawing congressional district lines in order to comply with Sec. 5 of the Voting Rights Act as interpreted by the Department of Justice not a compelling governmental interest).

\41\ Id.; Shaw v. Reno, 509 U.S. 630 (1993). See also Shaw v. Hunt, 517 U.S. 899 (1996) (creating an unconventionally-shaped majority-minority congressional district in one portion of State in order to alleviate effect of fragmenting geographically compact minority population in another portion of State does not remedy a violation of Sec. 2 of Voting Rights Act, and is thus not a compelling governmental interest).

\42\ Bush v. Vera, 517 U.S. 952, 979 (1996) (opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) (also involving congressional districts).

The Right to Travel
[P. 1911, add new paragraph following heading:]

The doctrine of the ``right to travel'' actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between States, a right venerable for its longevity, but still lacking a clear doctrinal basis.\43\ The second, expressly addressed by the first sentence of Article IV, provides a citizen of one State who is temporarily visiting another State the ``Privileges and Immunities'' of a citizen of the latter State.\44\ The third is the right of a new arrival to a State, who establishes citizenship in that State, to enjoy

the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a State for a specified period of time before taking advantage of the benefits of that State's citizenship.

\43\ Saenz v. Roe, 526 U.S. 489 (1999). ``For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of ``free ingress and regress to and from'' neighboring States which was expressly mentioned in the text of the Articles of Confederation, may simply have been ``conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'' Id. at 501 (citations omitted). See main text infra n.5 [p. 1912].

\44\ Paul v. Virginia, 8 U.S. (Wall) 168, 180 (1868) (``without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists'').

--Durational Residency Requirements

[P. 1911, add new paragraph to text following heading:]

Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, however, a majority of the Supreme Court approved a doctrinal shift, so that state laws which distinguished between their own citizens based on how long they had been in the State would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment.\45\ The Court did not, however, question the continuing efficacy of the earlier cases.

\45\ Saenz v. Roe, 526 U.S. 489, 502-03 (1999).

[P. 1913, add to text following sentence containing n.10:]

The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a California law which limited welfare benefits for California citizens who had resided in the State for less than a year to the level of benefits which they would have received in the State of their prior residence.\46\

\46\ Saenz v. Roe, 526 U.S. 489 (1999).

[P. 1913, add to text following n.13:]

More recently, the Court has attempted to clarify these cases by distinguishing situations where a state citizen is likely to ``consume'' benefits within a State's borders (such as the provision or welfare) from those where citizens of other States are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying in-state tuition rate for a college education).\47\

\47\ Saenz v. Roe, 526 U.S. 489, 505 (1999).

[P. 1916, add new heading and text following n.24:]

Sexual Orientation

In Romer v. Evans,\48\ the Supreme Court struck

down a state constitutional amendment which both overturned local ordinances prohibiting discrimination against homosexuals, lesbians or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to follow the lead of the Supreme Court of Colorado, which had held that the amendment infringed on gays' and lesbians' fundamental right to participate in the political process.\49\ The Court also rejected the application of the heightened standard reserved for suspect classes, and sought only to determine whether the legislative classification had a rational relation to a legitimate end.

\48\ 517 U.S. 620 (1996).
\49\ Evans v. Romer, 854 P. 2d 1270 (Colo. 1993).

The Court found that the amendment failed even this restrained review. Animus against a class of persons was not considered by the Court as a legitimate goal of government: ``[I]f the constitutional conception of `equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'' \50\ The Court then rejected arguments that the amendment protected the freedom of association rights of landlords and employers, or that it would conserve resources in fighting discrimination against other groups. The Court found that the scope of the law was unnecessarily broad to achieve these stated purposes, and that no other legitimate rationale existed for such a restriction.

\50\ 517 U.S. at 634, quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

--Criminal Procedure

[P. 1919, add to n.40 after citation to Penson v. Ohio:]

But see Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues).

--Access to Courts

[P. 1922, add paragraph to text following n.56:]

The continuing vitality of Griffin v. Illinois, however, is seen in the case of M.L.B. v. S.L.J.,\51\ where the Court considered whether a State seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in Boddie, the State, Mississippi, had afforded the plaintiff a trial on the merits, and thus the ``monopolization'' of the avenues of relief alleged in Boddie was not at issue. As in Boddie, however, the Court focused on the substantive due process implications of the state limiting ``[c]hoices about marriage, family life, and the upbringing of children,'' \52\ while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the State pay for the transcript needed for an effective appeal,\53\ and that the forced dissolution of parental rights was ``more substantial than mere loss of money,'' \54\ the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

\51\ 519 U.S. 102 (1996).

\52\ 519 U.S. at 106. See Boddie v. Connecticut, 401 U.S. 371 (1971).

\53\ Mayer v. Chicago, 404 U.S. 189 (1971).

\54\ 519 U.S. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).

ENFORCEMENT

--State Action

[P. 1933, delete last full paragraph of section, and substitute the following:]

The Court, however, ultimately rejected this expansion of the powers of Congress in United States v. Morrison.\55\ In Morrison, the Court invalidated a provision of the Violence Against Women Act \56\ that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment,\57\ dismissing the dicta in Guest, and reaffirming the precedents of the Civil Rights Cases and United States v. Harris. The Court also rejected the assertion that the legislation was ``corrective'' of bias in the courts, as the suits are not directed at the State or any state actor, but rather at the individuals committing the criminal acts.\58\

\55\ 120 S. Ct. 1740, 1754-59 (2000).

\56\ Pub. L. No. 103-322, Sec. 40302, 108 Stat. 1941, 42 U.S.C. Sec. 13981.

\57\ 120 S. Ct. at 1756 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment ``erects no shield against merely private conduct, however discriminatory or wrongful'').

\58\ This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. Sec. 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in United States v. Harris) lacks a ``color of law'' requirement. Although the requirement was read into it in Collins v. Hardyman, 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (while it might be ``difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State''). What the unanimous Court held in Griffin was that an ``intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'' Id. at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress' powers under Sec. 5 of the Fourteenth Amendment. Id. at 107.

The lower courts have been quite divided with respect to what constitutes a non-racial, class-based animus, and what constitutional protections must be threatened before a private conspiracy can be reached under Sec. 1985(3). See, e.g., Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Great American Fed. S. & L. Ass'n v. Novotny, 584 F.2d 1235 (3d Cir. 1978) (en banc), rev'd, 442 U.S. 366 (1979); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (en banc). The Court's decision in Morrison, however, appears to

preclude the use of Sec. 1985(3) in relation to Fourteenth Amendment rights absent some state action.

--Congressional Definition of Fourteenth Amendment Rights

[P. 1936, add to text following n.127:]

The case of City of Boerne v. Flores,\59\ however, illustrates that the Court will not always defer to Congress' determination as to what legislation is appropriate to ``enforce'' the provisions of the Fourteenth Amendment. In Flores, the Court held that the Religious Freedom Restoration Act,\60\ which expressly overturned the Court's narrowing of religious protections under Employment Division v. Smith,\61\ exceeded congressional power under section 5 of the Fourteenth Amendment. Although the Court allowed that Congress' power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be ``a congruence and proportionality'' between the means adopted and the injury to be remedied.\62\ Unlike the pervasive suppression of the African-American vote in the South which led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an ``egregious predicate'' for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.\63\

\59\ 521 U.S. 507 (1997).

\60\ Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. Sec. 2000bb et. seq.

\61\ 494 U.S. 872 (1990).

\62\ 521 U.S. at 533.

\63\ 521 U.S. at 532-33. The Court found that the Religious Freedom Restoration Act was ``so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'' Id.

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in Boerne, as litigants precluded from arguing that a State's sovereign immunity has been abrogated under Article I congressional powers \64\ seek alternative legislative authority in section 5. For instance, in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,\65\ a bank which had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the State's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the States was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the States, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.\66\

\64\ Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Article I powers may not be used to abrogate a State's Eleventh Amendment immunity, but Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), holding that Congress may abrogate Eleventh Amendment immunity in exercise of Fourteenth Amendment enforcement power, remains good law). See discussion pp. 1533-37.

\65\ 527 U.S. 627 (1999).

\66\ 527 U.S. at 639-46. See also College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (Trademark Remedy Clarification Act amendment to Lanham Act subjecting States to suits for false advertising is not a valid exercise of Fourteenth Amendment power; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a ``property'' right protected by the Due Process Clause).

A similar result was reached regarding the application of the Age Discrimination in Employment Act to state agencies in Kimel v. Florida Board of Regents.\67\ In determining that the Act did not meet the ``congruence and proportionality'' test, the Court focused not just on whether state agencies had engaged in age discrimination, but on whether States had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by States, finding that there is a rational basis for States to use age as a proxy for other qualities, abilities and characteristics.\68\ Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the States, was ``so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior.'' \69\

\67\ 120 S. Ct. 631 (2000). Again, the issue of the Congress' power under Sec. 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against States from being authorized under Article I powers such as the Commerce Clause.

\68\ See, e.g., Gregory v. Ashcroft, 501 U.S. 452 (1991) (applying rational basis test to uphold mandatory retirement age of 70 for state judges).

\69\ 120 S. Ct. at 647, quoting City of Boerne, 521 U.S. at 532.

FIFTEENTH AMENDMENT

ABOLITION OF SUFFRAGE QUALIFICATIONS ON BASIS OF RACE
Adoption and Judicial Enforcement
--The Judicial View of the Amendment
[P. 1940, add new paragraph to text at end of section:]

Although ``the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote,'' the Amendment ``is cast in fundamental terms'' that transcend that immediate objective, and ``grants protection to all persons, not just members of a particular race.'' \1\ Moreover, the Court has construed ``race'' broadly to comprehend classifications based on ancestry as well as those based on race.\2\ ``Ancestry can be a proxy for race,'' the Court explained recently, finding such a proxy in Hawaii's limitation of the right to vote in a statewide election for an office responsible for administering a trust for the benefit of persons who can trace their ancestry to Hawaiian inhabitants of 1778.\3\

\1\ Rice v. Cayetano, 120 S. Ct. 1044, 1054 (2000).

\2\ Guinn v. United States, 238 U.S. 347 (1915) (invalidating Oklahoma exception to literacy requirement for any ``lineal descendants'' of persons entitled to vote in

1866).
\3\ Rice v. Cayetano, 120 S. Ct. 1044, 1055 (2000).

Congressional Enforcement
--Federal Remedial Legislation
[P. 1949, add to n.59:]

In Lopez v. Monterey County, 525 U.S. 266 (1999), the Court reiterated its prior holdings that Congress may exercise its enforcement power based on discriminatory effects, and without any finding of discriminatory intent.

TWENTY-FIRST AMENDMENT

Scope of Regulatory Power Conferred upon the States
--Effect of Section 2 upon Other Constitutional Provisions
[P. 1982, delete sentence containing n.31 and substitute the following:]

The Court departed from this line of reasoning in California v. LaRue.\1\

\1\ 409 U.S. 109 (1972).

[P. 1983, add to text at end of section:]

In 44 Liquormart, Inc. v. Rhode Island,\2\ the Court disavowed LaRue and Bellanca, and reaffirmed that, ``although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a state's regulatory power over the delivery or use of intoxicating beverages within its borders, `the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,' '' \3\ and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (e.g., those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-first Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate ``grossly sexual exhibitions in premises licensed to serve alcoholic beverages.'' ``Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations.'' \4\

\2\ 517 U.S. 484 (1996) (statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is not shielded from constitutional scrutiny by the Twenty-first Amendment).
\3\ 517 U.S. at 516 (quoting Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691, 712 (1984)).
\4\ 517 U.S. at 515.

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

128. Act of Aug. 29, 1935, ch. 814 Sec. 5(e), 49 Stat. 982, 27 U.S.C. Sec. 205(e).

The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels is inconsistent with the protections

afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the ``overall irrationality'' of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

Justices concurring: Thomas, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, and Chief Justice Rehnquist.

Justice concurring specially: Stevens.

129. Act of Aug. 16, 1954, ch. 736, 68A Stat. 521, 26 U.S.C. Sec. 4371(1).

A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, Sec. 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

United States v. IBM Corp., 517 U.S. 843 (1996).

Justices concurring: Thomas, O'Connor, Scalia, Souter, Breyer, and Chief Justice Rehnquist.

Justices dissenting: Kennedy, Ginsburg.

130. Act of May 11, 1976 (Pub. L. No. 94-283, Sec. 112(2)), 90 Stat. 489; 2 U.S.C. Sec. 441a(d)(3).

The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures by a political party ``in connection with the general election campaign of a [congressional] candidate,'' violates the First Amendment when applied to expenditures that a political party makes independently, without coordination with the candidate.

Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996).

Justices concurring: Breyer, O'Connor and Souter.

Justices concurring in part and dissenting in part: Kennedy, Scalia, Thomas, and Chief Justice Rehnquist.

Justices dissenting: Stevens and Ginsburg.

131. Act of Oct. 17, 1988 (Pub. L. No. 100-497, Sec. 11(d)(7)), 102 Stat. 2472, 25 U.S.C. Sec. 2710(d)(7).

A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States' Eleventh Amendment immunity from suit in federal court. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), is overruled.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia,

Kennedy, and Thomas.

Justices dissenting: Stevens, Souter, Ginsburg and Breyer.

132. Act of Nov. 30, 1989 (Pub. L. No. 101-194, Sec. 601), 103 Stat. 1760, 5 U.S.C. app. Sec. 501.

Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit Members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS-16. The ban is limited to expressive activity and does not include other outside income, and the ``speculative benefits'' of the ban do not justify its ``crudely crafted burden'' on expression.

United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, and Breyer.

Justice concurring in part and dissenting in part: O'Connor.

Justices dissenting: Chief Justice Rehnquist, and Scalia and Thomas.

133. Act of Nov. 29, 1990 (Pub. L. No. 101-647, Sec. 1702), 104 Stat. 4844, 18 U.S.C. Sec. 922q.

The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is ``a criminal statute that by its terms has nothing to do with `commerce' or any sort of economic enterprise.'' Possession of a gun at or near a school ``is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.''

United States v. Lopez, 514 U.S. 549 (1995).

Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia, Kennedy, and Thomas.

Justices dissenting: Stevens, Souter, Breyer, and Ginsburg.

134. Act of Dec. 19, 1991 (Pub. L. No. 102-242 Sec. 476), 105 Stat. 2387, 15 U.S.C. Sec. 78aa-1.

Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the power to render dispositive judgments.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

Justices concurring: Scalia, O'Connor, Kennedy, Souter, and Thomas, and Chief Justice Rehnquist.

Justice concurring specially: Breyer.

Justices dissenting: Stevens and Ginsburg.

135. Act of Oct. 5, 1992 (Pub. L. No. 102-385, Sec. Sec. 10(b) and 10(c)), 106 Stat. 1487, 1503; 47 U.S.C. Sec. 532(j) and Sec. 531 note, respectively.

Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of ``sexually explicit'' programming on public access channels, also violates the First Amendment.

Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727 (1996).

Justices concurring: Breyer, Stevens, O'Connor (Sec. 10(b) only), Kennedy, Souter, and Ginsburg.

Justices dissenting: Thomas, Scalia, O'Connor (Sec. 10(c) only), and Chief Justice Rehnquist.

136. Act of Oct. 30, 1984, (Pub. L. No. 98-608, Sec. 1(4)), 98 Stat. 3173, 25 U.S.C. Sec. 2206.

Section 207 of the Indian Land Consolidation Act, as amended in 1984, effects an unconstitutional taking of property without compensation by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in Hodel v. Irving (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cures the constitutional defect.

Babbitt v. Youpee, 519 U.S. 234 (1997).

Justices concurring: Ginsburg, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer, and Chief Justice Rehnquist.

Justice dissenting: Stevens.

137. Act of Nov. 16, 1993 (Pub. L. No. 103-141), 107 Stat. 1488, 42 U.S.C. Sec. Sec. 2000bb to 2000bb-4.

The Religious Freedom Restoration Act, which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion, exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under section 5 to ``enforce'' the Fourteenth Amendment by ``appropriate legislation'' does not extend to defining the substance of the Amendment's restrictions. This RFRA appears to do. RFRA ``is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.''

City of Boerne v. Flores, 521 U.S. 507 (1997).

Justices concurring: Kennedy, Stevens, Thomas, Ginsburg, and Chief Justice Rehnquist.

Justice concurring specially: Scalia.

Justices dissenting: O'Connor, Breyer; Souter.

138. Act of Feb. 8, 1996, 110 Stat. 56, 133-34 (Pub. L. No. 104-104, title V, Sec. 502), 47 U.S.C. Sec. Sec. 223(a), 223(d).

Two provisions of the Communications Decency Act of 1996--one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age--violate the First Amendment.

Reno v. ACLU, 521 U.S. 844 (1997).

Justices concurring: Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

Justices concurring in part and dissenting in part: O'Connor and Chief Justice Rehnquist.

139. Act of Nov. 30, 1993 (Pub. L. No. 103-159), 107 Stat. 1536.

Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between Federal and State governments. In New York v. United States, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and ``Congress cannot circumvent that prohibition by conscripting the State's officers directly.''

Printz v. United States, 521 U.S. 898 (1997).

Justices concurring: Scalia, O'Connor, Kennedy, Thomas, and Chief Justice Rehnquist.

Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

140. Act of Nov. 17, 1986 (Pub. L. No. 99-662, title IV, Sec. 1402(a)), 26 U.S.C. Sec. Sec. 4461, 4462.

The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, Sec. 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125 percent of cargo value on commercial cargo shipped through the Nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used by exporters, and the tax does not, therefore, represent compensation for services rendered.

United States v. United States Shoe Corp., 523 U.S. 360 (1998).

141. Act of Oct. 19, 1976 (Pub. L. No. 94-553, Sec. 101(c)), 17 U.S.C. Sec. 504(c).

Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, ``in a sum of not less than $500 or more than $20,000 as the court considers just,'' does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998).

142. Act of Oct. 24, 1992, Title XIX, 106 Stat. 3037 (Pub. L. No. 102-486), 26 U.S.C. Sec. Sec. 9701-9722.

The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

Justices concurring: O'Connor, Scalia, Thomas, and Chief Justice Rehnquist.

Justice concurring specially: Kennedy.

Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

143. Act of April 9, 1996, 110 Stat. 1200 (Pub. L. No. 104-130), 2 U.S.C. Sec. Sec. 691 et seq.

The Line Item Veto Act, which gives the President the authority to ``cancel in whole'' three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President ``the unilateral power to change the text of duly enacted statutes.'' This Line Item Veto Act authority differs in important respects from the President's constitutional authority to ``return'' (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

Clinton v. City of New York, 524 U.S. 417 (1998).

Justices concurring: Stevens, Kennedy, Souter, Thomas, Ginsburg, and Chief Justice Rehnquist.

Justices dissenting: Scalia, O'Connor, and Breyer.

144. Act of June 19, 1934, ch. 652, 48 Stat. 1088, Sec. 316, 18 U.S.C. Sec. 1304.

Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, violates the First Amendment's protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999).

Justices concurring: Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, and Chief Justice Rehnquist.

Justice concurring specially: Thomas.

145. Act of April 8, 1974, Pub. L. No. 93-259, Sec. Sec. 6(a)(6), 6(d)(1), 29 U.S.C. Sec. Sec. 203(x), 216(b).

Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.

Alden v. Maine, 527 U.S. 706 (1999).

Justices concurring: Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist.

Justices dissenting: Souter, Stevens, Ginsburg, and Breyer.

146. Act of Oct. 27, 1992, Pub. L. No. 102-542, 15 U.S.C. Sec. 1122.

The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) ``under the eleventh amendment . . . or under any other doctrine of sovereign immunity,'' did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Article I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a ``property right'' protected by the Due Process Clause.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

Justices concurring: Scalia, O'Connor, Kennedy, Thomas, and Chief Justice Rehnquist.

Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

147. Act of Oct. 28, 1992, 106 Stat. 4230, Pub. L. No. 102-560, 29 U.S.C. Sec. 296.

The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are ``out of proportion to a supposed remedial or preventive object.''

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999).

Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia, Kennedy, and Thomas.

Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

148. Act of April 8, 1974 (Pub. L. No. 93-259, Sec. Sec. 6(d)(1), 28(a)(2)), 88 Stat. 61, 74; 29 U.S.C. Sec. Sec. 216(b), 630(b).

The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect classification under the

Equal Protection Clause, and the ADEA is ``so out of proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.''

Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

Justices concurring: O'Connor, Scalia, Kennedy, Thomas, and Chief Justice Rehnquist.

Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

149. Act of September 13, 1994 (Pub. L. No. 103-322, Sec. 40302), 108 Stat. 1941, 42 U.S.C. Sec. 13981.

A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate ``noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.'' The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

United States v. Morrison, 120 S. Ct. 1740 (2000).

Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia, Kennedy, and Thomas.

Justices dissenting: Souter, Breyer, Stevens, and Ginsburg.

150. Act of Feb. 8, 1996 (Pub. L. No. 104-104, Sec. 505), 110 Stat. 136, 47 U.S.C. Sec. 561.

Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, since the Government did not establish that the less restrictive alternative found in section 504 of the Act--that of scrambling a channel at a subscriber's request--would be ineffective.

United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878 (2000).

Justices concurring: Kennedy, Stevens, Souter, Thomas, and Ginsburg.

Justices dissenting: Scalia, Breyer, O'Connor, and Chief Justice Rehnquist.

151. Act of June 19, 1968 (Pub. L. No. 90-351, Sec. 701(a)), 82 Stat. 210, 18 U.S.C. Sec. 3501.

A section of the Omnibus Crime Control and Safe Streets Act of 1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations prior to the Court's decision in Miranda v. Arizona, 384 U.S. 486 (1966),

is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by Miranda are constitution-based rules. While the Miranda Court invited a legislative rule that would be ``at least as effective'' in protecting a suspect's right to remain silent, section 3501 is not an adequate substitute.

Dickerson v. United States, 120 S. Ct. 2326 (2000).

Justices concurring: Chief Justice Rehnquist, and Stevens, O'Connor, Kennedy, Souter, and Ginsburg.

Justices dissenting: Scalia and Thomas.

STATE ACTS HELD UNCONSTITUTIONAL

1090. Edenfield v. Fane, 507 U.S. 761 (1993).

A rule of the Florida Board of Accountancy banning ``direct, in-person, uninvited solicitation'' of business by certified public accountants is inconsistent with the free speech guarantees of the First Amendment.

Justices concurring: Kennedy, White, Blackmun, Stevens, Scalia, Souter, Thomas, and Chief Justice Rehnquist.

Justice dissenting: O'Connor.

1091. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993).

Oklahoma may not impose income taxes or motor vehicle taxes on members of the Sac and Fox Nation who live in ``Indian country,'' whether the land is within reservation boundaries, on allotted lands, or in dependent communities. Such tax jurisdiction is considered to be preempted unless Congress has expressly provided to the contrary.

1092. Department of Treasury v. Fabe, 508 U.S. 491 (1993).

An Ohio statute setting priority of claims against insolvent insurance companies is preempted by the federal priority statute, 31 U.S.C. Sec. 3713, which accords first priority to the United States, to the extent that the Ohio law protects the claims of creditors who are not policyholders. Insofar as it protects the claims of policyholders, the law is saved from preemption by section 2(b) of the McCarran-Ferguson Act.

Justices concurring: Blackmun, White, Stevens, O'Connor, and Chief Justice Rehnquist.

Justices dissenting: Kennedy, Scalia, Souter, Thomas.

1093. Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994).

Oregon's imposition of a surcharge on in-state disposal of solid waste generated in other states--a tax three times greater than the fee charged for disposal of waste that was generated in Oregon--constitutes an invalid burden on interstate commerce. The tax is facially discriminatory against interstate commerce, is not a valid compensatory tax, and is not justified by any other legitimate state interest.

Justices concurring: Thomas, Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg.

Justices dissenting: Chief Justice

Rehnquist, and Blackmun.

1094. Associated Industries v. Lohman, 511 U.S. 641 (1994).
Missouri's uniform, statewide use tax constitutes an invalid discrimination against interstate commerce in those counties in which the use tax is greater than the sales tax imposed as a local option, even though the overall statewide effect of the use tax places a lighter aggregate tax burden on interstate commerce than on intrastate commerce.

1095. Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994).
Montana's tax on the possession of illegal drugs, to be ``collected only after any state or federal fines or forfeitures have been satisfied,'' constitutes punishment, and violates the prohibition, derived from the Double Jeopardy Clause, against successive punishments for the same offense.

Justices concurring: Stevens, Blackmun, Kennedy, Souter, and Ginsburg.

Justices dissenting: Chief Justice Rehnquist, and O'Connor, Scalia, and Thomas.

1096. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).
A Massachusetts milk pricing order, imposing an assessment on all milk sold by dealers to Massachusetts retailers, is an unconstitutional discrimination against interstate commerce because the entire assessment is then distributed to Massachusetts dairy farmers in spite of the fact that about two-thirds of the assessed milk is produced out of state. The discrimination imposed by the pricing order is not justified by a valid factor unrelated to economic protectionism.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, and Ginsburg.

Justices concurring specially: Scalia and Thomas.

Justices dissenting: Chief Justice Rehnquist and Blackmun.

1097. Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).
A provision of the Oregon Constitution, prohibiting judicial review of the amount of punitive damages awarded by a jury unless the court can affirmatively say there is no evidence to support the verdict, is invalid under the Due Process Clause of the Fourteenth Amendment. Judicial review of the amount awarded was one of the few procedural safeguards available at common law, yet Oregon has removed that safeguard without providing any substitute procedure, and with no indication that the danger of arbitrary awards has subsided.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter, and Thomas.

Justices dissenting: Ginsburg and Chief Justice Rehnquist.

1098. Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994).
A New York State law creating a special school district for an incorporated village composed exclusively of members of one small religious sect violates the Establishment Clause.

Justices concurring: Souter, Blackmun, Stevens, O'Connor, and Ginsburg.

Justice concurring specially: Kennedy.

Justices dissenting: Scalia, Thomas, and Chief Justice Rehnquist.

1099. American Airlines v. Wolens, 513 U.S. 219 (1995).
The Illinois Consumer Fraud Act, to the extent that it authorizes actions in state court challenging as ``unfair or deceptive'' marketing practices an airline company's changes in its frequent flyer program, is preempted by the Airline Deregulation Act, which prohibits states from ``enact[ing] or enforc[ing] any law . . . relating to [air carrier] rates, routes, or services.''

Justices concurring: Ginsburg, Kennedy, Souter, Breyer, and Chief Justice Rehnquist.

Justices concurring specially: O'Connor, Thomas.

Justice dissenting: Stevens.

1100. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).
Ohio's prohibition on the distribution of anonymous campaign literature abridges the freedom of speech. The law, aimed at speech designed to influence voters in an election, is a limitation on political expression subject to exacting scrutiny. Neither of the interests asserted by Ohio justifies the limitation.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer.

Justice concurring specially: Thomas.

Justices dissenting: Scalia, and Chief Justice Rehnquist.

1101. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
An amendment to the Arkansas Constitution denying ballot access to congressional candidates who have already served three terms in the House of Representatives or two terms in the Senate is invalid as conflicting with the qualifications for office set forth in Article I of the U.S. Constitution, (specifying age, duration of U.S. citizenship, and state inhabitancy requirements). Article I sets the exclusive qualifications for a United States Representative or Senator.

Justices concurring: Stevens Kennedy, Souter, Ginsburg, and Breyer.

Justices dissenting: Thomas, O'Connor, Scalia, and Chief Justice Rehnquist.

1102. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).
Oklahoma may not impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land. The legal incidence of the motor fuels tax fall--on the retailer, located within Indian country, and the petitioner did not properly raise the issue of whether Congress had authorized such taxation in the Hayden-Cartwright Act.

1103. Hurley v. Irish-American Gay Group, 515 U.S. 557 (1995).
Application of Massachusetts' public accommodations law to require the private organizers of a St. Patrick's Day

parade to allow participation in the parade by a gay and lesbian group wishing to proclaim its members' gay and lesbian identity violates the First Amendment because it compels parade organizers to include in the parade a message they wish to exclude.

1104. Miller v. Johnson, 515 U.S. 900 (1995).

Georgia's congressional districting plan violates the Equal Protection Clause. The district court's finding that race was the predominant factor in drawing the boundaries of the Eleventh District was not clearly erroneous. The State did not meet its burden under strict scrutiny review to demonstrate that its districting was narrowly tailored to achieve a compelling interest.

Justices concurring: Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist.

Justices dissenting: Stevens Ginsburg, Breyer, and Souter.

1105. Fulton Corp. v. Faulkner, 516 U.S. 325 (1996).

North Carolina's intangibles tax on a fraction of the value of corporate stock owned by North Carolina residents inversely proportional to the corporation's exposure to the State's income tax, violates the ``dormant'' Commerce Clause. The tax facially discriminates against interstate commerce, and is not a ``compensatory tax'' designed to make interstate commerce bear a burden already borne by intrastate commerce.

1106. Barnett Bank v. Nelson, 517 U.S. 25 (1996).

A federal law empowering national banks in small towns to sell insurance (12 U.S.C. Sec. 92) preempts a Florida law prohibiting banks from dealing in insurance. The federal law contains no explicit statement of preemption, but preemption is implicit because the state law stands as an obstacle to the accomplishment of one of the federal law's purposes.

1107. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages abridges freedom of speech protected by the First Amendment, and is not shielded from constitutional scrutiny by the Twenty-first Amendment. There is not a ``reasonable fit'' between the blanket prohibition and the State's goal of reducing alcohol consumption.

Justices concurring: Stevens, Scalia (in part), Kennedy (in part), Souter (in part), Thomas (in part), and Ginsburg (in part).

Justices concurring specially: Scalia, Thomas, O'Connor, Souter, Breyer, and Chief Justice Rehnquist.

1108. Romer v. Evans, 517 U.S. 620 (1996).

Amendment 2 to the Colorado Constitution, which prohibits all legislative, executive, or judicial action at any level of state or local government if that action is designed to protect homosexuals, violates the Equal Protection Clause of the Fourteenth Amendment. The amendment, adopted by statewide referendum in 1992, does not bear a rational relationship to a legitimate governmental purpose.

Justices concurring: Kennedy, Stevens, O'Connor, Souter, Ginsburg, and

Breyer.

Justices dissenting: Scalia, Thomas, and Chief Justice Rehnquist.

1109. Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).
A Montana law declaring an arbitration clause unenforceable unless notice that the contract is subject to arbitration appears in underlined capital letters on the first page of the contract is preempted by the Federal Arbitration Act.

Concurring Justices: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Breyer, and Chief Justice Rehnquist.

Justice dissenting: Thomas.

1110. Shaw v. Hunt, 517 U.S. 899 (1996).
North Carolina's congressional districting law, containing the racially gerrymandered 12th Congressional District as well as another majority-black district, violates the Equal Protection Clause because, under strict scrutiny applicable to racial classifications, creation of District 12 was not narrowly tailored to serve a compelling state interest. Creation of District 12 was not necessary to comply with either section 2 or section 5 of the Voting Rights Act, and the lower court found that the redistricting plan was not actually aimed at ameliorating past discrimination.

Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia, Kennedy, and Thomas.

Justices dissenting: Stevens, Ginsburg, Souter, and Breyer.

1111. Bush v. Vera, 517 U.S. 952 (1996).
Three congressional districts created by Texas law constitute racial gerrymanders that are unconstitutional under the Equal Protection Clause. The district court correctly held that race predominated over legitimate districting considerations, including incumbency, and consequently strict scrutiny applies. None of the three districts is narrowly tailored to serve a compelling state interest.

Justices concurring: O'Connor, Kennedy, and Chief Justice Rehnquist.

Justices concurring specially: O'Connor, Kennedy, Thomas, and Scalia.

Justices dissenting: Stevens, Ginsburg, Breyer, and Souter.

1112. United States v. Virginia, 518 U.S. 515 (1996).
Virginia's exclusion of women from the educational opportunities provided by Virginia Military Institute denies to women the equal protection of the laws. A state must demonstrate ``exceedingly persuasive justification'' for gender discrimination, and Virginia has failed to do so in this case.

Justices concurring: Ginsburg, Stevens, O'Connor, Kennedy, Souter, and Breyer.

Justice concurring specially: Chief Justice Rehnquist.

Justice dissenting: Scalia.

1113. M.L.B. v. S.L.J., 519 U.S. 102 (1996).

Mississippi statutes that condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay for preparation of a trial transcript violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Decrees terminating parental rights belong in the same category of cases, starting with Griffin v. Illinois, 351 U.S. 12 (1956), in which the Court has ruled that the State's adverse action against an individual is so devastating that access to appellate review may not be made contingent upon ability to pay.

Justices concurring: Ginsburg, Stevens, O'Connor, Souter, and Breyer.

Justice concurring specially: Kennedy.

Justices dissenting: Chief Justice Rehnquist, and Thomas, and Scalia.

1114. Lynce v. Mathis, 519 U.S. 433 (1997).

A Florida statute canceling early release credits awarded to prisoners as a result of prison overcrowding violates the Ex Post Facto Clause, Art. I, Sec. 10, cl. 1, as applied to a prisoner who had already been awarded the credits and released from custody. The cancellation of early release credits met the two-part test for an ex post facto law: it was ``clearly retrospective'' and it disadvantaged the petitioner by lengthening his period of incarceration.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, and Chief Justice Rehnquist.

Justices concurring specially: Thomas, and Scalia.

1115. Chandler v. Miller, 520 U.S. 305 (1997).

A Georgia statute requiring that candidates for state office certify that they have passed a drug test effects a ``search'' that is plainly not tied to individualized suspicion, and does not fit within the ``closely guarded category of constitutionally permissible suspicionless searches,'' and hence violates the Fourth Amendment. Georgia has failed to establish existence of a ``special need, beyond the normal need for law enforcement,'' that can justify such a search.

Justices concurring: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer.

Justice dissenting: Chief Justice Rehnquist.

1116. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997).

Maine's property tax law, which contains an exemption for charitable institutions but limits that exemption to institutions serving principally Maine residents, violates the ``dormant'' Commerce Clause as applied to deny exemption status to a nonprofit corporation that operates a summer camp for children, most of whom are not Maine residents. The nonprofit character of the enterprise does not exclude it from protection. Protectionism, whether targeted at for-profit or not-for-profit entities, is prohibited.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, and Breyer.

Justices dissenting: Scalia, Thomas, Ginsburg, and Chief Justice Rehnquist.

1117. Foster v. Love, 522 U.S. 67 (1997).

A Louisiana statute that provides for an ``open primary'' in October for election of Members of Congress and that provides that any candidate receiving a majority of the vote in that primary ``is elected,'' conflicts with the federal law, 2 U.S.C. Sec. Sec. 1 and 7, that provides for a uniform federal election day in November, and is void to the extent of conflict. ``[A] contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day . . . clearly violates Sec. 7.''

1118. Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998).

A New York law that effectively denies only nonresident taxpayers an income tax deduction for alimony paid violates the Privileges or Immunities Clause of Art. IV, Sec. 2. New York did not adequately justify its failure to treat resident and nonresident taxpayers with substantial equality.

Justices concurring: O'Connor, Stevens, Scalia, Souter, Thomas, and Breyer.

Justices dissenting: Ginsburg, Kennedy, and Chief Justice Rehnquist.

1119. Knowles v. Iowa, 525 U.S. 113 (1998).

An Iowa statute authorizing law enforcement officers to conduct a full-blown search of an automobile when issuing a traffic citation violates the Fourth Amendment. The rationales that justify a search incident to arrest do not justify a similar search incident to a traffic citation.

1120. Buckley v. American Constitutional Law Found., 525 U.S. 182 (1999).

Three conditions that Colorado placed on the petition process for ballot initiatives--that petition circulators be registered voters, that they wear identification badges, and that initiative sponsors report the names and addresses of circulators and the amounts paid to each--impermissibly restrict political speech in violation of the First and Fourteenth Amendments.

Justices concurring: Ginsburg, Stevens, Scalia, Kennedy, and Souter.

Justice concurring specially: Thomas.

Justices concurring in part and dissenting in part: O'Connor, Souter, and Chief Justice Rehnquist.

1121. South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999).

Alabama's franchise tax law discriminates against foreign corporations in violation of the Commerce Clause. The law establishes a domestic corporation's tax base as the par value of its capital stock, a value that the corporation may set at whatever level it chooses. The tax base of a foreign corporation, on the other hand, contains balance sheet items that the corporation cannot so manipulate.

1122. Saenz v. Roe, 526 U.S. 489 (1999).

A provision of California's Welfare and Institutions Code limiting new residents, for the first year they live in California, to the level of welfare benefits that they would have received in the state of their prior

residence abridges the right to travel in violation of the Fourteenth Amendment.

Justices concurring: Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer.

Justices dissenting: Chief Justice Rehnquist, and Thomas.

1123. Rice v. Cayetano, 120 S. Ct. 1044 (2000).

A provision of the Hawaii Constitution restricting the right to vote for trustees of the Office of Hawaiian Affairs to persons who are descendants of people inhabiting the Hawaiian Islands in 1778 is a race-based voting qualification that violates the Fifteenth Amendment. Ancestry can be--and in this case is--a proxy for race.

Justices concurring: Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist.

Justices concurring specially: Breyer and Souter.

Justices dissenting: Stevens and Ginsburg.

1124. United States v. Locke, 120 S. Ct. 1135 (2000).

Four Washington State regulations governing oil tanker operations and manning are preempted. Primarily through Title II of the Ports and Waterways Safety Act of 1972, Congress has occupied the field of regulation of general seaworthiness of tankers and their crews, and there is no room for these state regulations imposing training and English language proficiency requirements on crews and imposing staffing requirements for navigation watch. State reporting requirements applicable to certain marine incidents are also preempted.

1125. Carmell v. Texas, 120 S. Ct. 1620 (2000).

A Texas law that eliminated a requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses violates the Ex Post Facto Clause of Art. I, Sec. 10 as applied to a crime committed while the earlier law was in effect. So applied, the law falls into the category of an ex post facto law that requires less evidence in order to convict. Under the old law, the petitioner could have been convicted only if the victim's testimony had been corroborated by two witnesses, while under the amended law the petitioner was convicted on the victim's testimony alone.

Justices concurring: Stevens, Scalia, Souter, Thomas, and Breyer.

Justices dissenting: Ginsburg, O'Connor, Kennedy, and Chief Justice Rehnquist.

1126. Troxel v. Granville, 120 S. Ct. 2054 (2000).

A Washington State law allowing ``any person'' to petition a court ``at any time'' to obtain visitation rights whenever visitation ``may serve the best interests'' of a child is unconstitutional as applied to an order requiring a parent to allow her child's grandparents more extensive visitation than the parent wished. Because no deference was accorded to the parent's wishes, the parent's due process liberty interest in making decisions concerning her child's care, custody, and control was violated.

Justices concurring: O'Connor, Ginsburg,

Breyer, and Chief Justice Rehnquist.

Justices concurring specially: Souter and Thomas.

Justices dissenting: Stevens, Scalia, and Kennedy.

1127. Apprendi v. New Jersey, 120 S. Ct. 2348 (2000).

A New Jersey ``hate crime'' statute that allows a judge to extend a sentence upon finding by a preponderance of the evidence that the defendant, in committing a crime for which he has been found guilty, acted with a purpose to intimidate because of race, violates the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's requirements of speedy and public trial by an impartial jury. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and established beyond a reasonable doubt.

Justices concurring: Stevens, Scalia, Souter, Thomas, and Ginsburg.

Justice concurring specially: Thomas.

Justices dissenting: O'Connor, Kennedy, Breyer, and Chief Justice Rehnquist.

1128. California Democratic Party v. Jones, 120 S. Ct. 2402 (2000).

California's ``blanket primary'' law violates the First Amendment associational rights of political parties. The law lists all candidates on one ballot and allows primary voters to choose freely among candidates without regard to party affiliation. The law ``adulterate[s]'' a party's candidate-selection process by forcing the party to open up that process to persons wholly unaffiliated with the party, and is not narrowly tailored to serve a compelling state interest.

Justices concurring: Scalia, O'Connor, Kennedy, Souter, Thomas, Breyer, and Chief Justice Rehnquist.

Justices dissenting: Stevens and Ginsburg.

1129. Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000).

Application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as a member and assistant scout master violates the organization's First Amendment associational rights. The general mission of the Scouts, to instill values in young people, is expressive activity entitled to First Amendment protection, and requiring the Scouts to admit a gay scout leader would contravene the Scouts' asserted policy disfavoring homosexual conduct.

Justices concurring: Chief Justice Rehnquist, and O'Connor, Scalia, Kennedy, and Thomas.

Justices dissenting: Stevens, Souter, Ginsburg, and Breyer.

1130. Stenberg v. Carhart, 120 S. Ct. 2597 (2000).

Nebraska's statute criminalizing the performance of ``partial birth abortions'' is unconstitutional under principles set forth in Roe v. Wade and Planned Parenthood v. Casey. The statute lacks an exception for instances in which the banned procedure is necessary to preserve the health of the mother, and, because it applies to the commonplace dilation and evacuation procedure as well as to

the dilation and extraction method, imposes an ``undue burden'' on a woman's right to an abortion.

Justices concurring: Breyer, Stevens, O'Connor, Souter, and Ginsburg.

Justices dissenting: Chief Justice Rehnquist, and Scalia, Kennedy, and Thomas.

ORDINANCES HELD UNCONSTITUTIONAL

125. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

Cincinnati's refusal, pursuant to an ordinance prohibiting distribution of commercial handbills on public property, to allow the distribution of commercial publications through freestanding newsracks located on public property, while at the same time allowing similar distribution of newspapers and other noncommercial publications, violates the First Amendment.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, and Souter.

Justices dissenting: Chief Justice Rehnquist, and White and Thomas.

126. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

Hialeah, Florida ordinances banning the killing of animals in a ritual sacrifice are unconstitutional as infringing the free exercise of religion by members of the Santeria religion.

Justices concurring: Kennedy, White, Stevens, Scalia, Souter, Thomas, and Chief Justice Rehnquist.

Justices concurring specially: Blackmun and O'Connor.

127. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

Clarkstown, New York ``flow control'' ordinance, which requires all solid waste within the town to be processed at a designated transfer station before leaving the municipality, discriminates against interstate commerce and is invalid under the Commerce Clause.

Justices concurring: Kennedy, Stevens, Scalia, Thomas, and Ginsburg.

Justice concurring specially: O'Connor.

Justices dissenting: Souter, Blackmun, and Chief Justice Rehnquist.

128. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

An ordinance of the City of Ladue, Missouri, which prohibits all signs but makes exceptions for several narrow categories, violates the First Amendment by prohibiting a resident from placing in the window of her home a sign containing a political message. By prohibiting residential signs that carry political, religious, or personal messages, the ordinance forecloses ``a venerable means of communication that is both unique and important.''

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

Chicago's Gang Congregation Ordinance, which prohibits ``criminal street gang members'' from ``loitering'' with one another or with other persons in any public place after being ordered by a police officer to disperse, violates the Due Process Clause of the Fourteenth Amendment. The ordinance violates the requirement that a legislature establish minimal guidelines for law enforcement.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer.

Justices dissenting: Scalia, Thomas, and Chief Justice Rehnquist.

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

	Overruling Case	Overruled Case(s)
* 205.	United States v. Dixon, 509 U.S. 688 (1993).	Grady v. Corbin, 495 U.S. 508 (1990).
* 206.	Nichols v. United States, 511 U.S. 738 (1994).	Baldasar v. Illinois, 446 U.S. 222 (1980).
* 207.	Hubbard v. United States, 514 U.S. 695 (1995).	United States v. Bramblett, 348 U.S. 503 (1955).
* 208.	Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).	Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1990) (in part).
* 209.	United States v. Gaudin, 515 U.S. 506 (1995).	Sinclair v. United States, 279 U.S. 263 (1929).
* 210.	Fulton Corp. v. Faulkner, 516 U.S. 325 (1996).	Darnell v. Indiana, 226 U.S. 390 (1912).
* 211.	Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).	Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
* 212.	44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).	California v. LaRue, 409 U.S. 109 (1972) (in part); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (in part); City of Newport v. Iacobucci, 479 U.S. 92 (1986) (in part).
* 213.	Agostini v. Felton, 521 U.S. 203 (1997).	Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (in part).
* 214.	State Oil Co. v. Khan, 522 U.S. 3 (1997).	Albrecht v. Herald Co., 390 U.S. 145 (1968).
* 215.	Hudson v. United States, 522 U.S. 93 (1997).	United States v. Halper, 490 U.S. 435 (1989).
* 216.	Hohn v. United States, 524 U.S. 236 (1998).	House v. Mayo, 324 U.S. 42 (1945).
* 217.	Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).	Ward v. Race Horse, 163 U.S. 504 (1896) (in part).
* 218.	College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).	Parden v. Terminal Ry., 377 U.S. 184 (1964) (in part).
* 219.	Mitchell v. Helms, 120 S. Ct. 2530 (2000).	Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

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2d Session

SENATE

DOCUMENT
No. 108–17

THE CONSTITUTION

of the

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

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

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AUTHORIZATION

HISTORICAL NOTE PUBLIC LAW 91-589, 84 STAT. 1585, 2 U.S.C. § 168

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

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

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

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

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

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

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

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

the end of the October 1971 term of the Supreme Court, construing provisions of the Constitution;

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

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

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

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

Sec. 3. There shall be printed four thousand eight hundred and seventy additional copies of the hardbound revised editions prepared pursuant to clause (1) of the first section and of all cumulative pocket-part supplements thereto, of which two thousands six hundred and thirty-four copies shall be for the use of the House of Representatives, one thousand two hundred and thirty-six copies shall be for the use of the Senate, and one thousand copies shall be for the use of the Joint Committee on Printing. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners, newly elected subsequent to the issuance of the hardbound revised edition prepared pursuant to such clause and prior to the first hardbound decennial revised edition, who did not receive a copy of the edition prepared pursuant to such clause, shall,

upon timely request, receive one copy of such edition and the then current cumulative pocket-part supplement and any further supplements thereto. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners, no longer serving after the issuance of the hardbound revised edition prepared pursuant to such clause and who received such edition, may receive one copy of each cumulative pocket-part supplement thereto upon timely request.

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

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

Approved December 24, 1970.

INTRODUCTION TO THE 2002 EDITION

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

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

I

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

Over the last decade, however, the Court has established limits on the seemingly irrevocable expansion of the commerce power. While the Court has declined to overrule even its most expansive rulings regarding "effects" on commerce, it has recently limited the exercise of this authority to the regulation of activities which were both economic in nature and which

had a nontrivial or "substantial" affect on commerce (although regulation of non-economic activity would still be allowed if it is an essential part of a larger economic regulatory scheme). The Court also seems far less likely to defer to Congressional findings of the existence of an economic effect. The relevant cases arose in an area of traditional state concern – the regulation of criminal activity – and the new doctrine resulted in the invalidation of recently-passed federal laws, including a ban on gun possession in schools and the provision of civil remedies to compensate gender-motivated violence.

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

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

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

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

Court's recent decisions to prohibit federal claims by citizens against states in either a state's own courts or federal agencies.

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

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

II

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

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

The larger conflict has been political, and the Court resisted many efforts to involve it in litigation over the use of troops in Vietnam. In the context of treaty termination, the Court came close to declaring the resurgence of the political question doctrine to all such executive-congressional disputes. Nevertheless, a significant congressional interest in achieving a new and different balance between the political branches appears to have survived cessation of the Vietnam conflict. Future congressional assertion of this interest may well involve the judiciary to a much greater extent, and, in any event, the congressional branch is not without effective weapons of its own in this regard.

III

The Court's practice of overturning economic legislation under principles of substantive due process in order to protect "property" was already in sharp decline when Professor Corwin wrote his introduction in the 1950s. In a few isolated cases, however, especially regarding the obligation of contracts clause and perhaps the expansion of the regulatory takings doctrine, the Court demonstrated that some life is left in the old doctrines. On the other hand, the word "liberty" in the due process clauses of the Fifth and Fourteenth Amendment has been seized upon by the Court to harness substantive due process to the protection of certain personal and familial privacy rights, most controversially in the abortion cases.

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

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

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

It may be that a differently constituted Court would narrow the scope of the Amendment's protection and enlarge the permissible range of governmental action. But, in contrast to other areas in which the present Court has varied from its predecessor, the record with respect to the First Amendment has been one of substantial though uneven expansion of precedent.

IV

Unremarked by scholars of some fifty years ago was the place of the equal protection clause in constitutional jurisprudence – simply because at that time Holmes' pithy characterization of it as a "last resort" argument was generally true. Subsequently, however, especially during the Warren era, equal protection litigation occupied a position of almost predominant character in each Term's output. The rational basis standard of review of different treatments of individuals, businesses, or subjects remained of little concern to the Justices. Rather, the clause blossomed after *Brown v. Board of Education*, as the Court confronted state and local laws and ordinances drawn on the basis of race. This aspect of the doctrinal use of the clause is still very evident on the Court's docket, though in ever new and interesting forms.

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

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

V

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

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

During the last two decades, however, the Court has also redrawn some of these lines. The self-incrimination and right-to-counsel doctrines have been eroded in part (although in no respect has the Court returned to the constitutional jurisprudence prevailing before the 1960s). The exclusionary rule has been cabined and redefined in several limiting ways. Search and seizure doctrine has been revised to enlarge police powers. And, most recently, for instance, the exception for "special needs" has allowed such practices as suspicionless, random drug-testing in the workplace and at schools.

An expansion of the use of *habeas corpus* powers of the federal courts undergirded the 1960s procedural and substantive development, thus sweeping away many jurisdictional restrictions previously imposed upon the exercise of review of state criminal convictions. Concomitantly with the narrowing of the precedents of the 1950s and 1960s Court, however, came a retraction of federal *habeas* powers, both by the Court and through federal legislation.

VI

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

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

HISTORICAL NOTE ON FORMATION OF THE CONSTITUTION

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

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

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

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

[2] Text in Tansill, op. cit., 10.

[3] Id. at 19.

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

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

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

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

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

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

[4] Id. at 21.

States." Maryland in January 1785 responded to the Virginia resolution by appointing a like number of commissioners[5] "for the purpose of settling the navigation and jurisdiction over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke" with full power on behalf of Maryland "to adjudge and settle the jurisdiction to be exercised by the said State, respectively, over the waters and navigations of the same."

At the invitation of Washington the commissioners met at Mount Vernon, in March 1785, and drafted a compact which, in many of its details relative to the navigation and jurisdiction of the Potomac, is still in force.[6] What is more important, the commissioners submitted to their respective States a report in favor of a convention of all the States "to take into consideration the trade and commerce" of the Confederation. Virginia, in January 1786, advocated such a convention, authorizing its commissioners to meet with those of other States, at a time and place to be agreed on, "to take into consideration the trade of the United States; to examine the relative situations and trade of the said State; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several State, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same."[7]

This proposal for a general trade convention seemingly met with general approval; nine States appointed commissioners. Under the leadership of the Virginia delegation, which included Randolph and Madison, Annapolis was accepted as the place and the first Monday in September 1786 as the time for the convention. The attendance at Annapolis proved disappointing. Only five States--Virginia, Pennsylvania, Delaware, New Jersey, and New York--were represented; delegates from Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Because of the small representation, the Annapolis convention did not deem "it advisable to proceed on the business of their mission." After an exchange of views, the Annapolis delegates unanimously submitted to their respective States a report in which they suggested that a convention of representatives from all the States meet at Philadelphia on the second Monday in May 1787 to examine the defects in the existing system of government and formulate "a plan for supplying such defects as may be discovered."[8]

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

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

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

[7] Transill, op. cit., 38.

[8] Id. at 39.

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

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

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

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

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

State an equal vote in the upper house--five States in the affirmative, five in the negative, one divided.[9]

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

Debates on the Virginia resolutions continued. The 15 original resolutions had been expanded into 23. Since these resolutions were largely declarations of principles, on July 24 a committee of five[10] was elected to draft a detailed constitution embodying the fundamental principles which had thus far been approved. The Convention adjourned from July 26 to August 6 to await the report of its committee of detail. This committee, in preparing its draft of a Constitution, turned for assistance to the State constitutions, to the Articles of Confederation, to the various plans which had been submitted to the Convention and other available material. On the whole the report of the committee conformed to the resolutions adopted by the Convention, though on many clauses the members of the committee left the imprint of their individual and collective judgments. In a few instances the committee avowedly exercised considerable discretion.

From August 6 to September 10 the report of the committee of detail was discussed, section by section, clause by clause. Details were attended to, further compromises were effected. Toward the close of these discussions, on September 8, another committee of five[11] was appointed "to revise the style of and arrange the articles which had been agreed to by the house."

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

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

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

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

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

taining the consent of the States to the new instrument of Government, were anxious to obtain the unanimous support of the delegations from each State. It was feared that many of the delegates would refuse to give their individual assent to the Constitution. Therefore, in order that the action of the Convention would appear to be unanimous, Gouverneur Morris devised the formula "Done in Convention, by the unanimous consent of the States present the 17th of September...In witness whereof we have hereunto subscribed our names." Thirty-nine of the forty-two delegates present thereupon "subscribed" to the document. [12]

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

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

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

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

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

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

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

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

Eleven States having thus ratified the Constitution,[14] the Continental Congress--which still functioned at irregular intervals--passed a resolution on September 13, 1788, to put the new Constitution into operation. The first Wednesday of January 1789 was fixed as the day for choosing presidential electors, the first Wednesday of February for the meeting of electors, and the first Wednesday of March (i.e. March 4, 1789) for the opening session of the new Congress. Owing to various delays, Congress was late in assembling, and it was not until April 30, 1789, that George Washington was inaugurated as the first President of the United States.

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

CONSTITUTION OF THE UNITED STATES

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

Article. I.

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

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

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

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within

every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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

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

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

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

porary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

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

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

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

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

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

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at

any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

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

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

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

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

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

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning

from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

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

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

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

by their Adjournment prevent its Return, in which Case it shall not be a Law

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

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

To borrow Money on the credit of the United States;

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

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

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

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

To establish Post Offices and post Roads;

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

To constitute Tribunals inferior to the supreme Court;

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

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

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

To provide and maintain a Navy;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article. II.

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

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

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

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

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

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

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

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

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the

principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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

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

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

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

Article. III.

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

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

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appel-

late Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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

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

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

Article. IV.

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

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

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

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

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

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

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

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by

Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

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

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

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

Article. VII.

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

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

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

Attest WILLIAM JACKSON
Secretary

Go. WASHINGTON—Presidt.
and deputy from Virginia

New Hampshire	JOHN LANGDON NICHOLAS GILMAN
Massachusetts	NATHANIEL GORHAM RUFUS KING
Connecticut	WM SAML JOHNSON ROGER SHERMAN
New York	ALEXANDER HAMILTON
New Jersey	WIL: LIVINGSTON DAVID BREARLEY. WM PATTERSON. JONA: DAYTON
Pennsylvania	B FRANKLIN THOMAS MIFFLIN ROBT MORRIS GEO. CLYMER THOS FITZSIMONS JARED INGERSOL JAMES WILSON GOUV MORRIS

Delaware	GEO: READ GUNNING BEDFORD JUN JOHN DICKINSON RICHARD BASSETT JACO: BROOM
Maryland	JAMES MCHENRY DAN OF ST THOS JENIFER DANL CARROLL
Virginia	JOHN BLAIR— JAMES MADISON JR.
North Carolina	WM BLOUNT RICHD DOBBS SPAIGHT HU WILLIAMSON J. RUTLEDGE
South Carolina	CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER
Georgia	WILLIAM FEW ABR BALDWIN

In Convention Monday, September 17th 1787.
Present
The States of

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

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators

should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

Go: WASHINGTON—Presidt.

W. JACKSON Secretary.

AMENDMENTS

TO THE

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION[1]

AMENDMENT [I.][2]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

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

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

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

peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [II.]

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

AMENDMENT [III.]

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

AMENDMENT [IV.]

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

AMENDMENT [V.]

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

AMENDMENT [VI.]

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

AMENDMENT [VII.]

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

AMENDMENT [VIII.]

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

AMENDMENT [IX.]

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

AMENDMENT [X.]

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

AMENDMENT [XI.][3]

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

AMENDMENT [XII.][4]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as

[3] The Eleventh Amendment was proposed by Congress on March 4, 1794, when it passed the House, 4 *Annals of Congress* 477, 478, having previously passed the Senate on January 14, Id., 30, 31. It appears officially in 1 Stat. 402. Ratification was completed on February 7, 1795, when the twelfth State (North Carolina) approved the amendment, there being then 15 States in the Union. Official announcement of ratification was not made until January 8, 1798, when President John Adams in a message to Congress stated that the Eleventh Amendment had been adopted by three-fourths of the States and that it "may now be deemed to be a part of the Constitution." In the interim South Carolina had ratified, and Tennessee had been admitted into the Union as the sixteenth State.

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

[4] The Twelfth Amendment was proposed by Congress on December 9, 1803, when it passed the House, 13 *Annals of Congress* 775, 776, having previously passed the Senate on December 2. Id., 209. It was not signed by the presiding officers of the House and Senate until December 12. It appears officially in 2 Stat. 306. Ratification was probably completed on June 15, 1804, when the legislature of the thirteenth State (New Hampshire) approved the amendment, there being then 17 States in the Union. The Governor of New Hampshire, however, vetoed this act of the legislature on June 20, and the act failed to pass again by two-thirds vote then required by the state constitution. Inasmuch as Article V of the Federal Constitution specifies that amendments shall become effective "when ratified by legislatures of three-fourths of the several States or by conventions in three-fourths thereof," it has been generally believed that an approval or veto by a governor is without significance. If the ratification by New Hampshire be deemed ineffective, then the amendment became operative by Tennessee's ratification on July 27, 1804. On September 25, 1804, in a circular letter to the Governors of the several States, Secretary of State Madison declared the amendment ratified by three-fourths of the States.

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

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

quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII.[5]

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

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

AMENDMENT XIV.[6]

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

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

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

[6] The Fourteenth Amendment was proposed by Congress on June 13, 1866, when it passed the House, Cong. Globe (39th Cong., 1st Sess.) 3148, 3149, having previously passed the Senate on June 8. Id., 3042. It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth State

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

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and

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(South Carolina or Louisiana) approved the amendment, there being then 37 States in the Union. However, Ohio and New Jersey had prior to that date "withdrawn" their earlier assent to this amendment. Accordingly, Secretary of State Seward on July 20, 1868, certified that the amendment had become a part of the Constitution if the said withdrawals were ineffective. 15 Stat. 706–707. Congress on July 21, 1868, passed a joint resolution declaring the amendment a part of the Constitution and directing the Secretary to promulgate it as such. On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution. In the interim, two other States, Alabama on July 13 and Georgia on July 21, 1868, had added their ratifications.

The several state legislatures ratified the Fourteenth Amendment on the following dates: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (the New Jersey Legislature on February 20, 1868 "withdrew" its consent to the ratification; the Governor vetoed that bill on March 5, 1868; and it was repassed over his veto on March 24, 1868); Oregon, September 19, 1866 (Oregon "withdrew" its consent on October 15, 1868); Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11, 1867 (Ohio "withdrew" its consent on January 15, 1868); Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867 (date on which it was certified by the Missouri secretary of state); Rhode Island, February 7, 1867; Pennsylvania, February 12, 1867; Wisconsin, February 13, 1867 (actually passed February 7, but not signed by legislative officers until February 13); Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 9, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868 (after having rejected the amendment on December 13, 1866); Louisiana, July 9, 1868 (after having rejected the amendment on February 6, 1867); South Carolina, July 8, 1868 (after having rejected the amendment on December 20, 1866); Alabama, July 13, 1868 (date on which it was "approved" by the Governor); Georgia, July 21, 1868 (after having rejected the amendment on November 9, 1866—Georgia ratified again on February 2, 1870); Virginia, October 8, 1869 (after having rejected the amendment on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected the amendment on October 27, 1866); Delaware, February 12, 1901 (after having rejected the amendment on February 7, 1867). The amendment was rejected (and not subsequently ratified) by Kentucky on January 8, 1867. Maryland and California ratified this amendment in 1959.

Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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

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

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

AMENDMENT XV. [7]

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

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

AMENDMENT XVI. [8]

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

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

The several state legislatures ratified the Fifteenth Amendment on the following dates: Nevada, March 1, 1869; West Virginia, March 3, 1869; North Carolina, March 5, 1869; Louisiana, March 5, 1869 (date on which it was "approved" by the Governor); Illinois, March 5, 1869; Michigan, March 5, 1869; Wisconsin, March 5, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; South Carolina, March 15, 1869; Arkansas, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York "withdrew" its consent to the ratification on January 5, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had ratified the first section of the 15th Amendment on March 1, 1869; it failed to include in its ratification the second section of the amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the amendment on March 18, 1869). The amendment was rejected (and not subsequently ratified) by Kentucky, Maryland, and Tennessee. California ratified this amendment in 1962 and Oregon in 1959.

[8] The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House, 44 Cong. Rec. (61st Cong., 1st Sess.) 4390, 4440, 4441, having previously passed the Senate on July 5. Id., 4121. It appears officially in 36 Stat. 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or New Mexico) approved the amendment, there being then 48 States in the Union. On February

among the several States, and without regard to any census or enumeration.

AMENDMENT [XVII.][9]

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

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

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

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

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

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

writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

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

AMENDMENT [XVIII.] [10]

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

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

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

The several state legislatures ratified the Eighteenth Amendment on the following dates: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 28, 1918 (date on which approved by Governor); South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 9, 1918 (date on which approved by Governor); Florida, November 27, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Illinois, January 14, 1919; Indiana, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919; Minnesota, January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; Pennsylvania, February 25, 1919; Connecticut, May 6, 1919; New Jersey, March 9, 1922; New York, January 29, 1919; Vermont, January 29, 1919.

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

AMENDMENT [XIX.][11]

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

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

AMENDMENT [XX.][12]

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

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

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

[12] The Twentieth Amendment was proposed by Congress on March 2, 1932, when it passed the Senate, Cong. Rec. (72d Cong., 1st Sess.) 5086, having previously passed the House on March 1. Id., 5027. It appears officially in 47 Stat. 745. Ratification was completed on January 23, 1933, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On February 6, 1933, Secretary of State Stimson certified that it had become a part of the Constitution. 47 Stat. 2569.

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

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

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

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

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

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

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

AMENDMENT [XXI.] [13]

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

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

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

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

therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

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

AMENDMENT [XXII.][14]

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

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

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

President or acting as President during the remainder of such term.

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

AMENDMENT [XXIII.] [15]

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

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

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

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

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

AMENDMENT [XXIV.][16]

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

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

AMENDMENT [XXV.][17]

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

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

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

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

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

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

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

This Amendment was ratified by the following States:

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

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on February 25, 1967, F.R. Doc. 67–2208, 32 Fed. Reg. 3287.

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

AMENDMENT [XXVI] [18]

SECTION. 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied

[18] The Twenty-sixth Amendment was proposed by Congress on March 23, 1971, upon passage by the House of Representatives, the Senate having previously passed an identical resolution on March 10, 1971. It appears officially in 85 Stat. 825. Ratification was completed on July 1, 1971, when action by the legislature of the 38th State, North Carolina, was concluded, and the Administrator of the General Services Administration officially certified it to have been duly ratified on July 5, 1971. 36 Fed. Reg. 12725.

As of the publication of this volume, 42 States had ratified this Amendment:

Connecticut, March 23, 1971; Delaware, March 23, 1971; Minnesota, March 23, 1971; Tennessee, March 23, 1971; Washington, March 23, 1971; Hawaii, March 24, 1971; Massachusetts, March 24, 1971; Montana, March 29, 1971; Arkansas, March 30, 1971; Idaho, March 30, 1971; Iowa, March 30, 1971; Nebraska, April 2, 1971; New Jersey, April 3, 1971; Kansas, April 7, 1971; Michigan, April 7, 1971; Alaska, April 8, 1971; Maryland, April 8, 1971; Indiana, April

or abridged by the United States or by any State on account of age.

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

AMENDMENT [XXVII] [19]

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

8, 1971; Maine, April 9, 1971; Vermont, April 16, 1971; Louisiana, April 17, 1971; California, April 19, 1971; Colorado, April 27, 1971; Pennsylvania, April 27, 1971; Texas, April 27, 1971; South Carolina, April 28, 1971; West Virginia, April 28, 1971; New Hampshire, May 13, 1971; Arizona, May 14, 1971; Rhode Island, May 27, 1971; New York, June 2, 1971; Oregon, June 4, 1971; Missouri, June 14, 1971; Wisconsin, June 22, 1971; Illinois, June 29, 1971; Alabama, June 30, 1971; Ohio, June 30, 1971; North Carolina, July 1, 1971; Oklahoma, July 1, 1971; Virginia, July 8, 1971; Wyoming, July 8, 1971; Georgia, October 4, 1971.

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

The several state legislatures ratified the proposal on the following dates: Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; Delaware, January 28, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791; Ohio, May 6, 1873; Wyoming, March 6, 1978; Maine, April 27, 1983; Colorado, April 22, 1984; South Dakota, February 1985; New Hampshire, March 7, 1985; Arizona, April 3, 1985; Tennessee, May 28, 1985; Oklahoma, July 10, 1985; New Mexico, February 14, 1986; Indiana, February 24, 1986; Utah, February 25, 1986; Arkansas, March 13, 1987; Montana, March 17, 1987; Connecticut, May 13, 1987; Wisconsin, July 15, 1987; Georgia, February 2, 1988; West Virginia, March 10, 1988; Louisiana, July 7, 1988; Iowa, February 9, 1989; Idaho, March 23, 1989; Nevada, April 26, 1989; Alaska, May 6, 1989; Oregon, May 19, 1989; Minnesota, May 22, 1989; Texas, May 25, 1989; Kansas, April 5, 1990; Florida, May 31, 1990; North Dakota, Mary 25, 1991; Alabama, May 5, 1992; Missouri, May 5, 1992; Michigan, May 7, 1992. New Jersey subsequently ratified on May 7, 1992.

PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES

PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES

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

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

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

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

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

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

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

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

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

"ARTICLE THIRTEEN

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

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

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

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

ARTICLE———

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

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

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

HOUSE JOINT RESOLUTION 208

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

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

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

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

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

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

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

HOUSE JOINT RESOLUTION 554

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

"ARTICLE

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

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

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

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

THE PREAMBLE

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

Purpose and Effect of the Preamble

Although the preamble is not a source of power for any department of the Federal Government,[1] the Supreme Court has often referred to it as evidence of the origin, scope, and purpose of the Constitution.[2] "Its true office," wrote Joseph Story in his *Commentaries*, "is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?"[3]

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[1] Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

[2] *E.g.*, the Court has read the preamble as bearing witness to the fact that the Constitution emanated from the people and was not the act of sovereign and independent States. McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 403 (1819) Chisholm v. Georgia, 2 Dall. (2 U.S.) 419, 471 (1793); Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 324 (1816), and that it was made for, and is binding only in, the United States of America. Downes v. Bidwell, 182 U.S. 244 (1901); In re Ross, 140 U.S. 453, 464 (1891).

[3] 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 462 (1833). For a lengthy exegesis of the preamble phrase by phrase, see M. ADLER & W. GORMAN, THE AMERICAN TESTAMENT 63-118 (1975).

ARTICLE I

LEGISLATIVE DEPARTMENT

CONTENTS

LEGISLATIVE DEPARTMENT

ARTICLE I

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

SEPARATION OF POWERS AND CHECKS AND BALANCES

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

The Theory Elaborated and Implemented

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

[1] Among the best historical treatments are M.Vile, Constitutionalism and the Separation of Powers (1967), and W. Gwyn, The Meaning of the Separation of Powers (1965).

[2] Thus the Constitution of Virginia of 1776 provided: "The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time[.]" Reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (W. S. Windler ed., 1979). *See also* 5 id. at 96, Art. XXX of Part First, Massachusetts Constitution of 1780: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."

place events prior to the convening of the Convention.[3] Theory as much as experience guided the Framers in the summer of 1787.[4]

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

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

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

[4] The intellectual history through the state period and the Convention proceedings is detailed in G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969) (*see* index entries under "separation of powers").

[5] THE FEDERALIST Nos. 47–51 (J. Cooke ed. 1961), 323–353 (Madison).

[6] Id. at No. 47, 325–326 (emphasis in original).

[7] Id. at Nos. 47–49, 325–343.

counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[8]

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

Judicial Enforcement

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

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[8] Id. at No. 51, 349.

[9] "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Justice Jackson concurring).

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

[11] *See* Mistretta v. United States, 488 U.S. 361, 415–416 (1989) (Justice Scalia dissenting).

[12] The principal example is Myers v. United States, 272 U.S. 52 (1926), written by Chief Justice Taft, himself a former President. The breadth of the holding was modified in considerable degree in Humphrey's Executor v. United States, 295 U.S. 602 (1935), and the premise of the decision itself was recast and largely softened in Morrison v. Olson, 487 U.S. 654 (1988).

Following a lengthy period of relative inattention to separation of powers issues, the Court since 1976[13] has recurred to the doctrine in numerous cases, and the result has been a substantial curtailing of congressional discretion to structure the National Government. Thus, the Court has interposed constitutional barriers to a congressional scheme to provide for a relatively automatic deficit-reduction process because of the critical involvement of an officer with significant legislative ties,[14] to the practice set out in more than 200 congressional enactments establishing a veto of executive actions,[15] and to the vesting of broad judicial powers to handle bankruptcy cases in officers not possessing security of tenure and salary.[16] On the other hand, the highly-debated establishment by Congress of a process by which independent special prosecutors could be established to investigate and prosecute cases of alleged corruption in the Executive Branch was sustained by the Court in a opinion that may presage a judicial approach in separation of powers cases more accepting of some blending of functions at the federal level.[17]

Important as the results were in this series of cases, the development of two separate and inconsistent doctrinal approaches to separation of powers issues occasioned the greatest amount of commentary. The existence of the two approaches, which could apparently be employed in the discretion of the Justices, made difficult the prediction of the outcomes of differences over proposals and alternatives in governmental policy. Significantly, however, it appeared that the Court most often used a more strict analysis in cases in which infringements of executive powers were alleged and a less strict analysis when the powers of the other two Branches were concerned. The special prosecutor decision, followed by the decision sustaining the Sentencing Commission, may signal the adoption of a single analysis, the less strict analysis, for all separation of power cases or it may turn out to be but an exception to the Court's dual doctrinal approach.[18]

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[13] Beginning with Buckley v. Valeo, 424 U.S. 1, 109–43 (1976), a relatively easy case, in which Congress had attempted to reserve to itself the power to appoint certain officers charged with enforcement of a law.

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

[15] INS v. Chadha, 462 U.S. 919 (1983).

[16] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

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

[18] The tenor of a later case, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991), was decidedly formalistic, but it involved a factual situation and a doctrinal predicate easily rationalized by the principles of *Morrison* and *Mistretta*, aggrandizement of its powers by Congress. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), reasserted the fundamental status of *Marathon*, again in a bankruptcy courts context, although the issue was

While the two doctrines have been variously characterized, the names generally attached to them have been "formalist," applied to the more strict line, and "functional," applied to the less strict. The formalist approach emphasizes the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating.[19] The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential attributes of the legislative, executive, or judicial function or functions. Under this approach, there is considerable flexibility in the moving branch, usually Congress acting to make structural or institutional change, if there is little significant risk of impairment of a core function or in the case of such a risk if there is a compelling reason for the action.[20]

Chadha used the formalist approach to invalidate the legislative veto device by which Congress could set aside a determination by the Attorney General, pursuant to a delegation from Congress, to suspend deportation of an alien. Central to the decision were two conceptual premises. First, the action Congress had taken was leg-

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the right to a jury trial under the Seventh Amendment rather than strictly speaking a separation-of-powers question. Freytag v. CIR, 501 U.S. 868 (1991), 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, 491 U.S. 440, 467 (1989) (concurring), Justice Kennedy would have followed the formalist approach, but he explicitly grounded it on the distinction between an express constitutional vesting of power as against implicit vestings. Separately, the Court has for some time viewed the standing requirement for access to judicial review as reflecting a separation-of-powers component—confining the courts to their proper sphere— Allen v. Wright, 468 U.S. 737, 752 (1984), but that view seemed largely superfluous to the conceptualization of standing rules. However, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992), the Court imported the take-care clause, obligating the President to see to the faithful execution of the laws, into standing analysis, creating a substantial barrier to congressional decisions to provide for judicial review of executive actions. It is not at all clear, however, that the effort, by Justice Scalia, enjoys the support of a majority of the Court. Id. at 579-81 (Justices Kennedy and Souter concurring). The cited cases do seem to demonstrate that a strongly formalistic wing of the Court does continue to exist.

[19] "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." INS v. Chadha, 462 U.S. 919, 951 (1983). *See* id. at 944–51; Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–66 (1982) (plurality opinion); Bowsher v. Synar, 478 U.S. 714, 721–727 (1986).

[20] CFTC v. Schor, 478 U.S. 833, 850–51, 856–57 (1986); Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587, 589–93 (1985). The Court had first formulated this analysis in cases challenging alleged infringments on presidential powers, United States v. Nixon, 418 U.S. 683, 713 (1974); Nixon v. Administrator of General Services, 433 U.S. 425, 442–43 (1977), but it had subsequently turned to the more strict test. *Schor* and *Thomas* both involved provisions challenged as infringing judicial powers.

islative, because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside the Legislative Branch, and thus Congress had to comply with the bicameralism and presentment requirements of the Constitution.[21] Second, the Attorney General was performing an executive function in implementing the delegation from Congress, and the legislative veto was an impermissible interference in the execution of the laws. Congress could act only by legislating, by changing the terms of its delegation.[22] In *Bowsher*, the Court held that Congress could not vest even part of the execution of the laws in an officer, the Comptroller General, who was subject to removal by Congress because this would enable Congress to play a role in the execution of the laws. Congress could act only by passing other laws.[23]

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

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[21] INS v. Chadha, 462 U.S. 919, 952 (1983).

[22] Id. at 954–955.

[23] Bowsher v. Synar, 478 U.S. 714, 726–727, 733–734 (1986).

[24] While 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 characterization of the entity is irrelevant and, in fact, the Court made nothing of the difference. The issue in either case was whether the judicial power of the United States could be conferred on an entity not an Article III court.

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

[26] *Schor*, 478 U.S. at 851.

[27] 478 U.S. at 856.

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

While the Court, in applying one or the other analysis in separation of powers cases, had never indicated its standards for choosing one analysis over the other, beyond inferences that the formalist approach was proper when the Constitution fairly clearly committed a function or duty to a particular branch and the functional approach was proper when the constitutional text was indeterminate and a determination must be made on the basis of the likelihood of impairment of the essential powers of a branch, the overall results had been a strenuous protection of executive powers and a concomitant relaxed view of the possible incursions into the powers of the other branches. It was thus a surprise, then, when in the independent counsel case, the Court, again without stating why it chose that analysis, utilized the functional standard to sustain the creation of the independent counsel.[28] The independent-counsel statute, the Court emphasized, was not an attempt by Congress to increase its own power at the expense of the executive nor did it constitute a judicial usurpation of executive power. Moreover, the Court stated, the law did not "impermissibly undermine" the powers of the Executive Branch nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[29] Acknowledging that the statute undeniably reduced executive control over what it had previously identified as a core executive function, the execution of the laws through criminal prosecution , through its appointment provisions and its assurance of independence by limitation of removal to a "good cause" standard, the Court nonetheless noticed the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to ensure that the laws are faithfully executed by the counsel. This balancing, the Court thought, left the President with sufficient control to ensure that he is able to perform his constitutionally assigned functions. A notably more pragmatic, functional analysis suffused the opinion of the Court when it upheld the con-

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

[29] 487 U.S. at 695 (quoting, respectively, *Schor*, 478 U.S. at 856, and Nixon v. Administrator of General Services, 433 U.S. at 443).

stitutionality of the Sentencing Commission.[30] Charged with promulgating guidelines binding on federal judges in sentencing convicted offenders, the seven-member Commission, three members of which had to be Article III judges, was made an independent entity in the judicial branch. The President appointed all seven members, the judges from a list compiled by the Judicial Conference, and he could remove from the Commission any member for cause. According to the Court, its separation-of-powers jurisprudence is always animated by the concerns of encroachment and aggrandizement. "Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[31] Thus, to each of the discrete questions, the placement of the Commission, the appointment of the members, especially the service of federal judges, and the removal power, the Court carefully analyzed whether one branch had been given power it could not exercise or had enlarged its powers impermissibly and whether any branch would have its institutional integrity threatened by the structural arrangement.

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

BICAMERALISM

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

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

[31] 488 U.S. at 382.

unicameral, and the Continental Congress, limited in power as it was, consisted of one house.

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

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

ENUMERATED, IMPLIED, RESULTING, AND INHERENT POWERS

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

[32] THE FEDERALIST, No. 39 (J. Cooke ed. 1961), 250–257 (Madison).

[33] Id. at No. 51, 347–353 (Madison). The assurance of the safeguard is built into the presentment clause. Article I, § 7, cl. 2; *and see* id. at cl. 3. The structure is not often the subject of case law, but it was a foundational matter in INS v. Chadha, 462 U.S. 919, 944–951 (1983).

[34] 17 U.S. (4 Wheat.) 316, 405 (1819).

and is found in decisions of the Court;[35] a similar latitudinarian conception of "the judicial power of the United States" was voiced in Justice Brewer's opinion for the Court in *Kansas v. Colorado*.[36] But even when confined to "the legislative powers herein granted," the doctrine is severely strained by Marshall's conception of some of these as set forth in his *McCulloch v. Maryland* opinion. He asserts that "the sword and the purse, all the external relations and no inconsiderable portion of the industry of the nation, are intrusted to its government;"[37] he characterizes "the power of making war," of "levying taxes," and of "regulating commerce" as "great, substantive and independent powers;"[38] and the power conferred by the "necessary and proper" clause embraces, he declares, all legislative "means which are appropriate" to carry out the legitimate ends of the Constitution, unless forbidden by "the letter and spirit of the Constitution."[39]

Nine years later, Marshall introduced what Story in his *Commentaries* labels the concept of "resulting powers," those which "rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specially enumerated."[40] Story's reference is to Marshall's opinion in *American Insurance Co. v. Canter*,[41] where the latter said, that "the Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[42] And from the power to acquire territory, he continues, arises as "the inevitable consequence" the right to govern it.[43]

Subsequently, powers have been repeatedly ascribed to the National Government by the Court on grounds that ill accord with the doctrine of enumerated powers: the power to legislate in effectuation of the "rights expressly given, and duties expressly enjoined" by the Constitution;[44] the power to impart to the paper currency of the Government the quality of legal tender in the payment

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[35] *See* discussion under Article II, § 1, cl. 1, Executive Power: Theory of the Presidential Office, infra.

[36] 206 U.S. 46, 82 (1907).

[37] 17 U.S. (4 Wheat.) at 407.

[38] 17 U.S. at 411.

[39] 17 U.S. at 421.

[40] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1256 (1833). *See also* id. at 1286 and 1330.

[41] 26 U.S. (1 Pet.) 511 (1828).

[42] 26 U.S. at 542.

[43] 26 U.S. at 543.

[44] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618–619 (1842).

of debts;[45] the power to acquire territory by discovery;[46] the power to legislate for the Indian tribes wherever situated in the United States;[47] the power to exclude and deport aliens;[48] and to require that those who are admitted be registered and fingerprinted;[49] and finally the complete powers of sovereignty, both those of war and peace, in the conduct of foreign relations. Thus, in *United States v. Curtiss-Wright Corp.*,[50] decided in 1936, Justice Sutherland asserted the dichotomy of domestic and foreign powers, with the former limited under the enumerated powers doctrine and the latter virtually free of any such restraint. That doctrine has been the source of much scholarly and judicial controversy, but, although limited, it has not been repudiated.

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

DELEGATION OF LEGISLATIVE POWER

The History of the Doctrine of Nondelegability

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

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[45] Juilliard v. Greenman, 110 U.S. 421, 449–450 (1884). *See also* Justice Bradley's concurring opinion in Knox v. Lee, 79 U.S. (12 Wall.) 457, 565 (1871).

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

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

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

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

[50] 299 U.S. 304 (1936).

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

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

[53] The Court in *Shreveport Grain & Elevator* upheld a delegation of authority to the FDA to allow reasonable variations, tolerances, and exemptions from mis-

tion of the law requires exercise of discretion,[54] 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."[55] 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."[56] Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies.

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

The modern doctrine may be traced to the 1928 case *J. W. Hampton, Jr. & Co. v. United States*, in which the Court, speaking through Chief Justice Taft, upheld Congress' delegation to the President of the authority to set tariff rates that would equalize production costs in the United States and competing countries.[57] Although formally invoking the contingency theory, the Court's opinion also looked forward, emphasizing that in seeking the cooperation of another branch Congress was restrained only according to "common sense and the inherent necessities" of the situation.[58] This vague statement was elaborated somewhat in the statement that the Court would sustain delegations whenever Congress provided an "intelligible principle" to which the President or an agency must conform.[59]

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branding 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."

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

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

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

[57] 276 U.S. 394 (1928).

[58] 276 U.S. at 406.

[59] 276 U.S. at 409. The "intelligible principle" test of *Hampton* is the same as the "legislative standards" test of A. L. A. Schechter Poultry Corp. v. United States,

As characterized by the Court, the delegations struck down in 1935 in the *Panama Refining*[60] and *Schechter*[61] cases were not only broad but unprecedented. Both cases involved provisions of the National Industrial Recovery Act. At issue in *Panama Refining* was a delegation to the President of authority to prohibit interstate transportation of what was known as "hot oil" – oil produced in excess of quotas set by state law. The problem was that the Act provided no guidance to the President in determining whether or when to exercise this authority, and required no finding by the President as a condition of exercise of the authority. Congress "declared no policy, . . . established no standard, [and] laid down no rule," but rather "left the matter to the President without standard or rule, to be dealt with as he pleased."[62] At issue in *Schechter* was a delegation to the President of authority to promulgate codes of fair competition that could be drawn up by industry groups or prescribed by the President on his own initiative. The codes were required to implement the policies of the Act, but those policies were so general as to be nothing more than an endorsement of whatever might be thought to promote the recovery and expansion of the particular trade or industry. The President's authority to approve, condition, or adopt codes on his own initiative was similarly devoid of meaningful standards, and "virtually unfettered."[63] This broad delegation was "without precedent." The Act supplied "no standards" for any trade or industry group, and, unlike other broad delegations that had been upheld, did not set policies that could be implemented by an administrative agency required to follow "appropriate administrative procedure." "Instead of prescribing rules of conduct, [the Act] authorize[d] the making of codes to prescribe them."[64]

Since 1935, the Court has not struck down a delegation to an administrative agency.[65] Rather, the Court has approved, "without deviation, Congress' ability to delegate power under broad stand-

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295 U.S. 495, 530 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

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

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

[62] 293 U.S. at 430, 418, respectively. Similarly, the 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.

[63] 295 U.S. at 542.

[64] 295 U.S. at 541. Other concerns were that the industrial codes were backed by criminal sanction, and that regulatory power was delegated to private individuals. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

[65] 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).

ards."[66] The Court has upheld, for example, delegations to administrative agencies to determine "excessive profits" during wartime,[67] to determine "unfair and inequitable distribution of voting power" among securities holders,[68] to fix "fair and equitable" commodities prices,[69] to determine "just and reasonable" rates,[70] and to regulate broadcast licensing as the "public interest, convenience, or necessity require."[71] During all this time the Court "has not seen fit . . . to enlarge in the slightest [the] relatively narrow holdings" of *Panama Refining* and *Schechter*.[72] Again and again, the Court has distinguished the two cases, sometimes by finding adequate standards in the challenged statute,[73] sometimes by contrasting the vast scope of the power delegated by the National Industrial Recovery Act,[74] and sometimes by pointing to required administrative findings and procedures that were absent in the NIRA.[75] The Court has also relied on the constitutional doubt principle of statutory construction to narrow interpretations of statutes that, interpreted broadly, might have presented delegation issues.[76]

Concerns in the scholarly literature with respect to the scope of the delegation doctrine[77] have been reflected in the opinions of

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

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

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

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

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

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

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

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

[74] *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (contrasting the delegation to deal with "unprecedented economic problems of varied industries" with the delegation of authority to deal with problems of the banking industry, where there was "accumulated experience" derived from long regulation and close supervision); Whitman v. American Trucking Ass'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'").

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

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

[77] *E.g.*, *A Symposium on Administrative Law: Part I - Delegation of Powers to Administrative Agencies*, 36 AMER. U. L. REV. 295 (1987); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORN. L. REV. 1 (1982).

some of the Justices.[78] Nonetheless, the Court's decisions continue to approve very broad delegations,[79] and the practice will likely remain settled.

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

The Nature and Scope of Permissible Delegations

Application of two distinct constitutional principles contributed to the development of the nondelegation doctrine: separation of powers and due process. A rigid application of separation of powers would prevent the lawmaking branch from divesting itself of any of its power and conferring it on one of the other branches. But the doctrine is not so rigidly applied as to prevent conferral of significant authority on the executive branch.[80] In *J. W. Hampton, Jr. & Co. v. United States*,[81] Chief Justice Taft explained the doctrine's import in the delegation context. "The Federal Constitution . . . divide[s] the governmental power into three branches. . . . [I]n carrying out that constitutional division . . . it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either execu-

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[78] American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Chief Justice Burger dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (then-Justice Rehnquist concurring). *See also* United States v. Midwest Video Corp., 406 U.S. 649, 675, 677 (1972) (Chief Justice Burger concurring, Justice Douglas dissenting); Arizona v. California, 373 U.S. 546, 625–26 (1963) (Justice Harlan dissenting in part). Occasionally, statutes are narrowly construed, purportedly to avoid constitutional problems with delegations. *E.g.*, Industrial Union Dep't, 448 U.S. at 645–46 (plurality opinion); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

[79] *E.g.*, Mistretta v. United States, 488 U.S. 361, 371–79 (1989). *See also* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 220–24 (1989); Touby v. United States, 500 U.S. 160, 164–68 (1991); Whitman v. American Trucking Ass'ns, 531 U.S. 547 (2001). While expressing considerable reservations about the scope of delegations, Justice Scalia, in *Mistretta*, 488 U.S. at 415–16, conceded both the inevitability of delegations and the inability of the courts to police them.

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

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

[81] 276 U.S. 394, 405–06 (1928).

tive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[82]

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

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

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*.[86] He distinguished between "important" subjects, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provi-

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

[83] 517 U.S. 748 (1996).

[84] 517 U.S. at 758–59.

[85] Carter v. Carter Coal Co., 298 U.S. 238, 310–12 (1936); Yakus v. United States, 321 U.S. 414, 424-25 (1944). Since 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).

[86] 23 U.S. (10 Wheat.) 1, 41 (1825).

sion may be made, and power given to those who are to act under such general provisions, to fill up the details." While his distinction may be lost, the theory of the power "to fill up the details" remains current. A second theory, formulated even earlier, is that Congress may legislate contingently, leaving to others the task of ascertaining the facts that bring its declared policy into operation.[87]

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

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

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

[88] 23 U.S. (10 Wheat.) 1 (1825).

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

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

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

[92] 165 U.S. at 533.

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

[94] 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.

Contingent Legislation.—An entirely different problem arises when, instead of directing another department of government to apply a general statute to individual cases, or to supplement it by detailed regulation, Congress commands that a previously enacted statute be revived, suspended, or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer. Since the delegated function in such cases is not that of "filling up the details" of a statute, authority for it must be sought under some other theory.

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

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

194 (1912) (upholding delegation to prescribe methods of accounting for carriers in interstate commerce).

[95] 11 U.S. (7 Cr.) 382 (1813).

[96] 11 U.S. (7 Cr.) at 388.

[97] 143 U.S. 649 (1892).

[98] 143 U.S. at 691.

tion of the suspension so ordered."[99] By similar reasoning, the Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as such differences were ascertained and proclaimed by the President.[100]

Standards.—Implicit in the concept of filling in the details is the idea that there is some intelligible guiding principle or framework to apply. Indeed, the requirement that Congress set forth "intelligible principles" or "standards" to guide as well as limit the agency or official in the performance of its assigned task has been critical to the Court's acceptance of legislative delegations. In theory, the requirement of standards serves two purposes: "it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people, [and] it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged."[101]

The only two instances in which the Court has found an unconstitutional delegation to a public entity have involved grants of discretion that the Court found to be unbounded, hence standardless. Thus, in *Panama Refining Co. v. Ryan*,[102] the President was authorized to prohibit the shipment in interstate commerce of "hot oil"—oil produced in excess of state quotas. Nowhere – not in the language conferring the authority, nor in the "declaration of policy," nor in any other provision – did the statute specify a policy to guide the President in determining when and under what circumstances to exercise the power.[103] While the scope of granted authority in *Panama Refining* was narrow, the grant in *A.L.A. Schechter Poultry Corp. v. United States*[104] was sweeping. The National Industrial Recovery Act devolved on the executive branch the power to formulate codes of "fair competition" for all industry in order to promote "the policy of this title." The policy was "to eliminate unfair competitive practices, to promote the fullest possible

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[99] 143 U.S. at 692, 693.

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

[101] Arizona v. California, 373 U.S. 546, 626 (1963) (Justice Harlan, dissenting).

[102] 293 U.S. 388 (1935).

[103] The Court, in the view of many observers, was influenced heavily by the fact that the President's orders were nowhere published and notice of regulations bearing criminal penalties for their violations was spotty at best. *Cf.* E. CORWIN, THE PRESIDENT—OFFICE AND POWERS 1787–1957 394–95 (4th ed. 1958). The result of the Government's discomfiture in Court was enactment of the Federal Register Act, 49 Stat. 500 (1935), 44 U.S.C. § 301, providing for publication of Executive Orders and agency regulations in the daily Federal Register.

[104] 295 U.S. 495 (1935).

utilization of the present productive capacity of industries, . . . and otherwise to rehabilitate industry. . . ." [105] Though much of the opinion is written in terms of the failure of these policy statements to provide meaningful standards, the Court was also concerned with the delegation's vast scope – the "virtually unfettered" discretion conferred on the President of "enacting laws for the government of trade and industry throughout the country." [106]

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

The Court has been notably successful in finding standards that are constitutionally adequate. Standards have been ascertained to exist in such formulations as "just and reasonable," [110] "public interest," [111] "public convenience, interest, or ne-

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[105] 48 Stat. 195 (1933), Tit. I, § 1.

[106] 295 U.S. at 541–542. A delegation of narrower scope led to a different result in Fahey v. Mallonee, 332 U.S. 245, 250 (1947), the Court finding explicit standards unnecessary because "[t]he provisions are regulatory" and deal with but one enterprise, banking, the problems of which are well known and the authorized remedies as equally well known. "A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields." The Court has recently explained that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 475 (2001) (Congress need not provide "any direction" to EPA in defining "country elevators," but "must provide substantial guidance on setting air standards that affect the entire national economy").

[107] 307 U.S. 533 (1939).

[108] 307 U.S. at 575. Other guidance in the marketing law limited the terms of implementing orders and specified the covered commodities.

[109] Yakus v. United States, 321 U.S. 414 (1944) (the principal purpose was to control wartime inflation, and the administrator was directed to give "due consideration" to a specified pre-war base period).

[110] Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930).

[111] New York Central Securities Corp. v. United States, 287 U.S. 12 (1932).

cessity,"[112] "unfair methods of competition,"[113] and "requisite to protect the public health [with] an adequate margin of safety."[114] Thus, in *National Broadcasting Co. v. United States*,[115] the Court found that the discretion conferred on the Federal Communications Commission to license broadcasting stations to promote the "public interest, convenience, or necessity" conveyed a standard "as complete as the complicated factors for judgment in such a field of delegated authority permit."[116] Yet the regulations upheld were directed to the contractual relations between networks and stations and were designed to reduce the effect of monopoly in the industry, a policy on which the statute was silent.[117] When in the Economic Stabilization Act of 1970, Congress authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries," and the President responded by imposing broad national controls, the lower court decision sustaining the action was not even appealed to the Supreme Court.[118] Explicit standards are not even required in all situations, the Court having found standards reasonably implicit in a delegation to the Federal Home Loan Bank Board to regulate banking associations.[119]

The Court has recently emphatically rejected the idea that administrative implementation of a congressional enactment may provide the intelligible standard necessary to uphold a delegation. The Court's decision in *Lichter v. United States*[120] could be read as approving of a bootstrap theory, the Court in that case having upheld the validity of a delegation of authority to recover "excessive profits" as applied to profits earned prior to Congress's incorporation into the statute of the administrative interpretation.[121] In *Whit-*

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[112] Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

[113] FTC v. Gratz, 253 U.S. 421 (1920).

[114] Whitman v. American Trucking Ass'ns, 531 U.S. 547 (2001).

[115] 319 U.S. 190 (1943).

[116] 319 U.S. at 216.

[117] Similarly, the promulgation by the FCC of rules creating a "fairness doctrine" and a "right to reply" rule has been sustained, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), as well as a rule requiring the carrying of anti-smoking commercials. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969).

[118] Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971). The three-judge court relied principally on *Yakus*.

[119] Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (the Court explained that both the problems of the banking industry and the authorized remedies were well known).

[120] 334 U.S. 742 (1948).

[121] In upholding the delegation as applied to the pre-incorporation administrative definition, the Court explained that "[t]he statutory term 'excessive profits,' in its context, was a sufficient expression of legislative policy and standards to render it constitutional." 334 U.S. at 783. The "excessive profits" standard, prior to defini-

man v. American Trucking Associations,[122] however, the Court asserted that *Lichter* mentioned agency regulations only "because a subsequent Congress had incorporated the regulations into a revised version of the statute."[123] "We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction . . . ,"[124] the Court concluded.

Even in "sweeping regulatory schemes" that affect the entire economy, the Court has "never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[125] Thus Congress need not quantify how "imminent" is too imminent, how "necessary" is necessary enough, how "hazardous" is too hazardous, or how much profit is "excess." Rather, discretion to make such determinations may be conferred on administrative agencies.[126]

While Congress must ordinarily provide some guidance that indicates broad policy objectives, there is no general prohibition on delegating authority that includes the exercise of policy judgment. In *Mistretta v. United States*,[127] the Court approved congressional delegations to the Sentencing Commission, an independent agency in the judicial branch, to develop and promulgate guidelines binding federal judges and cabining their discretion in sentencing criminal defendants. Although the Court enumerated the standards Congress had provided, it admitted that significant discretion existed with respect to making policy judgments about the relative severity of different crimes and the relative weight of the characteristics of offenders that are to be considered, and stated forthrightly that delegations may carry with them "the need to exercise judgment on matters of policy."[128] A number of cases illustrate the point. Thus, the Court has upheld complex economic regulations of industries in instances in which the agencies had first denied possession of such power, had unsuccessfully sought authorization from Congress, and had finally acted without the requested congressional guidance.[129] The Court has also recognized that when

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tion, was contained in Tit. 8 of the Act of October 21, 1942, 56 Stat. 798, 982. The administrative definition was added by Tit. 7 of the Act of February 25, 1944, 58 Stat. 21, 78.

[122] 531 U.S. 547 (2001).

[123] 531 U.S. at 472.

[124] Id.

[125] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 475 (2001).

[126] Whitman, 531 U.S. at 475-76.

[127] 488 U.S. 361 (1989).

[128] 488 U.S. at 378.

[129] *E.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968); American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397 (1967).

Administrations change, new officials may have sufficient discretion under governing statutes to change or even reverse agency policies.[130]

It seems therefore reasonably clear that the Court does not really require much in the way of standards from Congress. The minimum which the Court usually insists on is that Congress employ a delegation which "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."[131] Where the congressional standards are combined with requirements of notice and hearing and statements of findings and considerations by the administrators, so that judicial review under due process standards is possible, the constitutional requirements of delegation have been fulfilled.[132] This requirement may be met through the provisions of the Administrative Procedure Act,[133] but where that Act is inapplicable or where the Court sees the necessity for exceeding its provisions, due process can supply the safeguards of required hearing, notice, supporting statements, and the like.[134]

Preemptive Reach of Delegated Authority.—In exercising a delegated power the President or another officer may effectively suspend or rescind a law passed by Congress, or may preempt state law. A rule or regulation properly promulgated under authority received from Congress is *law*, and under the supremacy clause of the Constitution can preempt state law.[135] Similarly, a valid regu-

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[130] Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842–45, 865–66 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." Id. at 865). *See also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 42–44, 46–48, 51–57 (1983) (recognizing agency could have reversed its policy but finding reasons not supported on record).

[131] Yakus v. United States, 321 U.S. 414, 425 (1944).

[132] Yakus v. United States, 321 U.S. 414, 426; Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989); American Light & Power Co. v. SEC, 329 U.S. 90, 107, 108 (1946); Opp Cotton Mills v. Administrator, 312 U.S. 126, 144 (1941). It should be remembered that the Court has renounced strict review of economic regulation wholly through legislative enactment, forsaking substantive due process, so that review of the exercise of delegated power by the same relaxed standard forwards a consistent policy. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[133] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. §§ 551–559. In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), six Justices agreed that a Board proceeding had been in fact rule-making and not adjudication and that the APA should have been complied with. The Board won the particular case, however, because of a coalescence of divergent views of the Justices, but the Board has since reversed a policy of not resorting to formal rule-making.

[134] *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[135] City of New York v. FCC, 486 U.S. 57, 63–64 (1988); Louisiana PSC v. FCC, 476 U.S. 355, 368–69 (1986); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153–54 (1982).

lation can supersede a federal statute. Early cases sustained contingency legislation giving the President power, upon the finding of certain facts, to revive or suspend a law,[136] and the President's power to raise or lower tariff rates equipped him to alter statutory law.[137] The Court in *Opp Cotton Mills v. Administrator*[138] upheld Congress' decision to delegate to the Wage and Hour Administrator of the Labor Department the authority to establish a minimum wage in particular industries greater than the statutory minimum but no higher than a prescribed figure. Congress has not often expressly addressed the issue of repeals or supersessions, but in authorizing the Supreme Court to promulgate rules of civil and criminal procedure and of evidence it directed that such rules supersede previously enacted statutes with which they conflict.[139]

Delegations to the President in Areas of Shared Authority

Foreign Affairs.—That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was asserted in *United States v. Curtiss-Wright Corporation*.[140] There the Court upheld a joint resolution of Congress making it unlawful to sell arms to certain warring countries upon certain findings by the President, a typically contingent type of delegation. But Justice Sutherland for the Court proclaimed that the President is largely free of the constitutional constraints imposed by the nondelegation doctrine when he acts in foreign affairs.[141] Sixty years later, the Court, relying on *Curtiss-Wright*, reinforced such a distinction in a case involving the President's authority over military justice.[142] Whether or not the President is the "sole organ of the nation" in its foreign relations, as asserted in *Curtiss-Wright*,[143] a lesser

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[136] *E.g.*, The Brig Aurora, 11 U.S. (7 Cr.) 382 (1813).

[137] *E.g.*, J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

[138] 312 U.S. 126 (1941).

[139] *See* 28 U.S.C. § 2072. In Davis v. United States, 411 U.S. 233, 241 (1973), the Court referred in passing to the supersession of statutes without evincing any doubts about the validity of the results. When Congress amended the Rules Enabling Acts in the 100th Congress, P.L. 100–702, 102 Stat. 4642, 4648, amending 28 U.S.C. § 2072, the House would have altered supersession, but the Senate disagreed, the House acquiesced, and the old provision remained. *See* H.R. 4807, H. Rep. No. 100–889, 100th Cong., 2d sess. (1988), 27–29; 134 CONG REC. 23573–84 (1988), id. at 31051–52 (Sen. Heflin); id. at 31872 (Rep. Kastenmeier).

[140] 299 U.S. 304, 319-29 (1936).

[141] 299 U.S. 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).

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

[143] 299 U.S. at 319.

standard of delegation is applied in areas of power shared by the President and Congress.

Military.—Superintendence of the military is another area in which shared power with the President affects delegation doctrine. The Court in *Loving v. United States* [144] approved a virtually standardless delegation to the President.

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

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

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[144] 517 U.S. 748 (1996).

[145] 10 U.S.C. §§ 918(1), (4).

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

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

[148] 10 U.S.C. §§ 818, 836(a), 856.

[149] 517 U.S. at 771–74. *See also* United States v. Mazurie, 419 U.S. 544, 556-57 (1974) (limits on delegation are "less stringent" when delegation is made to an Indian tribe that can exercise independent sovereign authority over the subject matter).

Delegations to States and to Private Entities

Delegations to the States.—Beginning in the Nation's early years, Congress has enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[150] Challenges to the practice have been uniformly rejected. While the Court early expressed its doubt that Congress could compel state officers to act, it entertained no such thoughts about the propriety of authorizing them to act if they chose.[151] When, in the *Selective Draft Law Cases*,[152] the contention was made that the act was invalid because of its delegations of duties to state officers, the argument was rejected as "too wanting in merit to require further notice." Congress continues to empower state officers to act.[153] Presidents who have objected have done so not on delegation grounds, but rather on the basis of the Appointments Clause.[154]

Delegations to Private Entities.—Statutory delegations to private persons in the form of contingency legislation have passed Court tests. Thus, statutes providing that restrictions upon the production or marketing of agricultural commodities are to become operative only upon a favorable vote by a prescribed majority of those persons affected have been upheld.[155] The rationale of the Court is that such a provision does not involve any delegation of legislative authority, since Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.[156]

Statutes that have given private entities actual regulatory power, rather than merely made regulation contingent on their approval, have also been upheld. The Court upheld a statute that del-

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[150] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1187 (1938).

[151] 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*.

[152] 245 U.S. 366, 389 (1918).

[153] *E.g.*, P.L. 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, P.L. 100–582, 102 Stat. 2955, 42 U.S.C. § 6992f (States may impose civil and possibly criminal penalties against violators of the law).

[154] *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).

[155] Currin v. Wallace, 306 U.S. 1 (1939); United States v. Rock Royal Co-operative, 307 U.S. 533, 577 (1939); Wickard v. Filburn,
317 U.S. 111, 115–116 (1942);
(1990).

[156] Currin v. Wallace, 306 U.S. 1, 15, 16 (1939).

egated to the American Railway Association, a trade group, the authority to determine the standard height of draw bars for freight cars and to certify the figure to the Interstate Commerce Commission, which was required to accept it.[157] The Court simply cited *Buttfield v. Stranahan*,[158] in which it had sustained a delegation to the Secretary of the Treasury to promulgate minimum standards of quality and purity for imported tea, as a case "completely in point" and resolving the issue without need of further consideration.[159] Similarly, the Court had enforced statutes that gave legal effect to local customs of miners with respect to claims on public lands.[160]

The Court has struck down delegations to private entities, but not solely because they were to private entities. The *Schechter* case condemned the involvement of private trade groups in the drawing up of binding codes of competition in conjunction with governmental agencies, but the Court's principal objection was to the statute's lack of adequate standards.[161] In *Carter v. Carter Coal Co.*,[162] the Court struck down the Bituminous Coal Conservation Act in part because the statute penalized persons who failed to observe minimum wage and maximum hour regulations drawn up by prescribed majorities of coal producers and coal employees. But the problem for the Court apparently was not so much that the statute delegated to private entities as that it delegated to private entities whose interests were adverse to the interests of those regulated, thereby denying the latter due process.[163] And several later cases have upheld delegations to private entities.[164]

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[157] St. Louis, Iron Mt. & So. Ry. v. Taylor, 210 U.S. 281 (1908).

[158] 192 U.S. 470 (1904).

[159] 210 U.S. at 287.

[160] Jackson v. Roby, 109 U.S. 440 (1883); Erhardt v. Boaro, 113 U.S. 527 (1885); Butte City Water Co. v. Baker, 196 U.S. 119 (1905).

[161] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935). In two subsequent cases, the Court referred to *Schechter* as having struck down a delegation for its lack of standards. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001).

[162] 298 U.S. 238 (1936). *But compare* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (upholding a delegation in the Bituminous Coal Act of 1937).

[163] "One person may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311.

[164] *See, e.g.*, Schweiker v. McClure, 456 U.S. 188 (1992) (adjudication of Medicare claims, without right of appeal, by hearing officer appointed by private insurance carrier upheld under due process challenge); Association of Amer. Physicians & Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill.) (three-judge court) (delegation to Professional Standards Review Organization), aff'd per curiam, 423 U.S. 975 (1975); Noblecraft Industries v. Secretary of Labor, 614 F.2d 199 (9th Cir. 1980) (Secretary authorized to adopt interim OSHA standards produced by private organization). Executive Branch objections to these kinds of delegations have involved appointments clause arguments rather than delegation issues per se.

Even though the Court has upheld some private delegations by reference to cases involving delegations to public agencies, some uncertainty remains as to whether identical standards apply. The *Schechter* Court contrasted the National Industrial Recovery Act's broad and virtually standardless delegation to the President, assisted by private trade groups,[165] with other broad delegations of authority to administrative agencies, characterized by the Court as bodies of experts "required to act upon notice and hearing," and further limited by the requirement that binding orders must be "supported by findings of fact which in turn are sustained by evidence."[166] The absence of these procedural protections, designed to ensure fairness – as well as the possible absence of impartiality identified in *Carter Coal*– could be cited to support closer scrutiny of private delegations. While the Court has emphasized the importance of administrative procedures in upholding broad delegations to administrative agencies,[167] it has not, since *Schechter* and *Carter Coal*, relied on the distinction to strike down a private delegation.

Particular Subjects or Concerns – Closer Scrutiny or Uniform Standard?

The Court has strongly implied that the same principles govern the validity of a delegation regardless of the subject matter of the delegation. "[A] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."[168] Holding that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges," the Court explained in *Skinner v. Mid-America Pipeline Company*[169] that

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[165] The Act conferred authority on the President to approve the codes of competition, either as proposed by the appropriate trade group, or with conditions that he added. Thus the principal delegation was to the President, with the private trade groups being delegated only recommendatory authority. 295 U.S. at 538-39.

[166] 295 U.S. at 539.

[167] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424-25 (1944).

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

[169] 490 U.S. 212, 223 (1989). In National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974), and FPC v. New England Power Co., 415 U.S. 345 (1974), the Court had appeared to suggest that delegation of the taxing power would be fraught with constitutional difficulties. How this conclusion could have been thought viable after the many cases sustaining delegations to fix tariff rates, which are in fact and law taxes, J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892); *and see* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (delegation to President to raise license "fees" on imports when necessary to protect national security), is difficult to discern. Nor should doubt exist respecting the appropriations power. *See* Synar v. United States, 626 F. Supp. 1374, 1385–86 (D.D.C.) (three-judge court), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

there was "nothing in the placement of the Taxing Clause" in Article I, § 8 that would distinguish it, for purposes of delegation, from the other powers enumerated in that clause.[170] Thus, the test in the taxing area is the same as for other areas – whether the statute has provided the administrative agency with standards to guide its actions in such a way that a court can determine whether the congressional policy has been followed.

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

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

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[170] 490 U.S. at 221. Nor is there basis for distinguishing the other powers enumerated in § 8. See, e.g., Loving v. United States, 517 U.S. 748 (1996). *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.

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

[172] Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 410 (1873).

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

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

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

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

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

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

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

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

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

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

[180] 488 U.S. at 377-78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." Id. at 378 n.11.

Delegation and Individual Liberties.—It has been argued in separate opinions by some Justices that delegations by Congress of power to affect the exercise of "fundamental freedoms" by citizens must be closely scrutinized to require the exercise of a congressional judgment about meaningful standards.[181] 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."[182] The standard practice of the Court has been to interpret the delegation narrowly so as to avoid constitutional problems.[183]

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.[184]

CONGRESSIONAL INVESTIGATIONS

Source of the Power to Investigate

No provision of the Constitution expressly authorizes either House of Congress to make investigations and exact testimony to the end that it may exercise its legislative functions effectively and advisedly. But such a power had been frequently exercised by the British Parliament and by the Assemblies of the American Colonies prior to the adoption of the Constitution.[185] It was asserted by the House of Representatives as early as 1792 when it appointed a

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[181] United States v. Robel, 389 U.S. 258, 269 (1967) (Justice Brennan concurring). The view was specifically rejected by Justices White and Harlan in dissent, id. at 288–289, and ignored by the majority.

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

[183] Kent v. Dulles, 357 U.S. 116 (1958); 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).

[184] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (5–to–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).

[185] Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159–166 (1926); M. DIMOCK, CONGRESSIONAL INVESTIGATING COMMITTEES ch. 2 (1929).

committee to investigate the defeat of General St. Clair and his army by the Indians in the Northwest and empowered it to "call for such persons, papers, and records, as may be necessary to assist their inquiries." [186]

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

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

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[186] 3 ANNALS OF CONGRESS 490–494 (1792); 3 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 1725 (1907).

[187] McGrain v. Daugherty, 273 U.S. 135, 174–175 (1927).

[188] Watkins v. United States, 354 U.S. 178, 187 (1957).

legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." [189]

Broad as the power of inquiry is, it is not unlimited. The power of investigation may properly be employed only "in aid of the legislative function." [190] Its outermost boundaries are marked, then, by the outermost boundaries of the power to legislate. In principle, the Court is clear on the limitations, clear "that neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'; that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action; that if the inquiry relates to 'a matter wherein relief or redress could be had only by a judicial proceeding' it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse must be had to the resolution or order under which it is made." [191]

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

Investigations of Conduct of Executive Department

For many years the investigating function of Congress was limited to inquiries into the administration of the Executive Department or of instrumentalities of the Government. Until the administration of Andrew Jackson this power was not seriously challenged. [192] During the controversy over renewal of the charter of the Bank of the United States, John Quincy Adams contended that an unlimited inquiry into the operations of the bank would be beyond the power of the House. [193] Four years later the legislative

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[189] Barenblatt v. United States, 360 U.S. 109, 111 (1959). *See also* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503–507 (1975).

[190] Kilbourn v. Thompson, 103 U.S. 168, 189 (1881).

[191] McGrain v. Daugherty, 273 U.S. 135, 170 (1927). The internal quotations are from Kilbourn v. Thompson, 103 U.S. 168, 190, 193 (1881).

[192] In 1800, Secretary of the Treasury, Oliver Wolcott, Jr., addressed a letter to the House of Representatives advising them of his resignation from office and inviting an investigation of his office. Such an inquiry was made. 10 ANNALS OF CONGRESS 786–788 (1800).

[193] 8 CONG. DEB. 2160 (1832).

power of investigation was challenged by the President. A committee appointed by the House of Representatives "with power to send for persons and papers, and with instructions to inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted, . . ." [194] called upon the President and the heads of departments for lists of persons appointed without the consent of the Senate and the amounts paid to them. Resentful of this attempt "to invade the just rights of the Executive Departments," the President refused to comply and the majority of the committee acquiesced. [195] Nevertheless, congressional investigations of Executive Departments have continued to the present day. Shortly before the Civil War, contempt proceedings against a witness who refused to testify in an investigation of John Brown's raid upon the arsenal at Harper's Ferry occasioned a thorough consideration by the Senate of the basis of this power. After a protracted debate, which cut sharply across sectional and party lines, the Senate voted overwhelmingly to imprison the contumacious witness. [196] Notwithstanding this firmly established legislative practice, the Supreme Court took a narrow view of the power in the case of *Kilbourn v. Thompson*. [197] It held that the House of Representatives had overstepped its jurisdiction when it instituted an investigation of losses suffered by the United States as a creditor of Jay Cooke and Company, whose estate was being administered in bankruptcy by a federal court. [198] But nearly half a century later, in *McGrain v. Daugherty*, [199] it ratified in sweeping terms, the power of Congress to inquire into the administration of an executive department and to sift charges of malfeasance in such administration. [200]

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[194] 13 CONG. DEB. 1057–1067 (1836).

[195] H. R. Rep. No. 194, 24th Congress, 2d sess., 1, 12, 31 (1837).

[196] CONG. GLOBE, 36th Congress, 1st sess., 1100–1109 (1860).

[197] 103 U.S. 168 (1881).

[198] The Court held that inasmuch as the entire proceedings arising out of the bankruptcy were pending in court, as the authorizing resolution contained no suggestion of contemplated legislation, as in fact no valid legislation could be enacted on the subject, and as the only relief which the United States could seek was judicial relief in the bankruptcy proceeding, the House had exceeded its powers in authorizing the inquiry. *But see* Hutcheson v. United States, 369 U.S. 599 (1962).

[199] 273 U.S. 135, 177, 178 (1927).

[200] We consider elsewhere the topic of executive privilege, the claimed right of the President and at least some of his executive branch officers to withhold from Congress information desired by it or by one of its committees. Although the issue has been one of contention between the two branches of Government since Washington's refusal in 1796 to submit certain correspondence to the House of Representatives relating to treaty negotiations, it has only recently become a judicial issue.

Investigations of Members of Congress

When either House exercises a judicial function, as in judging of elections or determining whether a member should be expelled, it is clearly entitled to compel the attendance of witnesses to disclose the facts upon which its action must be based. Thus, the Court held that since a House had a right to expel a member for any offense which it deemed incompatible with his trust and duty as a member, it was entitled to investigate such conduct and to summon private individuals to give testimony concerning it.[201] The decision in *Barry v. United States ex rel. Cunningham*[202] sanctioned the exercise of a similar power in investigating a senatorial election.

Investigations in Aid of Legislation

Purpose.—Beginning with the resolution adopted by the House of Representatives in 1827, which vested its Committee on Manufactures "with the power to send for persons and papers with a view to ascertain and report to this House in relation to a revision of the tariff duties on imported goods,"[203] the two Houses have asserted the right to collect information from private persons as well as from governmental agencies when necessary to enlighten their judgment on proposed legislation. The first case to review the assertion saw a narrow view of the power taken and the Court held that the purpose of the inquiry was to pry improperly into private affairs without any possibility of legislating on the basis of what might be learned and further that the inquiry overstepped the bounds of legislative jurisdiction and invaded the provinces of the judiciary.[204]

Subsequent cases, however, have given the Congress the benefit of a presumption that its object is legitimate and related to the possible enactment of legislation. Shortly after *Kilbourn*, the Court declared that "it was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded" in order that the inquiry be under a lawful exercise of power.[205] Similarly, in *McGrain v. Daugherty*,[206] the investigation was presumed to have been undertaken in good faith to aid the Senate in legislating. Then, in *Sinclair v. United States*,[207] on its facts presenting a close parallel to

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[201] In re Chapman, 166 U.S. 661 (1897).
[202] 279 U.S. 597 (1929).
[203] 4 CONG. DEB. 862, 868, 888, 889 (1827).
[204] Kilbourn v. Thompson, 103 U.S. 168 (1881).
[205] In re Chapman, 166 U.S. 661, 670 (1897).
[206] 273 U.S. 135, 178 (1927).
[207] 279 U.S. 263 (1929).

Kilbourn, the Court affirmed the right of the Senate to carry out investigations of fraudulent leases of government property after suit for recovery had been instituted. The president of the lessee corporation had refused to testify on the ground that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, asserting that the inquiry was not actually in aid of legislation. The Senate had prudently directed the investigating committee to ascertain what, if any, legislation might be advisable. Conceding "that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits," the Court declared that the authority "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[208]

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

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[208] 279 U.S. at 295.

[209] 279 U.S. at 294.

[210] The first case so holding is ICC v. Brimson, 154 U.S. 447 (1894), which asserts that inasmuch as Congress could itself have made the inquiry to appraise its regulatory activities it could delegate the power of inquiry to the agency to which it had delegated the regulatory function.

[211] Watkins v. United States, 354 U.S. 178, 195 (1957).

[212] *See* Dennis v. United States, 341 U.S. 494 (1951); Barenblatt v. United States, 360 U.S. 109, 127 (1959); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

life—in education,[213] in labor and industry,[214] and other areas.[215] Because its powers to regulate interstate commerce afford Congress the power to regulate corruption in labor-management relations, congressional committees may inquire into the extent of corruption in labor unions.[216] Because of its powers to legislate to protect the civil rights of its citizens, Congress may investigate organizations which allegedly act to deny those civil rights.[217] It is difficult in fact to conceive of areas into which congressional inquiry might not be carried, which is not the same, of course, as saying that the exercise of the power is unlimited.

One limitation on the power of inquiry which has been much discussed in the cases concerns the contention that congressional investigations often have no legislative purpose but rather are aimed at achieving results through "exposure" of disapproved persons and activities: "We have no doubt," wrote Chief Justice Warren, "that there is no congressional power to expose for the sake of exposure."[218] Although some Justices, always in dissent, have attempted to assert limitations in practice based upon this concept, the majority of Justices has adhered to the traditional precept that courts will not inquire into legislators' motives but will look[219] only

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[213] Barenblatt v. United States, 360 U.S. 109, 129–132 (1959); Deutch v. United States, 367 U.S. 456 (1961); *cf.* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state inquiry).

[214] Watkins v. United States, 354 U.S. 178 (1957); Flaxer v. United States, 358 U.S. 147 (1958); Wilkinson v. United States, 365 U.S. 399 (1961).

[215] McPhaul v. United States, 364 U.S. 372 (1960).

[216] Hutcheson v. United States, 369 U.S. 599 (1962).

[217] Shelton v. United States, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

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

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

[219] Barenblatt v. United States, 360 U.S. 109, 153–162, 166 (1959); Wilkinson v. United States, 365 U.S. 399, 415, 423 (1961); Braden v. United States, 365 U.S. 431, 446 (1961); *but see* DeGregory v. Attorney General, 383 U.S. 825 (1966) (a state investigative case).

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

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

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[220] "Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindicative motives are readily attributable to legislative conduct and as readily believed. Courts are not the place for such controversies." Tenney v. Brandhove, 341 U.S. 367, 377–378 (1951). For a statement of the traditional unwillingness to inquire into congressional motives in the judging of legislation, *see* United States v. O'Brien, 391 U.S. 367, 382–386 (1968). But note that in Jenkins v. McKeithen, 395 U.S. 411 (1969), in which the legislation establishing a state crime investigating commission clearly authorized the commission to designate individuals as law violators, due process was violated by denying witnesses the rights existing in adversary criminal proceedings.

[221] Barenblatt v. United States, 360 U.S. 109, 132 (1959).

[222] United States v. Rumely, 345 U.S. 41, 44 (1953).

[223] 354 U.S. 178, 201 (1957).

[224] The Committee has since been abolished.

[225] Watkins v. United States, 354 U.S. 178, 202 (1957).

[226] 360 U.S. 109 (1959).

[227] 360 U.S. at 117–18.

sideration is unassailable, and that . . . the Rule cannot be said to be constitutionally infirm on the score of vagueness."[228]

Because of the usual precision with which authorizing resolutions have generally been drafted, few controversies have arisen about whether a committee has projected its inquiry into an area not sanctioned by the parent body.[229] But in *United States v. Rumely*,[230] the Court held that the House of Representatives, in authorizing a select committee to investigate lobbying activities devoted to the promotion or defeat of legislation, did not thereby intend to empower the committee to probe activities of a lobbyist that were unconnected with his representations directly to Congress but rather designed to influence public opinion by distribution of literature. Consequently the committee was without authority to compel the representative of a private organization to disclose the names of all who had purchased such literature in quantity.[231]

Still another example of lack of proper authority is *Gojack v. United States*,[232] in which the Court reversed a contempt citation because there was no showing that the parent committee had delegated to the subcommittee before whom the witness had appeared the authority to make the inquiry and neither had the full committee specified the area of inquiry.

Watkins v. United States,[233] remains the leading case on pertinency, although it has not the influence on congressional investigations that some hoped and some feared in the wake of its announcement. When questioned by a Subcommittee of the House Un-American Activities Committee, Watkins refused to supply the names of past associates, who, to his knowledge, had terminated their membership in the Communist Party and supported his noncompliance by, *inter alia*, contending that the questions were unrelated to the work of the Committee. Sustaining the witness, the Court emphasized that inasmuch as a witness by his refusal exposes himself to a criminal prosecution for contempt, he is entitled

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

[229] *But see* Tobin v. United States, 306 F. 2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

[230] 345 U.S. 41 (1953).

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

[232] 384 U.S. 702 (1966).

[233] 354 U.S. 178 (1957).

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

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

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

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[234] 354 U.S. at 208–09.

[235] 354 U.S. at 209–15.

[236] Id. *See also* Sacher v. United States, 356 U.S. 576 (1958), a *per curiam* reversal of a contempt conviction on the ground that the questions did not relate to a subject "within the subcommittee's scope of inquiry," arising out of a hearing pertaining to a recantation of testimony by a witness in which the inquiry drifted into a discussion of legislation barring Communists from practice at the federal bar, the unanswered questions being asked then; and Flaxer v. United States, 358 U.S. 147 (1958), a reversal for refusal to produce membership lists because of an ambiguity in the committee's ruling on the time of performance; and Scull v. Virginia ex rel. Committee, 359 U.S. 344 (1959), a reversal on a contempt citation before a state legislative investigating committee on pertinency grounds.

[237] Notice should be taken, however, of two cases which, though decided four and five years after *Watkins*, involved persons who were witnesses before the Un-American Activities Committee either shortly prior to or shortly following Watkins' appearance and who were cited for contempt before the Supreme Court decided Watkins' case.

In Deutch v. United States, 367 U.S. 456 (1961), involving an otherwise cooperative witness who had refused to identify certain persons with whom he had been

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

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

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

[238] 360 U.S. 109 (1959).

[239] 365 U.S. 399 (1961).

[240] Braden v. United States, 365 U.S. 431 (1961).

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

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

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

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

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

[242] 374 U.S. 109 (1963).

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

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

[245] Barenblatt v. United States, 360 U.S. 109, 112 (1959).

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

The most extensive amount of litigation in this area has involved the privilege against self-incrimination guaranteed against governmental abridgment by the Fifth Amendment. Observance of the privilege by congressional committees has been so uniform that no court has ever held that it must be observed, though the dicta are plentiful.[246] Thus, the cases have explored not the issue of the right to rely on the privilege but rather the manner and extent of its application.

There is no prescribed form in which one must plead the privilege. When a witness refused to answer a question about Communist Party affiliations and based his refusal upon the assertion by a prior witness of "the first amendment supplemented by the fifth," the Court held that he had sufficiently invoked the privilege, at least in the absence of committee inquiry seeking to force him to adopt a more precise stand.[247] If the committee suspected that the witness was being purposely vague, in order perhaps to avoid the stigma attached to a forthright claim of the privilege, it should have requested him to state specifically the ground of his refusal to testify. Another witness, who was threatened with prosecution for his Communist activities, could claim the privilege even to some questions the answers to which he might have been able to explain away as unrelated to criminal conduct; if an answer might tend to be incriminatory, the witness is not deprived of the privilege merely because he might have been able to refute inferences of guilt.[248] In still another case, the Court held that the Committee had not clearly overruled the claim of privilege and directed an answer.[249]

The privilege against self-incrimination is not available as a defense to an organizational officer who refuses to turn over organization documents and records to an investigating committee.[250]

In *Hutcheson v. United States*,[251] the Court rejected a challenge to a Senate Committee inquiry into union corruption on the part of a witness who was under indictment in state court on charges relating to the same matters about which the Committee sought to interrogate him. The witness did not plead his privilege against self-incrimination but contended that by questioning him about matters which would aid the state prosecutor the Committee

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[246] 360 U.S. at 126; Watkins v. United States, 354 U.S. 178, 196 (1957); Quinn v. United States, 349 U.S. 155, 161 (1955).

[247] Quinn v. United States, 349 U.S. 155 (1955).

[248] Emspak v. United States, 349 U.S. 190 (1955).

[249] Bart v. United States, 349 U.S. 219 (1955).

[250] McPhaul v. United States, 364 U.S. 372 (1960).

[251] 369 U.S. 599 (1962).

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

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

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

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

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

[254] Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[255] Barenblatt v. United States, 360 U.S. 109 (1959).

[256] Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

would raise a serious First Amendment issue.[257] And in a state legislative investigating committee case, the majority of the Court held that an inquiry seeking the membership lists of the National Association for the Advancement of Colored People was so lacking in a "nexus" between the organization and the Communist Party that the inquiry infringed the First Amendment.[258]

Dicta in the Court's opinions acknowledge that the Fourth Amendment guarantees against unreasonable searches and seizures are applicable to congressional committees.[259] The issue would most often arise in the context of subpoenas, inasmuch as that procedure is the usual way by which committees obtain documentary material and inasmuch as Fourth Amendment standards apply as well to subpoenas as to search warrants.[260] But there are no cases in which a holding turns on this issue.[261]

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

Sanctions of the Investigatory Power: Contempt

Explicit judicial recognition of the right of either House of Congress to commit for contempt a witness who ignores its summons or refuses to answer its inquiries dates from *McGrain v. Daugherty*.[262] But the principle there applied had its roots in an early case, *Anderson v. Dunn*,[263] which stated in broad terms the right of either branch of the legislature to attach and punish a person other than a member for contempt of its authority.[264] The right to punish a contumacious witness was conceded in *Marshall v. Gordon*,[265] although the Court there held that the implied power to

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[257] United States v. Rumely, 345 U.S. 41 (1953).

[258] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). *See also* DeGregory v. Attorney General, 383 U.S. 825 (1966).

[259] Watkins v. United States, 354 U.S. 178, 188 (1957).

[260] *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and cases cited.

[261] *Cf.* McPhaul v. United States, 364 U.S. 372 (1960).

[262] 273 U.S. 135 (1927).

[263] 19 U.S. (6 Wheat.) 204 (1821).

[264] The contempt consisted of an alleged attempt to bribe a Member of the House for his assistance in passing a claims bill. The case was a civil suit brought by Anderson against the Sergeant at Arms of the House for assault and battery and false imprisonment. *Cf.* Kilbourn v. Thompson, 103 U.S. 168 (1881). The power of a legislative body to punish for contempt one who disrupts legislative business was reaffirmed in Groppi v. Leslie, 404 U.S. 496 (1972), but a unanimous Court there held that due process required a legislative body to give a contemnor notice and an opportunity to be heard prior to conviction and sentencing. Although this case dealt with a state legislature, there is no question it would apply to Congress as well.

[265] 243 U.S. 521 (1917).

deal with contempt did not extend to the arrest of a person who published matter defamatory of the House.

The cases emphasize that the power to punish for contempt rests upon the right of self-preservation. That is, in the words of Chief Justice White, "the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed" necessitates the contempt power.[266] Thus, in *Jurney v. MacCracken*,[267] the Court turned aside an argument that the Senate had no power to punish a witness who, having been commanded to produce papers, destroyed them after service of the subpoena. The punishment would not be efficacious in obtaining the papers in this particular case, but the power to punish for a past contempt is an appropriate means of vindicating "the established and essential privilege of requiring the production of evidence."[268]

Under the rule laid down by *Anderson v. Dunn*,[269] imprisonment by one of the Houses of Congress could not extend beyond the adjournment of the body which ordered it. Because of this limitation and because contempt trials before the bar of the House charging were time-consuming, in 1857 Congress enacted a statute providing for criminal process in the federal courts with prescribed penalties for contempt of Congress.[270]

The Supreme Court has held that the purpose of this statute is merely supplementary of the power retained by Congress, and all constitutional objections to it were overruled. "We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved."[271]

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

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[266] 243 U.S. at 542.
[267] 294 U.S. 125 (1935).
[268] 294 U.S. at 150.
[269] 19 U.S. (6 Wheat.) 204 (1821).
[270] Act of January 24, 1857, 11 Stat. 155. With only minor modification, this statute is now 2 U.S.C. § 192.
[271] In re Chapman, 166 U.S. 661, 671–672 (1897).

cords in all other federal criminal cases,[272] and the discussion in previous sections of many reversals of contempt convictions bears witness to the assertion in practice. What constitutional protections ordinarily necessitated by due process requirements, such as notice, right to counsel, confrontation, and the like, prevail in a contempt trial before the bar of one House or the other is an open question.[273]

It has long been settled that the courts may not intervene directly to restrain the carrying out of an investigation or the manner of an investigation, and that a witness who believes the inquiry to be illegal or otherwise invalid in order to raise the issue must place himself in contempt and raise his beliefs as affirmative defenses on his criminal prosecution. This understanding was sharply reinforced when the Court held that the speech-or-debate clause utterly foreclosed judicial interference with the conduct of a congressional investigation, through review of the propriety of subpoenas or otherwise.[274] It is only with regard to the trial of contempts that the courts may review the carrying out of congressional investigations and may impose constitutional and other constraints.

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

CONGRESSIONAL DISTRICTING

A major innovation in constitutional law in recent years has been the development of a requirement that election districts in each State be so structured that each elected representative should represent substantially equal populations.[275] While this require-

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

[273] *Cf.* Groppi v. Leslie, 404 U.S. 496 (1972).

[274] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

[275] The phrase "one person, one vote" which came out of this litigation might well seem to refer to election districts drawn to contain equal numbers of voters

ment has generally been gleaned from the equal protection clause of the Fourteenth Amendment,[276] in *Wesberry v. Sanders*,[277] the Court held that "construed in its historical context, the command of Art. 1, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[278]

Court involvement in this issue developed slowly. In our early history, state congressional delegations were generally elected at-large instead of by districts, and even when Congress required single-member districting[279] and later added a provision for equally populated districts[280] 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.[281] The first series of cases did not reach the Supreme Court, in fact, until the States began redistricting through the 1930 Census, and these were resolved without reaching constitutional issues and indeed without resolving the issue whether such voter complaints were justiciable at all.[282] In the late 1940s and the early 1950s, the Court utilized the "political question" doctrine to decline to adjudicate districting and apportionment suits, a position changed in *Baker v. Carr*.[283]

For the Court in *Wesberry*,[284] Justice Black argued that a reading of the debates of the Constitutional Convention conclusively demonstrated that the Framers had meant, in using the phrase "by the People," to guarantee equality of representation in

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rather than equal numbers of persons. But it seems clear from a consideration of all the Court's opinions and the results of its rulings that the statement in the text accurately reflects the constitutional requirement. The case expressly holding that total population, or the exclusion only of transients, is the standard is Burns v. Richardson, 384 U.S. 73 (1966), a legislative apportionment case. Notice that considerable population disparities exist from State to State, as a result of the requirement that each State receive at least one Member and the fact that state lines cannot be crossed in districting. At least under present circumstances, these disparities do not violate the Constitution. U.S. Department of Commerce v. Montana, 503 U.S. 442 (1992).

[276] 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).

[277] 376 U.S. 1 (1964). *See also* Martin v. Bush, 376 U.S. 222 (1964).

[278] 376 U.S. at 7.

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

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

[281] 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).

[282] 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).

[283] 369 U.S. 186 (1962).

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

the election of Members of the House of Representatives.[285] Justice Harlan in dissent argued that the statements relied on by the majority had uniformly been in the context of the Great Compromise—Senate representation of the States with Members elected by the state legislatures, House representation according to the population of the States, qualified by the guarantee of at least one Member per State and the counting of slaves as three-fifths of persons—and not at all in the context of intrastate districting. Further, he thought the Convention debates clear to the effect that Article I, § 4, had vested exclusive control over state districting practices in Congress, and that the Court action overrode a congressional decision not to require equally-populated districts.[286]

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.[287] But in *Kirkpatrick v. Preisler*,[288] a sharply divided Court announced the rule that a State must make a "good-faith effort to achieve precise mathematical equality."[289] 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."[290] 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,[291] (2) the requirements of legislative compromise,[292] (3) a desire to maintain the integrity of political subdivision lines,[293] (4) the exclusion from total population figures of certain military personnel and students

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[285] 376 U.S. at 7–18.

[286] 376 U.S. at 20–49.

[287] 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.

[288] 394 U.S. 526 (1969). *See also* Wells v. Rockefeller, 394 U.S. 542 (1969).

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

[290] 394 U.S. at 531.

[291] 394 U.S. at 533. People vote as individuals, Justice Brennan said for the Court, and it is the equality of individual voters that is protected.

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

[293] 394 U.S. at 533–34. The argument is not "legally acceptable."

not residents of the areas in which they were found,[294] (5) an attempt to compensate for population shifts since the last census,[295] or (6) an effort to achieve geographical compactness.[296]

Illustrating the strictness of the standard, the Court upheld a lower court voiding of a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[297] Adhering to the principle of strict population equality in a subsequent case, the Court refused to find a plan valid simply because the variations were smaller than the estimated census undercount. Rejecting the plan, the difference in population between the most and least populous districts being 3,674 people, in a State in which the average district population was 526,059 people, the Court opined that, given rapid advances in computer technology, it is now "relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has."[298]

Attacks on partisan gerrymandering have proceeded under equal-protection analysis, and, while the Court has held justiciable claims of denial of effective representation, the standards are so high neither voters nor minority parties have yet benefitted from the development.[299]

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

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

[296] 394 U.S. at 536. Justifications based upon "the unaesthetic appearance" of the map will not be accepted.

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

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

[299] The principal case was Davis v. Bandemer, 478 U.S. 109 (1986), a legislative apportionment case, but no doubt should exist that congressional districting is covered. *See* Badham v. Eu, 694 F. Supp. 664 (N.D. Cal.) (three-judge court) (adjudicating partisan gerrymandering claim as to congressional districts but deciding against plaintiffs on merits), *aff'd*, 488 U.S. 1024 (1988); Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.) (three-judge court) (same), *aff'd*, 506 U.S. 801 (1992).

ELECTOR QUALIFICATIONS

It was the original constitutional scheme to vest the determination of qualifications for electors in congressional elections [300] solely in the discretion of the States, save only for the express requirement that the States could prescribe no qualifications other than those provided for voters for the more numerous branch of the legislature. [301] This language has never been expressly changed, but the discretion of the States, and not only with regard to the qualifications of congressional electors, has long been circumscribed by express constitutional limitations [302] and by judicial decisions. [303] Further, beyond the limitation of discretion on the part of the States, Congress has assumed the power, with judicial acquiescence, to legislate to provide qualifications at least with regard to some elections. [304] Thus, in the Voting Rights Act of 1965 [305] Congress legislated changes of a limited nature in the literacy laws of some of the States, [306] and in the Voting Rights Act Amendments of 1970 [307] Congress successfully lowered the minimum voting age in federal elections [308] and prescribed residency qualifications for presidential elections, [309] the Court striking down an attempt to lower the minimum voting age for all elections. [310] These developments greatly limited the discretion granted in Article I, § 2, cl. 1, and are more fully dealt with in the treatment of § 5 of the Fourteenth Amendment.

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

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[300] The clause refers only to elections to the House of Representatives, of course, and, inasmuch as Senators were originally chosen by state legislatures and presidential electors as the States would provide, it was only with the qualifications for these voters with which the Constitution was originally concerned.

[301] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1875); Breedlove v. Suttles, 302 U.S. 277, 283 (1937). *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 576–585 (1833).

[302] The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments limited the States in the setting of qualifications in terms of race, sex, payment of poll taxes, and age.

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

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

[305] § 4(e), 79 Stat. 437, 439, 42 U.S.C. § 1973b(e), as amended.

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

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

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

[309] Oregon v. Mitchell, 400 U.S. 112, 134, 147–150, 236–239, 285–292 (1970).

[310] Oregon v. Mitchell, 400 U.S. 112, 119–131, 152–213, 293–296 (1970).

stitution,[311] and Congress has had the power under Article I, § 4, to legislate to protect that right against both official[312] and private denial.[313]

Clause 2. No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

QUALIFICATIONS OF MEMBERS OF CONGRESS

When the Qualifications Must Be Possessed

A question much disputed but now seemingly settled is whether a condition of eligibility must exist at the time of the election or whether it is sufficient that eligibility exist when the Member-elect presents himself to take the oath of office. While the language of the clause expressly makes residency in the State a condition at the time of election, it now appears established in congressional practice that the age and citizenship qualifications need only be met when the Member-elect is to be sworn.[314] Thus, persons elected to either the House of Representatives or the Senate before attaining the required age or term of citizenship have been admitted as soon as they became qualified.[315]

Exclusivity of Constitutional Qualifications

Congressional Additions.—Writing in *The Federalist* with reference to the election of Members of Congress, Hamilton firmly stated that "[t]he qualifications of the persons who may . . . be chosen . . . are defined and fixed in the constitution; and are unalterable by the legislature."[316] Until the Civil War, the issue was not

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[311] "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).

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

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

[314] *See* S. Rep. No. 904, 74th Congress, 1st sess. (1935), reprinted in 79 CONG. REC. 9651–9653 (1935).

[315] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 418 (1907); 79 CONG. REC. 9841–9842 (1935); *cf.* HINDS' PRECEDENTS, supra § 429.

[316] No. 60 (J. Cooke ed. 1961), 409. *See also* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 623–627 (1833) (relating to the power of the States to add qualifications).

raised, the only actions taken by either House conforming to the idea that the qualifications for membership could not be enlarged by statute or practice.[317] But in the passions aroused by the fratricidal conflict, Congress enacted a law requiring its members to take an oath that they had never been disloyal to the National Government.[318] Several persons were refused seats by both Houses because of charges of disloyalty,[319] and thereafter House practice, and Senate practice as well, was erratic.[320] But in *Powell v. McCormack*,[321] it was conclusively established that the qualifications listed in cl. 2 are exclusive[322] and that Congress could not add to them by excluding Members-elect not meeting the additional qualifications.[323]

Powell was excluded from the 90th Congress on grounds that he had asserted an unwarranted privilege and immunity from the process of a state court, that he had wrongfully diverted House funds for his own uses, and that he had made false reports on the expenditures of foreign currency.[324] The Court determination that he had been wrongfully excluded proceeded in the main from the Court's analysis of historical developments, the Convention de-

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[317] All the instances appear to be, however, cases in which the contest arose out of a claimed additional state qualification.

[318] Act of July 2, 1862, 12 Stat. 502. Note also the disqualification written into § 3 of the Fourteenth Amendment.

[319] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 451, 449, 457 (1907).

[320] In 1870, the House excluded a Member-elect who had been re-elected after resigning earlier in the same Congress when expulsion proceedings were instituted against him for selling appointments to the Military Academy. Id. at § 464. A Member-elect was excluded in 1899 because of his practice of polygamy, id. at 474–80, but the Senate refused, 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), and R. Hupman, *Senate Election, Expulsion and Censure Cases From 1789 to 1960*, S. DOC. NO. 71, 87th Congress, 2d sess. (1962), 140 (dealing with the effort to exclude Senator Langer of North Dakota).

[321] 395 U.S. 486 (1969). The Court divided eight to one, Justice Stewart dissenting on the ground the case was moot. *Powell's* continuing validity was affirmed in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), both by the Court in its holding that the qualifications set out in the Constitution are exclusive and may not be added to by either Congress or the States, id. at 787–98, and by the dissent, who would hold that Congress, for different reasons could not add to qualifications, although the States could. Id. at 875–76.

[322] The Court declined to reach the question whether the Constitution in fact does impose other qualifications. 395 U.S. at 520 n. 41 (possibly Article I, § 3, cl. 7, disqualifying persons impeached, Article I, § 6, cl. 2, incompatible offices, and § 3 of the Fourteenth Amendment). It is also possible that the oath provision of Article VI, cl. 3, could be considered a qualification. *See* Bond v. Floyd, 385 U.S. 116, 129–131 (1966).

[323] 395 U.S. at 550.

[324] H. Rep. No. 27, 90th Congress, 1st sess. (1967); 395 U.S. at 489–493.

bates, and textual considerations. This process led the Court to conclude that Congress' power under Article I, § 5 to judge the qualifications of its Members was limited to ascertaining the presence or absence of the standing qualifications prescribed in Article I, § 2, cl. 2, and perhaps in other express provisions of the Constitution.[325] The conclusion followed because the English parliamentary practice and the colonial legislative practice at the time of the drafting of the Constitution, after some earlier deviations, had settled into a policy that exclusion was a power exercisable only when the Member-elect failed to meet a standing qualifications[326] because in the Constitutional Convention the Framers had defeated provisions allowing Congress by statute either to create property qualifications or to create additional qualifications without limitation,[327] and because both Hamilton and Madison in the *Federalist Papers* and Hamilton in the New York ratifying convention had strongly urged that the Constitution prescribed exclusive qualifications for Members of Congress.[328]

Further, the Court observed that the early practice of Congress, with many of the Framers serving, was consistently limited to the view that exclusion could be exercised only with regard to a Member-elect failing to meet a qualification expressly prescribed in the Constitution. Not until the Civil War did contrary precedents appear, and later practice was mixed.[329] Finally, even were the intent of the Framers less clear, said the Court, it would still be compelled to interpret the power to exclude narrowly. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' 2 *Elliot's Debates* 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Congress' own post-Civil War exclusion cases, against 'vesting an improper and dangerous power in the Legislature.' 2 Farrand 249."[330] Thus, the Court appears to say, to allow the House to exclude Powell on this basis of qualifications of its own choosing would impinge on the interests of his constituents

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[325] Powell v. McCormack, 395 U.S. 486, 518–47 (1969).
[326] 395 U.S. at 522–31.
[327] 395 U.S. at 532–39.
[328] 395 U.S. at 539–41.
[329] 395 U.S. at 541–47.
[330] 395 U.S. at 547–48.

in effective participation in the electoral process, an interest which could be protected by a narrow interpretation of Congressional power.[331]

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

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

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[331] The protection of the voters' interest in being represented by the person of their choice is thus analogized to their constitutionally secured right to cast a ballot and have it counted in general elections, Ex parte Yarbrough, 110 U.S. 651 (1884), and in primary elections, United States v. Classic, 313 U.S. 299 (1941), to cast a ballot undiluted in strength because of 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).

[332] Bond v. Floyd, 385 U.S. 116 (1966).

[333] 385 U.S. at 129–31, 132, 135.

[334] 385 U.S. at 135 n.13.

[335] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 414 (1907).

The Supreme Court reached the same conclusion as to state power, albeit by a surprisingly close 5-4 vote, in *U.S. Term Limits, Inc. v. Thornton*.[336] Arkansas, along with twenty-two other States, all but two by citizen initiatives, had limited the number of terms that Members of Congress may serve. In striking down the Arkansas term limits, the Court determined that the Constitution's qualifications clauses[337] establish exclusive qualifications for Members that may not be added to either by Congress or the States.[338] 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.[339]

Both majority and dissenting opinions in *Thornton* were richly embellished with disputatious arguments about the text of the Constitution, the history of its drafting and ratification, and the practices of Congress and the States in the nation's early years,[340] and these differences over text, creation, and practice derived from disagreement about the fundamental principle underlying the Constitution's adoption.

In the dissent's view, the Constitution was the result of the resolution of the peoples of the separate States to create the National Government. The conclusion to be drawn from this was that the peoples in the States agreed to surrender only those powers expressly forbidden them and those limited powers that they had delegated to the Federal Government expressly or by necessary implication. They retained all other powers and still retain them. Thus, "where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it."[341] The Constitution's silence

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

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

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

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

[340] *See* Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995).

[341] 514 U.S. at 848 (Justice Thomas dissenting). *See generally* id. at 846–65.

as to authority to impose additional qualifications meant that this power resides in the states.

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

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

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

[342] 514 U.S. at 802.

[343] 514 U.S. at 798–805. *And see* id. at 838–45 (Justice Kennedy concurring). The Court applied similar reasoning in Cook v. Gralike, 531 U.S. 510, 522-23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, no authority to regulate these offices could have preceded the Constitution and been reserved to the states, and the ballot labels were not valid exercise of the power granted by Article I, § 4 to regulate the "manner" of holding elections. See discussion under Federal Legislation Protecting Electoral Process, *infra*.

[344] The part of this clause relating to the mode of apportionment of representatives among the several States was changed by the Fourteenth Amendment, § 2 and as to taxes on incomes without apportionment, by the Sixteenth Amendment.

the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut, five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

APPORTIONMENT OF SEATS IN THE HOUSE

The Census Requirement

The Census Clause "reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the States, would determine the manner of conducting the census."[345] These determinations "all suggest a strong constitutional interest in accuracy."[346] The language employed – "actual enumeration" – requires an actual count, but gives Congress wide discretion in determining the methodology of that count. The word "enumeration" refers to a counting process without describing the count's methodological details. The word "actual" merely refers to the enumeration to be used for apportioning the Third Congress, and thereby distinguishes "a deliberately taken count" from the conjectural approach that had been used for the First Congress. Finally, the conferral of authority on Congress to "direct" the "manner" of enumeration underscores "the breadth of congressional methodological authority." Thus, the Court held in *Utah v. Evans*, "hot deck imputation," a method used to fill in missing data by imputing to an address the number of persons found at a nearby address or unit of the same type, does not run

[345] Utah v. Evans, 122 S. Ct. 2191, 2206 (2002).
[346] Id.

afoul of the "actual enumeration" requirement.[347] The Court distinguished imputation from statistical sampling, and indicated that its holding was relatively narrow. Imputation was permissible "where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely."[348]

While the Census Clause expressly provides for an enumeration of persons, Congress has expanded the scope of the census by including not only the free persons in the States, but also those in the territories, and by requiring all persons over eighteen years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court,[349] and is one of the methods whereby the national legislature exercises its inherent power to obtain the information necessary for intelligent legislative action.

Although taking an enlarged view of its census power, Congress has not always complied with its positive mandate to reapportion representatives among the States after the census is taken.[350] 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,[351] it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the States by the so-called "method of major fractions," which had been earlier employed in the apportionment of 1911, and which has now been replaced with

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[347] Utah v. Evans, 122 S. Ct. 2191 (2002).

[348] *See also* Wisconsin v. City of New York, 517 U.S. 1 (1996), in which the Court held that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute; and Franklin v. Massachusetts, 505 U.S. 788 (1992), upholding the practice of the Secretary of Commerce in allocating overseas federal employees and military personnel to the States of last residence. The mandate of an enumeration of "their respective numbers" was complied with, 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.

[349] Knox v. Lee (Legal Tender Cases). 79 U.S. (12 Wall.) 457, 536 (1971) ("Who questions the power to [count persons in the territories or] collect[ ] . . . statistics respecting age, sex, and production?").

[350] For an extensive history of the subject, *see* L. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT (1941).

[351] 46 Stat. 26, 22, as amended by 55 Stat. 761 (1941), 2 U.S.C. § 2a.

the "method of equal proportions." Following the 1990 census, a State that had lost a House seat as a result of the use of this formula sued, alleging a violation of the "one person, one vote" rule derived from Article I, § 2. Exhibiting considerable deference to Congress and a stated appreciation of the difficulties in achieving interstate equalities, the Supreme Court upheld the formula and the resultant apportionment.[352] 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."[353]

While requiring the election of Representatives by districts, Congress has left it to the States to draw district boundaries. This has occasioned a number of disputes. In *Ohio ex rel. Davis v. Hildebrant*,[354] a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several States produced a series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to state legislatures by the Constitution, the Court decided that it was legislative in character and subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the state constitution.[355]

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

IN GENERAL

The Supreme Court has not interpreted this clause.

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

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

[353] 503 U.S. at 463. "The need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50," the Court explained. Id.

[354] 241 U.S. 565 (1916).

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

IN GENERAL

See analysis of Impeachment under Article II, section 4.

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]. [356]

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, [357] [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]. [358]

IN GENERAL

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

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

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

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[356] *See* Seventeenth Amendment.
[357] *See* Seventeenth Amendment.
[358] *See* Seventeenth Amendment.

Clause 5. The Senate shall 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 the President of the United States.

IN GENERAL

The Supreme Court has not interpreted these clauses.

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

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

IN GENERAL

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

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

LEGISLATION PROTECTING ELECTORAL PROCESS

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

tives by districts,[359] did Congress undertake to exercise this power. In subsequent years, Congress expanded on the requirements, successively adding contiguity, compactness, and substantial equality of population to the districting requirements.[360] However, no challenge to the seating of Members-elect selected in violation of these requirements was ever successful,[361] and Congress deleted the standards from the 1929 apportionment act.[362]

In 1866 Congress was more successful in legislating to remedy a situation under which deadlocks in state legislatures over the election of Senators were creating vacancies in the office. The act required the two houses of each legislature to meet in joint session on a specified day and to meet every day thereafter until a Senator was selected.[363]

The first comprehensive federal statute dealing with elections was adopted in 1870 as a means of enforcing the Fifteenth Amendment's guarantee against racial discrimination in granting suffrage rights.[364] Under the Enforcement Act of 1870, and subsequent laws, false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required

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

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

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

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

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

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

of him by state or federal law were made federal offenses.[365] Provision was made for the appointment by federal judges of persons to attend at places of registration and at elections with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election talley sheets.[366] When the Democratic Party regained control of Congress, these pieces of Reconstruction legislation dealing specifically with elections were repealed,[367] but other statutes prohibiting interference with civil rights generally were retained and these were utilized in later years. More recently, Congress has enacted, in 1957, 1960, 1964, 1965, 1968, 1970, 1975, 1980, and 1982, legislation to protect the right to vote in all elections, federal, state, and local, through the assignment of federal registrars and poll watchers, suspension of literacy and other tests, and the broad proscription of intimidation and reprisal, whether with or without state action.[368]

Another chapter was begun in 1907 when Congress passed the Tillman Act, prohibiting national banks and corporations from making contributions in federal elections.[369] The Corrupt Practices Act, first enacted in 1910 and replaced by another law in 1925, extended federal regulation of campaign contributions and expenditures in federal elections,[370] and other acts have similarly provided other regulations.[371]

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[365] The Enforcement Act of May 31, 1870, 16 Stat. 140; The Force Act of February 28, 1871, 16 Stat. 433; The Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. The text of these and other laws and the history of the enactments and subsequent developments are set out in R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).

[366] The constitutionality of sections pertaining to federal elections was sustained in Ex parte Siebold, 100 U.S. 371 (1880), and Ex parte Yarbrough, 110 U.S. 651 (1884). The legislation pertaining to all elections was struck down as going beyond Congress' power to enforce the Fifteenth Amendment. United States v. Reese, 92 U.S. 214 (1876).

[367] 28 Stat. 144 (1894).

[368] P.L. 85–315, Part IV, § 131, 71 Stat. 634, 637 (1957); P.L. 86–449, Title III, § 301, Title VI, 601, 74 Stat. 86, 88, 90 (1960); P.L. 88–352, Title I, § 101, 78 Stat. 241 (1964); P.L. 89–110, 79 Stat. 437 (1965); P.L. 90–284, Title I, § 101, 82 Stat. 73 (1968); P.L. 91–285, 84 Stat. 314 (1970);P.L. 94–73, 89 Stat. 400 (1975); P.L. 97–205, 96 Stat. 131 (1982). Most of these statutes are codified in 42 U.S.C. § 1971 *et seq*. The penal statutes are in 18 U.S.C. §§ 241–245.

[369] Act of January 26, 1907, 34 Stat. 864, now a part of 18 U.S.C. § 610.

[370] Act of February 28, 1925, 43 Stat. 1070, 2 U.S.C. §§ 241–256. Comprehensive regulation is now provided by the Federal Election Campaign Act of 1971, 86 Stat. 3, and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, as amended, 90 Stat. 475, found in titles 2, 5, 18, and 26 of the U.S. Code. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[371] *E.g.*, the Hatch Act, relating principally to federal employees and state and local governmental employees engaged in programs at least partially financed with federal funds, 5 U.S.C. §§ 7324–7327.

As we have noted above, although § 2, cl. 1, of this Article vests in the States the responsibility, now limited, to establish voter qualifications for congressional elections, the Court has held that the right to vote for Members of Congress is derived from the Federal Constitution,[372] and that Congress therefore may legislate under this section of the Article to protect the integrity of this right. Congress may protect the right of suffrage against both official and private abridgment.[373] Where a primary election is an integral part of the procedure of choice, the right to vote in that primary election is subject to congressional protection.[374] The right embraces, of course, the opportunity to cast a ballot and to have it counted honestly.[375] Freedom from personal violence and intimidation may be secured.[376] The integrity of the process may be safeguarded against a failure to count ballots lawfully cast[377] or the dilution of their value by the stuffing of the ballot box with fraudulent ballots.[378] But the bribery of voters, although within reach of congressional power under other clauses of the Constitution, has been held not to be an interference with the rights guaranteed by this section to other qualified voters.[379]

To accomplish the ends under this clause, Congress may adopt the statutes of the States and enforce them by its own sanctions.[380] It may punish a state election officer for violating his duty under a state law governing congressional elections.[381] It may, in short, utilize its power under this clause, combined with the necessary-and-proper clause, to regulate the times, places, and manner of electing Members of Congress so as to fully safeguard the integrity of the process; it may not, however, under this clause, provide different qualifications for electors than those provided by the States.[382]

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[372] United States v. Classic, 313 U.S. 299, 314–15 (1941), and cases cited.

[373] 313 U.S. at 315; Buckley v. Valeo, 424 U. S. 1, 13 n.16 (1976).

[374] 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).

[375] United States v. Mosley, 238 U.S. 383 (1915); United States v. Saylor, 322 U.S. 385, 387 (1944).

[376] Ex parte Yarbrough, 110 U.S. 651 (1884).

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

[378] United States v. Saylor, 322 U.S. 385 (1944).

[379] United States v. Bathgate, 246 U.S. 220 (1918); United States v. Gradwell, 243 U.S. 476 (1917).

[380] Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Clarke, 100 U.S. 399 (1880); 4United States v. Gale, 109 U.S. 65 (1883); In re Coy, 127 U.S. 731 (1888).

[381] Ex parte Siebold, 100 U.S. 371 (1880)

[382] But in Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Black grounded his vote to uphold the age reduction in federal elections and the presidential voting residency provision sections of the Voting Rights Act Amendments of 1970 on this clause. Id. at 119–35. Four Justices specifically rejected this construction, id. at

State authority to regulate the "times, places, and manner" of holding congressional elections has also been tested, and has been described by the Court as "embrac[ing] authority to provide a complete code for congressional elections . . . ; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." [383] The Court has upheld a variety of state laws designed to ensure that elections – including federal elections – are fair and honest and orderly. [384] But the Court distinguished state laws that go beyond "protection of the integrity and regularity of the election process," and instead operate to disadvantage a particular class of candidates. [385] Term limits, viewed as serving the dual purposes of "disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause," crossed this line, [386] as did ballot labels identifying candidates who disregarded voters' instructions on term limits or declined to pledge support for them. [387] "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." [388]

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

IN GENERAL

This Clause was superseded by the Twentieth Amendment.

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

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

[383] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[384] *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); and Munro v. Socialist Workers Party, 479 U.S. 189, 194 (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).

[385] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995).

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

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

[388] Thornton, 514 U.S. at 833-34.

[389] See Twentieth Amendment.

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

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

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

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

POWERS AND DUTIES OF THE HOUSES

Power To Judge Elections

Each House, in judging of elections under this clause, acts as a judicial tribunal, with like power to compel attendance of witnesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming.[390] It may punish perjury committed in testifying before a notary public upon a contested election.[391] The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election.[392] Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the

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[390] Barry v. United States ex rel. Cunningham, 279 U.S. 597, 616 (1929).

[391] In re Loney, 134 U.S. 372 (1890).

[392] 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 72–74, 180 (1936). *Cf.* Newberry v. United States, 256 U.S. 232, 258 (1921).

Senate to inquire into the legality of the election.[393] Nor does such refusal unlawfully deprive the State which elected such person of its equal suffrage in the Senate.[394]

"A Quorum To Do Business"

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Reed and later embodied in Rule XV of the House, that members present in the chamber but not voting would be counted in determining the presence of a quorum.[395] The Supreme Court upheld this rule in *United States v. Ballin*,[396] saying that the capacity of the House to transact business is "created by the mere presence of a majority," and that since the Constitution does not prescribe any method for determining the presence of such majority "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact."[397] The rules of the Senate provide for the ascertainment of a quorum only by a roll call,[398] but in a few cases it has held that if a quorum is present, a proposition can be determined by the vote of a lesser number of members.[399]

Rules of Proceedings

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

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[393] Barry v. United States ex rel. Cunningham, 279 U.S. 597, 614 (1929).

[394] 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).

[395] HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2895–2905 (1907).

[396] 144 U.S. 1 (1892).

[397] 144 U.S. at 5–6.

[398] Rule V.

[399] 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2910–2915 (1907); 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 645, 646 (1936).

uous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[400] Where a rule affects private rights, the construction thereof becomes a judicial question. In *United States v. Smith*,[401] the Court held that the Senate's attempt to reconsider its confirmation of a person nominated by the President as Chairman of the Federal Power Commission was not warranted by its rules and did not deprive the appointee of his title to the office. In *Christoffel v. United States*,[402] a sharply divided Court upset a conviction for perjury in the district courts of one who had denied under oath before a House committee any affiliation with Communism. The reversal was based on the ground that inasmuch as a quorum of the committee, while present at the outset, was not present at the time of the alleged perjury, testimony before it was not before a "competent tribunal" within the sense of the District of Columbia Code.[403] Four Justices, speaking by Justice Jackson, dissented, arguing that under the rules and practices of the House, "a quorum once established is presumed to continue unless and until a point of no quorum is raised" and that the Court was, in effect, invalidating this rule, thereby invalidating at the same time the rule of self-limitation observed by courts "where such an issue is tendered."[404]

Powers of the Houses Over Members

Congress has authority to make it an offense against the United States for a Member, during his continuance in office, to receive compensation for services before a government department in relation to proceedings in which the United States is interested. Such a statute does not interfere with the legitimate authority of the Senate or House over its own Members.[405] In upholding the power of the Senate to investigate charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill, the Supreme Court asserted that "the right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a Member."[406] It cited with apparent approval the action of the Senate in expelling

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

[401] 286 U.S. 6 (1932).

[402] 338 U.S. 84 (1949).

[403] 338 U.S. at 87–90.

[404] 338 U.S. at 92–95.

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

[406] In re Chapman, 166 U.S. 661 (1897).

William Blount in 1797 for attempting to seduce from his duty an American agent among the Indians and for negotiating for services in behalf of the British Government among the Indians—conduct which was not a "statutable offense" and which was not committed in his official character, nor during the session of Congress nor at the seat of government.[407]

In *Powell v. McCormack*,[408] a suit challenging the exclusion of a Member-elect from the House of Representatives, it was argued that inasmuch as the vote to exclude was actually in excess of two-thirds of the Members it should be treated simply as an expulsion. The Court rejected the argument, noting that the House precedents were to the effect that it had no power to expel for misconduct occurring prior to the Congress in which the expulsion is proposed, as was the case of Mr. Powell's alleged misconduct, but basing its rejection on its inability to conclude that if the Members of the House had been voting to expel they would still have cast an affirmative vote in excess of two-thirds.[409]

Duty To Keep a Journal

The object of the clause requiring the keeping of a Journal is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents."[410] When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was present, though not disclosed by the yeas and nays, is final.[411] 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.[412]

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[407] 166 U.S. at 669–70. *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 836 (1833).

[408] 395 U.S. 486 (1969).

[409] 395 U.S. at 506–512.

[410] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 840 (1833), quoted with approval in Field v. Clark, 143 U.S. 649, 670 (1892).

[411] United States v. Ballin, 144 U.S. 1, 4 (1892).

[412] Field v. Clark, 143 U.S. 649 (1892); Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911). *See* the dispute in the Court with regard to the application of *Field* in an origination clause dispute. United States v. Munoz-Flores, 495 U.S. 385, 391 n. 4 (1990), and id. at 408 (Justice Scalia concurring in the judgment). A parallel rule

SECTION 6. Clause 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

COMPENSATION AND IMMUNITIES OF MEMBERS

Congressional Pay

With the surprise ratification of the Twenty-Seventh Amendment,[413] it is now the rule that congressional legislation "varying"—note that the Amendment applies to decreases as well as increases—the level of legislators' pay may not take effect until an intervening election has occurred. The only real controversy likely to arise in the interpretation of the new rule is whether pay increases that result from automatic alterations in pay are subject to the same requirement or whether it is only the initial enactment of the automatic device that is covered. That is, from the founding to 1967, congressional pay was determined directly by Congress in specific legislation setting specific rates of pay. In 1967, a law was passed that created a quadrennial commission with the responsibility to propose to the President salary levels for top officials of the Government, including Members of Congress.[414] 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.[415] These devices were attacked by dissenting Members of Congress as violating the mandate of clause 1 that compensation be "ascertained by Law[.]" However, these chal-

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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).

[413] *See* discussion under Twenty-Seventh Amendment, infra.

[414] P. L. 90–206, § 225, 81 Stat. 642 (1967), as amended, P. L. 95–19, § 401, 91 Stat. 45 (1977), as amended, P. L. 99–190, § 135(e), 99 Stat. 1322 (1985).

[415] P. L. 94–82, § 204(a), 89 Stat. 421.

lenges were rejected.[416] Thereafter, prior to ratification of the Amendment, Congress in the Ethics Reform Act of 1989,[417] altered both the pay-increase and the cost-of-living-increase provisions of law, making quadrennial pay increases effective only after an intervening congressional election and making cost-of-living increases dependent upon a specific congressional vote. Litigation of the effect of the Amendment is ongoing.[418]

Privilege From Arrest

This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted.[419] It does not apply to service of process in either civil[420] or criminal cases.[421] Nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" is interpreted to withdraw all criminal offenses from the operation of the privilege.[422]

Privilege of Speech or Debate

Members.—This clause represents "the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature."[423] So Justice Harlan explained the significance of the speech-and-debate clause, the ancestry of which traces back to a clause in the English Bill of Rights of 1689[424] and the history of which traces back almost to the beginning of the development of Parliament as an independent force.[425] "In the American govern-

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[416] 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).

[417] P.L. 101–194, 103 Stat. 1716, 2 U.S.C. § 31(2), 5 U.S.C. § 5318 note, and 2 U.S.C. §§ 351–363.

[418] Boehner v. Anderson, 809 F. Supp. 138 (D.D.C. 1992) (holding Amendment has no effect on present statutory mechanism).

[419] Long v. Ansell, 293 U.S. 76 (1934).

[420] 293 U.S. at 83.

[421] United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C. Pa. 1800).

[422] Williamson v. United States, 207 U.S. 425, 446 (1908).

[423] United States v. Johnson, 383 U.S. 169, 178 (1966).

[424] "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

[425] United States v. Johnson, 383 U.S. 169, 177–179, 180–183 (1966); Powell v. McCormack, 395 U.S. 486, 502 (1969).

mental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders."[426] "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[427]

The protection of this clause is not limited to words spoken in debate. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'"[428] Thus, so long as legislators are "acting in the sphere of legitimate legislative activity," they are "protected not only from the consequence of litigation's results but also from the burden of defending themselves."[429] But the scope of the meaning of "legislative activity" has its limits. "The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[430] Immunity from civil suit, both in law and equity, and from criminal action based on the performance of legislative duties flows from a determination that a challenged act is within the definition of legislative activity, but the Court in the more recent cases appears to have narrowed the concept somewhat.

In *Kilbourn v. Thompson*,[431] Members of the House of Representatives were held immune in a suit for false imprisonment brought about by a vote of the Members on a resolution charging

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[426] United States v. Johnson, 383 U.S. 169, 178 (1966).

[427] United States v. Brewster, 408 U.S. 501, 507 (1972). This rationale was approvingly quoted from Coffin v. Coffin, 4 Mass. 1, 28 (1808), in Kilbourn v. Thompson, 103 U.S. 168, 203 (1881).

[428] Powell v. McCormack, 395 U.S. 486, 502 (1969), quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[429] Tenney v. Brandhove, 341 U.S. 367, 376–377 (1972); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Powell v. McCormack, 395 U.S. 486, 505 (1969); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

[430] Gravel v. United States, 408 U.S. 606, 625 (1972). The critical nature of the clause is shown by the holding in Davis v. Passman, 442 U.S. 228, 235 n.11 (1979), that when a Member is sued under the Fifth Amendment for employment discrimination on the basis of gender, only the clause could shield such an employment decision, and not the separation of powers doctrine or emanations from it. Whether the clause would be a shield the Court had no occasion to decide and the case was settled on remand without a decision being reached.

[431] 103 U.S. 168 (1881). *But see* Gravel v. United States, 408 U. S. 606, 618–619 (1972).

contempt of one of its committees and under which the plaintiff was arrested and detained, even though the Court found that the contempt was wrongly voted. *Kilbourn* was relied on in *Powell v. McCormack*,[432] in which the plaintiff was not allowed to maintain an action for declaratory judgment against certain Members of the House of Representatives to challenge his exclusion by a vote of the entire House. Because the power of inquiry is so vital to performance of the legislative function, the Court held that the clause precluded suit against the Chairman and Members of a Senate subcommittee and staff personnel, to enjoin enforcement of a subpoena directed to a third party, a bank, to obtain the financial records of the suing organization. The investigation was a proper exercise of Congress' power of inquiry, the subpoena was a legitimate part of the inquiry, and the clause therefore was an absolute bar to judicial review of the subcommittee's actions prior to the possible institution of contempt actions in the courts.[433] And in *Dombrowski v. Eastland*,[434] the Court affirmed the dismissal of an action against the chairman of a Senate committee brought on allegations that he wrongfully conspired with state officials to violate the civil rights of plaintiff.

Through an inquiry into the nature of the "legislative acts" performed by Members and staff, the Court held that the clause did not defeat a suit to enjoin the public dissemination of legislative materials outside the halls of Congress.[435] A committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report that the House of Representatives routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner, and their parents sued various committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was deleted and also seeking damages. The Court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—

[432] 395 U.S. 486 (1969). The Court found sufficient the presence of other defendants to enable it to review Powell's exclusion but reserved the question whether in the absence of someone the clause would still preclude suit. Id. at 506 n.26. *See also* Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[433] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

[434] 387 U.S. 82 (1967). *But see* the reinterpretation of this case in Gravel v. United States, 408 U.S. 606, 619–620 (1972). *And see* McSurely v. McClellan, 553 F. 2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted, sub nom.* McAdams v. McSurely, 438 U.S. 189 (1978).

[435] Doe v. McMillan, 412 U.S. 306 (1973).

were protected by the clause. The Superintendent of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and those acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, because it is unnecessary to the performance of official legislative actions. Dissemination of the report within the body was protected, whereas dissemination in normal channels outside it was not.[436]

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

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

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

[437] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[438] 443 U.S. at 126, quoting Gravel v. United States, 408 U.S. 606, 625 (1972).

[439] Hutchinson v. Proxmire, 443 U.S. 111, 130, 132–133 (1979). The Court distinguished between the more important "informing" function of Congress, i.e., its efforts to inform itself in order to exercise its legislative powers, and the less important "informing" function of acquainting the public about its activities. The latter function the Court did not find an integral part of the legislative process. *See also* Doe v. McMillan, 412 U.S. 306, 314–317 (1973). *But compare* id. at 325 (concurring). For consideration of the "informing" function in its different guises in the context of legislative investigations, *see* Watkins v. United States, 354 U.S. 178, 200 (1957); United States v. Rumely, 345 U.S. 41, 43 (1953); Russell v. United States, 369 U.S. 749, 777–778 (1962) (Justice Douglas dissenting).

islative conduct and motivation of a Member. Thus, in *United States v. Johnson*,[440] the Court voided the conviction of a Member for conspiracy to impair lawful governmental functions, in the course of seeking to divert a governmental inquiry into alleged wrongdoing, by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy and extensive evidence concerning it was introduced at a trial. It was this examination into the context of the speech—its authorship, motivation, and content—which the Court found foreclosed by the speech-or-debate clause.[441]

However, in *United States v. Brewster*,[442] while continuing to assert that the clause "must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch,"[443] the Court substantially reduced the scope of the coverage of the clause. In upholding the validity of an indictment of a Member, which charged that he accepted a bribe to be "influenced in his performance of official acts in respect to his action, vote, and decision" on legislation, the Court drew a distinction between a prosecution that caused an inquiry into legislative acts or the motivation for performance of such acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch."[444] In other words, it is the fact of having taken a bribe, not the act the bribe is intended to influence, which is the subject of the prosecution, and the speech-or-debate clause interposes no obstacle to this type of prosecution.[445]

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[440] 383 U.S. 169 (1966).

[441] Reserved was the question whether a prosecution that entailed inquiry into legislative acts or motivation could be founded upon "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S.. at 185. The question was similarly reserved in United States v. Brewster, 408 U.S. 501, 529 n.18 (1972), although Justices Brennan and Douglas would have answered negatively. Id. at 529, 540.

[442] 408 U.S. 501 (1972).

[443] 408 U.S. at 516.

[444] 408 U.S. at 526.

[445] The holding was reaffirmed in United States v. Helstoski, 442 U.S. 477 (1979). On the other hand, the Court did hold that the protection of the clause is so fundamental that, assuming a Member may waive it, a waiver could be found

Applying in the criminal context the distinction developed in the civil cases between protected "legislative activity" and unprotected conduct prior to or subsequent to engaging in "legislative activity," the Court in *Gravel v. United States*,[446] held that a grand jury could validly inquire into the processes by which the Member obtained classified government documents and into the arrangements for subsequent private republication of these documents, since neither action involved protected conduct. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."[447]

Congressional Employees.—Until recently, it was seemingly the basis of the decisions that while Members of Congress may be immune from suit arising out of their legislative activities, legislative employees who participate in the same activities under the direction of the Member or otherwise are responsible for their acts if those acts be wrongful.[448] Thus, in *Kilbourn v. Thompson*,[449] the sergeant at arms of the House was held liable for false imprisonment because he executed the resolution ordering Kilbourn arrested and imprisoned. *Dombrowski v. Eastland*[450] held that a subcommittee counsel might be liable in damages for actions as to which the chairman of the committee was immune from suit. And in *Powell v. McCormack*,[451] the Court held that the presence of House of Representative employees as defendants in a suit for declaratory judgment gave the federal courts jurisdiction to review the propriety of the plaintiff's exclusion from office by vote of the House. Upon full consideration of the question, however, the Court, in *Gravel v. United States*,[452] accepted a series of contentions urged

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only after explicit and unequivocal renunciation, rather than by failure to assert it at any particular point. Similarly, Helstoski v. Meanor, 442 U.S. 500 (1979), held that since the clause properly applied is intended to protect a Member from even having to defend himself, he may appeal immediately from a judicial ruling of nonapplicability rather than wait to appeal after conviction.

[446] 408 U.S. 606 (1972).

[447] 408 U.S. at 626.

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

[449] 103 U.S. 168 (1881).

[450] 387 U.S. 82 (1967).

[451] 395 U.S. 486 (1969).

[452] 408 U.S. 606 (1972).

upon it not only by the individual Senator but by the Senate itself appearing by counsel as amicus: "that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate clause . . . will inevitably be diminished and frustrated."[453] Therefore, the Court held "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[454]

The *Gravel* holding, however, does not so much extend congressional immunity to employees as it narrows the actual immunity available to both aides and Members in some important respects. Thus, the Court says, the legislators in *Kilbourn* were immune because adoption of the resolution was clearly a legislative act but the execution of the resolution—the arrest and detention—was not a legislative act immune from liability, so that the House officer was in fact liable as would have been any Member who had executed it.[455] *Dombrowski* was interpreted as having held that no evidence implicated the Senator involved, whereas the committee counsel had been accused of "conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize."[456] And *Powell* was interpreted as simply holding that voting to exclude plaintiff, which was all the House defendants had done, was a legislative act immune from Member liability but not from judicial inquiry. "None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. . . . [N]o prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they

[453] 408 U.S. at 616–17.
[454] 408 U.S. at 618.
[455] 408 U.S. at 618–19.
[456] 408 U.S. at 619–20.

nor their aides should be immune from liability or questioning in such circumstances."[457]

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

DISABILITIES OF MEMBERS

Appointment to Executive Office

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

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

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[457] 408 U.S. at 620–21.

[458] 2 J. STORY, COMMENTARIES ON THE CONSTITUITON OF THE UNITED STATES § 864 (1833).

[459] 34 Stat. 948 (1907).

[460] 35 Stat. 626 (1909). Congress followed this precedent when the President wished to appoint a Senator as Attorney General and the salary had been increased pursuant to a process under which Congress did not need to vote to approve but could vote to disapprove. The salary was temporarily reduced to its previous level. 87 Stat. 697 (1975). *See also* 89 Stat. 1108 (1975) (reducing the salary of a member of the Federal Maritime Commission in order to qualify a Representative).

some time to run. The appointment was defended, however, with the argument that inasmuch as Mr. Black was only fifty-one years of age at the time, he would be ineligible for the "increased emolument" for nineteen years and it was not as to him an increased emolument.[461] In 1969, it was briefly questioned whether a Member of the House of Representatives could be appointed Secretary of Defense because, under a salary bill enacted in the previous Congress, the President would propose a salary increase, including that of cabinet officers, early in the new Congress which would take effect if Congress did not disapprove it. The Attorney General ruled that inasmuch as the clause would not apply if the increase were proposed and approved subsequent to the appointment, it similarly would not apply in a situation in which it was uncertain whether the increase would be approved.[462]

Incompatible Offices

This second part of the second clause elicited little discussion at the Convention and was universally understood to be a safeguard against executive influence on Members of Congress and the prevention of the corruption of the separation of powers.[463] Congress has at various times confronted the issue in regard to seating or expelling persons who have or obtain office in another branch. Thus, it has determined that visitors to academies, regents, directors, and trustees of public institutions, and members of temporary commissions who receive no compensation as members are not officers within the constitutional inhibition.[464] Government contractors and federal officers who resign before presenting their credentials may be seated as Members of Congress.[465]

One of the more recurrent problems which Congress has had with this clause is the compatibility of congressional office with service as an officer of some military organization—militia, reserves, and the like.[466] Members have been unseated for accepting appointment to military office during their terms of congressional

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

[462] 42 Op. Atty. Gen. No. 36 (January 3, 1969).

[463] THE FEDERALIST, No. 76 (Hamilton) (J. Cooke ed. 1961), 514; 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 866–869 (1833).

[464] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 493 (1907); 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 63–64 (1936).

[465] Hinds', supra §§ 496–499.

[466] *Cf.* Right of a Representative in Congress To Hold Commission in National Guard, H. Rep. No. 885, 64th Congress, 1st sess. (1916).

office,[467] but there are apparently no instances in which a Member-elect has been excluded for this reason. Because of the difficulty of successfully claiming standing, the issue has never been a litigatible matter.[468]

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

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

Clause 3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may

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[467] *Hinds',* supra §§ 486–492, 494; *Cannon's,* supra §§ 60–62.

[468] An effort to sustain standing was rebuffed in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

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

THE LEGISLATIVE PROCESS

Revenue Bills

Insertion of this clause was another of the devices sanctioned by the Framers to preserve and enforce the separation of powers.[469] It applies, in the context of the permissibility of Senate amendments to a House-passed bill, to all bills for collecting revenue—revenue decreasing as well as revenue increasing—rather than simply to just those bills that increase revenue.[470]

Only bills to levy taxes in the strict sense of the word are comprehended by the phrase "all bills for raising revenue"; bills for other purposes, which incidentally create revenue, are not included.[471] Thus, a Senate-initiated bill that provided for a monetary "special assessment" to pay into a crime victims fund did not violate the clause, because it was a statute that created and raised revenue to support a particular governmental program and was not a law raising revenue to support Government generally.[472] An act providing a national currency secured by a pledge of bonds of the United States, which, "in the furtherance of that object, and also to meet the expenses attending the execution of the act," imposed a tax on the circulating notes of national banks was held not to be a revenue measure which must originate in the House of Representatives.[473] Neither was a bill that provided that the District of Columbia should raise by taxation and pay to designated rail-

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[469] THE FEDERALIST, No. 58 (J. Cooke ed. 1961), 392–395 (Madison). *See* United States v. Munoz-Flores, 495 U.S. 385, 393–395 (1990).

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

[471] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 880 (1833).

[472] United States v. Munoz-Flores, 495 U.S. 385 (1990).

[473] Twin City National Bank v. Nebeker, 167 U.S. 196 (1897).

road companies a specified sum for the elimination of grade crossings and the construction of a railway station.[474] The substitution of a corporation tax for an inheritance tax,[475] and the addition of a section imposing an excise tax upon the use of foreign-built pleasure yachts,[476] have been held to be within the Senate's constitutional power to propose amendments.

Approval by the President

The President is not restricted to signing a bill on a day when Congress is in session.[477] He may sign within ten days (Sundays excepted) after the bill is presented to him, even if that period extends beyond the date of the final adjournment of Congress.[478] His duty in case of approval of a measure is merely to sign it. He need not write on the bill the word "approved" nor the date. If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer.[479] A bill becomes a law on the date of its approval by the President.[480] When no time is fixed by the act it is effective from the date of its approval,[481] which usually is taken to be the first moment of the day, fractions of a day being disregarded.[482]

The Veto Power

The veto provisions, the Supreme Court has told us, serve two functions. On the one hand, they ensure that "the President shall have suitable opportunity to consider the bills presented to him. ... It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become law if the adjournment of the Congress prevents their return."[483] 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."[484] The Court asserted that "[w]e

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[474] Millard v. Roberts, 202 U.S. 429 (1906).

[475] Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911).

[476] Rainey v. United States, 232 U.S. 310 (1914).

[477] La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).

[478] 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 23 days after the adjournment of Congress. Schmeckebier, *Approval of Bills After Adjournment of Congress*, 33 AM. POL. SCI. REV. 52–53 (1939).

[479] Gardner v. Collector, 73 U.S. (6 Wall.) 499 (1868).

[480] 73 U.S. at 504. *See also* Burgess v. Salmon, 97 U.S. 381, 383 (1878).

[481] Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 211 (1822).

[482] Lapeyre v. United States, 84 U.S. (17 Wall.) 191, 198 (1873).

[483] Wright v. United States, 302 U. S. 583, 596 (1938).

[484] 302 U.S. at 596.

should not adopt a construction which would frustrate either of these purposes."[485]

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

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

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[485] Id.

[486] *See* Line Item Veto: Hearing Before the Senate Committee on Rules and Administration, 99th Cong., 1st sess. (1985), esp. 10–20 (CRS memoranda detailing the issues). Some publicists have even contended, through a strained interpretation of clause 3, actually from its intended purpose to prevent Congress from subverting the veto power by calling a bill by some other name, that the President already possesses the line-item veto, but no President could be brought to test the thesis. *See Pork Barrels and Principles - The Politics of the Presidential Veto*, (Natl.Legal Center for the Public Interest, 19–8) (collecting essays).

[487] 279 U.S. 655 (1929).

[488] 279 U.S. at 680.

gress had never authorized an agent to receive bills during adjournment, the Court opined that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate."[489]

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

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

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[489] 279 U.S. at 684.

[490] 302 U.S. 583 (1938).

[491] 302 U.S. at 589–90.

[492] 302 U.S. at 589.

[493] 302 U.S. at 595.

[494] 511 F. 2d 430 (D.C. Cir. 1974). The Administration declined to appeal the case to the Supreme Court. The adjournment here was for five days. Subsequently, the President attempted to pocket veto two other bills, one during a 32 day recess and one during the period which Congress had adjourned sine die from the first to the second session of the 93d Congress. After renewed litigation, the Administration entered its consent to a judgment that both bills had become law, Kennedy v. Jones, Civil Action No. 74–194 (D.D.C., decree entered April 13, 1976), and it was announced that President Ford "will use the return veto rather than the pocket veto during intra-session and intersession recesses and adjournments of the Congress", provided that the House to which the bill must be returned has authorized an officer to receive vetoes during the period it is not in session. President Reagan repudi-

appellate court held that a return is not prevented by an intrasession adjournment of any length by one or both Houses of Congress, so long as the originating House arranged for receipt of veto messages. The court stressed that the absence of the evils deemed to bottom the Court's premises in The *Pocket Veto Case*—long delay and public uncertainty—made possible the result.

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

Presentation of Resolutions

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

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ated this agreement and vetoed a bill during an intersession adjournment. Although the lower court applied Kennedy v. Sampson to strike down the exercise of the power, but the case was mooted prior to Supreme Court review. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated and remanded to dismiss sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

[495] Missouri Pacific Ry. v. Kansas, 248 U.S. 276 (1919).

[496] 87 U.S. (20 Wall.) 92 (1874).

[497] 12 Stat. 589 (1862).

[498] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 301–302, 304–305.

[499] S. Rep. No. 1335, 54th Congress, 2d Sess.; 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3483 (1907).

laid before President Washington for his approval—a procedure the Court ratified in due course.[500]

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

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[500] Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

[501] Act of June 30, 1932, § 407, 47 Stat. 414.

[502] *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.

[503] 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 more up-to-date 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 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.

[504] 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).

In *INS v. Chadha*,[505] the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Art. I, §§ 1 and 7, and the presentment provisions of § 7, cl. 2 and 3. The provision in question was § 244(c)(2) of the Immigration and Nationality Act, which authorized either House of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country. The Court's analysis of the presentment issue made clear, however, that two-House veto provisions, despite their compliance with bicameralism, and committee veto provisions suffer the same constitutional infirmity.[506] In the words of dissenting Justice White, the Court in *Chadha* "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"[507]

In determining that veto of the Attorney General's decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the general standard. "Whether actions taken by either House are, in law and in fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' [T]he action taken here ... was essentially legislative," the Court concluded, because "it had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and *Chadha*, all outside the legislative branch."[508]

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

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[505] 462 U.S. 919 (1983).

[506] 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). Prior to Chadha, an appellate court in AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982), had voided a form of committee veto, a provision prohibiting the availability of certain funds for a particular purpose without the prior approval of the Committees on Appropriations.

[507] *Chadha*, 462 U.S. at 967. Justice Powell concurred separately, asserting that Congress had violated separation of powers principles by assuming a judicial function in determining that a particular individual should be deported. Justice Powell therefore found it unnecessary to express his view on "the broader question of whether legislative vetoes are invalid under the Presentment Clauses." Id. at 959.

[508] 462 U.S. at 952 (citation omitted).

pointments, and to advise and consent to treaties; similarly, the Congress may propose a constitutional amendment without the President's approval, and each House is given autonomy over certain "internal matters," e.g., judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these "narrow, explicit, and separately justified" exceptions must conform to the prescribed procedures: "passage by a majority of both Houses and presentment to the President."[509]

The breadth of the Court's ruling in *Chadha* was evidenced in its 1986 decision in *Bowsher v. Synar*.[510] Among the rationales for holding the Deficit Control Act unconstitutional was the Court's assertion that Congress had, in effect, retained control over executive action in a manner resembling a congressional veto. "[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[511] Congress had offended this principle by retaining removal authority over the Comptroller General, charged with executing important aspects of the Budget Act.

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

The Line Item Veto.—For more than a century, United States Presidents had sought the authority to strike out of appropriations bills particular items, to veto "line items" of money bills and sometimes legislative measures as well. Finally, in 1996, Congress approved and the President signed the Line Item Veto Act.[512] The law empowered the President, within five days of signing a bill, to "cancel in whole" spending items and targeted, defined tax benefits. In acting on this authority, the President was to determine that the cancellation of each item would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest."[513] In *Clinton v. City of New*

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[509] 462 U.S. at 955–56.

[510] 478 U.S. 714 (1986). *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[511] Bowsher v. Synar, 478 U.S. 714, 733 (1986). This position was developed at greater length in the concurring opinion of Justice Stevens. Id. at 736.

[512] Pub. L. 104–130, 110 Stat. 1200, codified in part at 2 U.S.C. §§691–92.

[513] Id. at § 691(a)(A).

York,[514] the Court held the Act to be unconstitutional because it did not comply with the presentment clause.

Although Congress in passing the Act considered itself to have been delegating power,[515] and although the dissenting Justices would have upheld the Act as a valid delegation,[516] the Court instead analyzed the statute under the presentment clause. In the Court's view, the two bills from which the President subsequently struck items became law the moment the President signed them. His cancellations thus amended and in part repealed the two federal laws. Under its most immediate precedent, the Court continued, statutory repeals must conform to the presentment clauses's "single, finely wrought and exhaustively considered, procedure" for enacting or repealing a law.[517] In no respect did the procedures in the Act comply with that clause, and in no way could they. The President was acting in a legislative capacity, altering a law in the manner prescribed, and legislation must, in the way Congress acted, be bicameral and be presented to the President after Congress acted. Nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court could construe both constitutional silence and the historical practice over 200 years as "an express prohibition" of the President's action.[518]

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

POWER TO TAX AND SPEND

Kinds of Taxes Permitted

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

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[514] 524 U.S. 417(1998).

[515] 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").

[516] 524 U.S. at 453 (Justice Scalia concurring in part and dissenting in part); id. at 469 (Justice Breyer dissenting).

[517] 524 U.S. at 438–39 (citing and quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[518] 524 U.S. at 439.

acter of this power by saying from time to time that it "reaches every subject,"[519] that it is "exhaustive"[520] or that it "embraces every conceivable power of taxation."[521] Despite these generalizations, the power has been at times substantially curtailed by judicial decision with respect to the subject matter of taxation, the manner in which taxes are imposed, and the objects for which they may be levied.

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

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[519] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).
[520] Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916).
[521] 240 U.S. at 12.
[522] 253 U.S. 245 (1920).
[523] 268 U.S. 501 (1925).
[524] 307 U.S. 277 (1939).
[525] 78 U.S. (11 Wall.) 113 (1871).
[526] Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). *Collector v. Day* was decided in 1871 while the country was still in the throes of Reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in Helvering v. Gerhardt, 304 U.S. 405, 414 n.4 (1938), the Court had not determined how far the Civil War Amendments had broadened the federal power at the expense of the States, but the fact that the taxing power had recently been used with destructive effect upon notes issued by the state banks, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869), suggested the possibility of similar attacks upon the existence of the States themselves. Two years later, the Court took the logical step of holding that the federal income tax could not be imposed on income received by a municipal corporation from its investments. United States v. Railroad Co., 84 U.S. (17 Wall.) 322 (1873). A far-reaching extension of private immunity was granted in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), where interest received by a private investor on state or municipal bonds was held to be exempt from federal taxation. (Though relegated to virtual desuetude, Pollock was not expressly overruled until South Carolina v. Baker, 485 U.S. 505 (1988)). As the apprehension of this era subsided, the doctrine of these cases was pushed into the background. It never received the same wide application as did McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), in curbing the power of the States to tax operations or instrumentalities of the Federal Government. Only once since the turn of the century has the national taxing power been further narrowed in the name of dual federalism. In 1931 the Court held that a federal excise tax was inapplicable to the manufacture and sale to a municipal corporation of equipment for its police force. Indian Motorcycle v. United States, 283 U.S. 570 (1931). Justices Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today. *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978).

a tax which would impair the sovereignty of the States—is still recognized as retaining some vitality.[527]

Federal Taxation of State Interests.—In 1903 a succession tax upon a bequest to a municipality for public purposes was upheld on the ground that the tax was payable out of the estate before distribution to the legatee. Looking to form and not to substance, in disregard of the mandate of *Brown v. Maryland*,[528] 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."[529] When South Carolina embarked upon the business of dispensing alcoholic beverages, its agents were held to be subject to the national internal revenue tax, the ground of the holding being that in 1787 such a business was not regarded as one of the ordinary functions of government.[530]

Another decision marking a clear departure from the logic of *Collector v. Day* was *Flint v. Stone Tracy Co.*,[531] where the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income. The argument that the tax imposed an unconstitutional burden on the exercise by a State of its reserved power to create corporate franchises was rejected, partly in consideration of the principle of national supremacy, and partly on the ground that the corporate franchises were private property. This case also qualified *Pollock v. Farmers' Loan & Trust Co.* to the extent of allowing interest on state bonds to be included in measuring the tax on the corporation.

Subsequent cases have sustained an estate tax on the net estate of a decedent, including state bonds,[532] excise taxes on the transportation of merchandise in performance of a contract to sell and deliver it to a county,[533] on the importation of scientific apparatus by a state university,[534] on admissions to athletic contests sponsored by a state institution, the net proceeds of which were used to further its educational program,[535] and on admissions to recreational facilities operated on a nonprofit basis by a municipal

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[527] 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.

[528] 25 U.S. (12 Wheat.) 419, 444 (1827).

[529] Snyder v. Bettman, 190 U.S. 249, 254 (1903).

[530] South Carolina v. United States, 199 U.S. 437 (1905). *See also* Ohio v. Helvering, 292 U.S. 360 (1934).

[531] 220 U.S. 107 (1911).

[532] Greiner v. Lewellyn, 258 U.S. 384 (1922).

[533] Wheeler Lumber Co. v. United States, 281 U.S. 572 (1930).

[534] Board of Trustees v. United States, 289 U.S. 48 (1933).

[535] Allen v. Regents, 304 U.S. 439 (1938).

corporation.[536] Income derived by independent engineering contractors from the performance of state functions,[537] the compensation of trustees appointed to manage a street railway taken over and operated by a State,[538] profits derived from the sale of state bonds,[539] or from oil produced by lessees of state lands,[540] have all been held to be subject to federal taxation despite a possible economic burden on the State.

In finally overruling *Pollock*, the Court stated that *Pollock* had "merely represented one application of 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."[541] That rule, the Court observed, had already been rejected in numerous decisions involving intergovernmental immunity. "We see no constitutional reason for treating persons who receive interest on governmental 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."[542]

Scope of State Immunity From Federal Taxation.—Although there have been sharp differences of opinion among members of the Supreme Court in cases dealing with the tax immunity of state functions and instrumentalities, it has been stated that "all agree that not all of the former immunity is gone."[543] Twice, the Court has made an effort to express its new point of view in a statement of general principles by which the right to such immunity shall be determined. However, the failure to muster a majority in concurrence with any single opinion in the latter case leaves the question very much in doubt. In *Helvering v. Gerhardt*,[544] where, without overruling *Collector v. Day*, it narrowed the immunity of salaries of state officers from federal income taxation, the Court announced "two guiding principles of limitation for holding the tax immunity of State instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the State or in its behalf, excludes from the immunity activities

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[536] Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949).
[537] Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926).
[538] Helvering v. Powers, 293 U.S. 214 (1934).
[539] Willcuts v. Bunn, 282 U.S. 216 (1931).
[540] Helvering v. Producers Corp., 303 U.S. 376 (1938), overruling Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932).
[541] South Carolina v. Baker, 485 U.S. 505, 517 (1988).
[542] 485 U.S. at 524.
[543] New York v. United States, 326 U.S. 572, 584 (1946) (concurring opinion of Justice Rutledge).
[544] 304 U.S. 405 (1938).

thought not to be essential to the preservation of State governments even though the tax be collected from the State treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the State only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the State is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the State government; even though the function be thought important enough to demand immunity from a tax upon the State itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons." [545]

The second attempt to formulate a general doctrine was made in *New York v. United States*, [546] where, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court reconsidered the right of Congress to tax business enterprises carried on by the States. Justice Frankfurter, speaking for himself and Justice Rutledge, made the question of discrimination *vel non* against state activities the test of the validity of such a tax. They found "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." [547] In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier case to the effect that "the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." [548] Justices Douglas and Black dissented in an opinion written by the former on the ground that the decision disregarded the Tenth Amendment, placed "the sovereign States on the same plane as private citizens," and made them "pay the Federal Government for the privilege of exercising powers of sovereignty guaranteed them by the Constitution." [549] In a later case dealing with state immunity the Court sustained the tax on the second ground mentioned in

[545] 304 U.S. at 419–20.
[546] 326 U.S. 572 (1946).
[547] 326 U.S. at 584.
[548] 326 at 589–90.
[549] 326 U.S. at 596.

Helvering v. Gerhardt—that the burden of the tax was borne by private persons—and did not consider whether the function was one which the Federal Government might have taxed if the municipality had borne the burden of the exaction.[550]

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

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

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[550] Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949). *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978).

[551] 485 U.S. 505 (1988).

[552] 485 U.S. at 523.

[553] 485 U.S. at 524 n.14.

[554] *See also* Article I, § 9, cl. 4.

[555] LaBelle Iron Works v. United States, 256 U.S. 377 (1921); Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916); Head Money Cases, 112 U.S. 580 (1884).

[556] 462 U.S. 74 (1983).

[557] 462 U.S. at 85.

The clause accordingly places no obstacle in the way of legislative classification for the purpose of taxation, nor in the way of what is called progressive taxation.[558] A taxing statute does not fail of the prescribed uniformity because its operation and incidence may be affected by differences in state laws.[559] A federal estate tax law which permitted deduction for a like tax paid to a State was not rendered invalid by the fact that one State levied no such tax.[560] The term "United States" in this clause refers only to the States of the Union, the District of Columbia, and incorporated territories. Congress is not bound by the rule of uniformity in framing tax measures for unincorporated territories.[561] Indeed, in *Binns v. United States*,[562] the Court sustained license taxes imposed by Congress but applicable only in Alaska, where the proceeds, although paid into the general fund of the Treasury, did not in fact equal the total cost of maintaining the territorial government.

PURPOSES OF TAXATION

Regulation by Taxation

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

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[558] Knowlton v. Moore, 178 U.S. 41 (1900).

[559] Fernandez v. Wiener, 326 U.S. 340 (1945); Riggs v. Del Drago, 317 U.S. 95 (1942); Phillips v. Commissioner, 283 U.S. 589 (1931); Poe v. Seaborn, 282 U.S. 101, 117 (1930).

[560] Florida v. Mellon, 273 U.S. 12 (1927).

[561] Downes v. Bidwell, 182 U.S. 244 (1901).

[562] 194 U.S. 486 (1904). The Court recognized that Alaska was an incorporated territory but took the position that the situation in substance was the same as if the taxes had been directly imposed by a territorial legislature for the support of the local government.

[563] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).

[564] United States v. Kahriger, 345 U.S. 22 (1953). Dissenting, Justice Frankfurter maintained that this was not a bona fide tax, but was essentially an effort to check, if not stamp out, professional gambling, an activity left to the responsibility of the States. Justices Jackson and Douglas noted partial agreement with this conclusion. *See also* Lewis v. United States, 348 U.S. 419 (1955).

[565] United States v. Yuginovich, 256 U.S. 450 (1921).

[566] United States v. Constantine, 296 U.S. 287, 293 (1935).

a question for decision by the State.[567] This, nevertheless, does not signify that Congress may not often regulate to some extent a business within a State in order to tax it more effectively. Under the necessary-and-proper clause, Congress may do this very thing. Not only has the Court sustained regulations concerning the packaging of taxed articles such as tobacco[568] and oleomargarine,[569] ostensibly designed to prevent fraud in the collection of the tax, it has also upheld measures taxing drugs[570] and firearms,[571] which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way. These regulations were sustained as conducive to the efficient collection of the tax though they clearly transcended in some respects this ground of justification.[572]

Extermination by Taxation

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

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[567] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).

[568] Felsenheld v. United States, 186 U.S. 126 (1902).

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

[570] United States v. Doremus, 249 U.S. 86 (1919). *Cf.* Nigro v. United States, 276 U.S. 332 (1928).

[571] Sonzinsky v. United States, 300 U.S. 506 (1937).

[572] Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled *Kahriger*, *Lewis*, *Doremus*, *Sonzinsky*, and similar cases on the ground that the statutory scheme compelled self-incrimination through registration. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States, 395 U.S. 6 (1969).

[573] McCray v. United States, 195 U.S. 27 (1904).

power of the lawmakers to realize by legislation directly addressed to their accomplishments.'" [574]

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

Promotion of Business: Protective Tariff

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

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[574] United States v. Sanchez, 340 U.S. 42, 44 (1950). *See also* Sonzinsky v. United States, 300 U.S. 506, 513–514 (1937).

[575] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 383 (1940). *See also* Head Money Cases, 112 U.S. 580, 596 (1884).

[576] Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922); Helwig v. United States, 188 U.S. 605 (1903).

[577] 296 U.S. 287 (1935).

[578] 1 Stat. 24 (1789).

[579] 276 U.S. 394 (1928).

it is unconstitutional to frame the customs duties with any other view than that of revenue raising."

The Chief Justice then observed that the first Congress in 1789 had enacted a protective tariff. "In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions.... The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history. ... Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subject of taxes cannot invalidate Congressional action."[580]

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

The grant of power to "provide ... for the general welfare" raises a two-fold question: how may Congress provide for "the general welfare" and what is "the general welfare" that it is authorized to promote? The first half of this question was answered by Thomas Jefferson in his opinion on the Bank as follows: "[T]he laying of taxes is the power, and the general welfare the purpose for which the power is to be exercised. They [Congress] are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose."[581] The clause, in short, is not an independent grant of power, but a qualification of the taxing power. Although a broader view has been occasionally asserted,[582] Congress has not acted upon it and the Court has had no occasion to adjudicate the point.

With respect to the meaning of "the general welfare" the pages of *The Federalist* itself disclose a sharp divergence of views between its two principal authors. Hamilton adopted the literal,

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[580] 276 U.S. at 411–12.

[581] 3 WRITINGS OF THOMAS JEFFERSON 147–149 (Library Edition, 1904).

[582] *See* W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

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

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

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[583] THE FEDERALIST, Nos. 30 and 34 (J. Cooke ed. 1961) 187–193, 209–215.

[584] Id. at No. 41, 268–78.

[585] 1 Stat. 229 (1792).

[586] 2 Stat. 357 (1806).

[587] In an advisory opinion, which it rendered for President Monroe at his request on the power of Congress to appropriate funds for public improvements, the Court answered that such appropriations might be properly made under the war and postal powers. *See* Albertsworth, *Advisory Functions in the Supreme Court*, 23 GEO. L. J. 643, 644–647 (1935). Monroe himself ultimately adopted the broadest view of the spending power, from which, however, he carefully excluded any element of regulatory or police power. *See* his *Views of the President of the United States on the Subject of Internal Improvements*, of May 4, 1822, 2 MESSAGES AND PAPERS OF THE PRESIDENTS 713–752 (Richardson ed., 1906).

[588] California v. Pacific R.R., 127 U.S. 1 (188).

[589] 255 U.S. 180 (1921).

[590] 262 U.S. 447 (1923). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938). These cases were limited by Flast v. Cohen, 392 U.S. 83 (1968).

[591] 160 U.S. 668 (1896).

[592] 160 U.S. at 681.

right of the Federal Government to acquire land within a State for use as a national park.

Finally, in *United States v. Butler*,[593] the Court gave its unqualified endorsement to Hamilton's views on the taxing power. Wrote Justice Roberts for the Court: "Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the numerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court had noticed the question, but has never found it necessary to decide which is the true construction. Justice Story, in his *Commentaries*, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[594]

By and large, it is for Congress to determine what constitutes the "general welfare." The Court accords great deference to Congress's decision that a spending program advances the general welfare,[595] and has even questioned whether the restriction is judi-

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[593] 297 U.S. 1 (1936). *See also* Cleveland v. United States, 323 U.S. 329 (1945).

[594] United States v. Butler, 297 U.S. 1, 65, 66 (1936). So settled had the issue become that 1970s attacks on federal grants-in-aid omitted any challenge on the broad level and relied on specific prohibitions, i.e., the religion clauses of the First Amendment. Flast v. Cohen, 392 U.S. 83 (1968); Tilton v. Richardson, 403 U.S. 672 (1971).

[595] Id. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937)).

cially enforceable.[596] Dispute, such as it is, turns on the conditioning of funds.

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

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

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[596] Buckley v. Valeo, 424 U.S. 1, 90–91 (1976); South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987).

[597] Justice Stone, speaking for himself and two other Justices, dissented on the ground that Congress was entitled when spending the national revenues for the "general welfare" to see to it that the country got its money's worth thereof, and that the condemned provisions were "necessary and proper" to that end. United States v. Butler, 297 U.S. 1, 84–86 (1936).

[598] 301 U.S. 548 (1937).

[599] 301 U.S. at 591.

[600] 301 U.S. at 590. *See also* Buckley v. Valeo, 424 U.S. 1, 90–92 (1976); Fullilove v. Klutznick, 448 U.S. 448, 473–475 (1980); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

[601] In the *Steward Machine Company* case, it was a taxpayer who complained of the invasion of state sovereignty, and the Court put great emphasis on the fact that the State was a willing partner in the plan of cooperation embodied in the Social Security Act. 301 U.S. 548, 589, 590 (1937).

Congress's power to do so in *Oklahoma v. Civil Service Commission*.[602] The State objected to the enforcement of a provision of the Hatch Act that reduced its allotment of federal highway funds because of its failure to remove from office a member of the State Highway Commission found to have taken an active part in party politics while in office. The Court denied relief on the ground that, "[w]hile the United States is not concerned with, and has no power to regulate local political activities as such of State officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.... The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the State, it has never been thought that such effect made the federal act invalid."[603]

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

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

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[602] 330 U.S. 127 (1947).

[603] 330 U.S. 127, 143 (1947).

[604] Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (Chief Justice Burger announcing judgment of the Court). The Chief Justice cited five cases to document the assertion: California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974); Lau v. Nichols, 414 U.S. 563 (1974); Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619 (1937); and Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

[605] *See* South Dakota v. Dole, 483 U.S. 203, 207–12 (1987).

[606] 483 U.S. at 207 (1987). *See* discussion under Scope of the Power, supra.

[607] Barnes v. Gorman, 122 S. Ct. 2097, 2100 (2002) (holding that neither the Americans With Disabilities Act of 1990 nor section 504 of the Rehabilitation Act of 1973 subjected states to punitive damages in private actions).

States may make an informed decision.[608] Third, the Court continues to state that the conditions must be related to the federal interest for which the funds are expended,[609] but it has never found a spending condition deficient under this part of the test.[610] Fourth, the power to condition funds may not be used to induce the States to engage in activities that would themselves be unconstitutional.[611] Fifth, the Court has suggested that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion,"[612] but again the Court has never found a congressional condition to be coercive in this sense.[613] Certain federalism restraints on other federal powers seem not to be relevant to spending conditions.[614]

If a State accepts federal funds on conditions and then fails to follow the requirements, the usual remedy is federal administrative action to terminate the funding and to recoup funds the State has already received.[615] While the Court has allowed beneficiaries of conditional grant programs to sue to compel states to comply with the federal conditions,[616] more recently the Court has required that

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[608] South Dakota v. Dole, 483 U.S. at 207 (1987). The requirement appeared in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246-47 (1985) (Rehabilitation Act does not clearly signal states that participation in programs funded by Act constitutes waiver of immunity from suit in federal court); Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002) (no private right of action was created by the Family Educational Rights and Privacy Act).

[609] South Dakota v. Dole, 483 U.S. 203, 207–208 (1987). *See* Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

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

[611] South Dakota v. Dole, 483 U.S. 203, 210–11 (1987).

[612] Steward Machine Co. v. Davis, 301 U.S. 548, 589–590 (1937); South Dakota v. Dole, 483 U.S. 203, 211–212 (1987).

[613] *See* North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), *aff'd* 435 U.S. 962 (1978).

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

[615] Bell v. New Jersey, 461 U.S. 773 (1983); Bennett v. New Jersey, 470 U.S. 632 (1985); Bennett v. Kentucky Dep't of Education, 470 U.S. 656 (1985).

[616] *E.g.*, King v. Smith, 392 U.S. 309 (1968); Rosado v. Wyman, 397 U.S. 397 (1970); Lau v. Nichols, 414 U.S. 563 (1974); Miller v. Youakim, 440 U.S. 125 (1979). Suits may be brought under 42 U.S.C. § 1983, *see* Maine v. Thiboutot, 448 U.S. 1 (1980), although in some instances the statutory conferral of rights may be too imprecise or vague for judicial enforcement. *Compare* Suter v. Artist M., 503 U.S. 347

any such susceptibility to suit be clearly spelled out so that states will be informed of potential consequences of accepting aid. Finally, it should be noted that Congress has enacted a range of laws forbidding discrimination in federal assistance programs,[617] and some of these laws are enforceable against the states.[618]

Earmarked Funds.—The appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other constitutional provision is violated. Thus a processing tax on coconut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury.[619] In *Helvering v. Davis*,[620] the excise tax on employers, the proceeds of which were not earmarked in any way, although intended to provide funds for payments to retired workers, was upheld under the "general welfare" clause, the Tenth Amendment being found to be inapplicable.

Debts of the United States.—The power to pay the debts of the United States is broad enough to include claims of citizens arising on obligations of right and justice.[621] The Court sustained an act of Congress which set apart for the use of the Philippine Islands, the revenue from a processing tax on coconut oil of Philippine production, as being in pursuance of a moral obligation to protect and promote the welfare of the people of the Islands.[622] Curiously enough, this power was first invoked to assist the United States to collect a debt due to it. In *United States v. Fisher*,[623] the Supreme Court sustained a statute which gave the Federal Government priority in the distribution of the estates of its insolvent debtors. The debtor in that case was the endorser of a foreign bill of exchange that apparently had been purchased by the United States. Invoking the "necessary and proper" clause, Chief Justice Marshall deduced the power to collect a debt from the power to pay

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(1992), *with* Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987).

[617] *E.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681; Title V of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

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

[619] Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

[620] 301 U.S. 619 (1937).

[621] United States v. Realty Co., 163 U.S. 427 (1896); Pope v. United States, 323 U.S. 1, 9 (1944).

[622] Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

[623] 6 U.S. (2 Cr.) 358 (1805).

its obligations by the following reasoning: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." [624]

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

BORROWING POWER

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

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

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

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[624] 6 U.S. at 396.

[625] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 144, 308–309 (rev. ed. 1937).

[626] Id. at 310.

[627] Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871), overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

[628] Perry v. United States, 294 U.S. 330, 351 (1935). *See also* Lynch v. United States, 292 U.S. 571 (1934).

POWER TO REGULATE COMMERCE

Purposes Served by the Grant

This clause serves a two-fold purpose: it is the direct source of the most important powers that the Federal Government exercises in peacetime, and, except for the due process and equal protection clauses of the Fourteenth Amendment, it is the most important limitation imposed by the Constitution on the exercise of state power. The latter, restrictive operation of the clause was long the more important one from the point of view of the constitutional lawyer. Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from state legislation.[629] The result was that, generally, the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in that of its operation as a source of national power. The consequence of this historical progression was that the word "commerce" came to dominate the clause while the word "regulate" remained in the background. The so-called "constitutional revolution" of the 1930s, however, brought the latter word to its present prominence.

Definition of Terms

Commerce.—The etymology of the word "commerce"[630] carries the primary meaning of traffic, of transporting goods across state lines for sale. This possibly narrow constitutional conception was rejected by Chief Justice Marshall in *Gibbons v. Ogden*,[631] which remains one of the seminal cases dealing with the Constitution. The case arose because of a monopoly granted by the New York legislature on the operation of steam-propelled vessels on its waters, a monopoly challenged by Gibbons, who transported passengers from New Jersey to New York pursuant to privileges granted by an act of Congress.[632] The New York monopoly was not in conflict with the congressional regulation of commerce, argued the monopolists, because the vessels carried only passengers between the two States and were thus not engaged in traffic, in "commerce" in the constitutional sense.

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[629] E. PRENTICE & J. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 14 (1898).

[630] That is, "cum merce (with merchandise)."

[631] 22 U.S. (9 Wheat.) 1 (1824).

[632] Act of February 18, 1793, 1 Stat. 305, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

"The subject to be regulated is commerce," the Chief Justice wrote. "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse."[633] The term, therefore, included navigation, a conclusion that Marshall also supported by appeal to general understanding, to the prohibition in Article I, § 9, against any preference being given "by any regulation of commerce or revenue, to the ports of one State over those of another," and to the admitted and demonstrated power of Congress to impose embargoes.[634]

Marshall qualified the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.[635] But, today, "commerce" in the constitutional sense, and hence "interstate commerce," covers every species of movement of persons and things, whether for profit or not, across state lines,[636] every species of communication, every species of transmission of intelligence, whether for commercial purposes or otherwise,[637] every species of commercial negotiation which will involve sooner or later an act of transportation of persons or things, or the flow of services or power, across state lines.[638]

There was a long period in the Court's history when a majority of the Justices, seeking to curb the regulatory powers of the Federal Government by various means, held that certain things were not encompassed by the commerce clause because they were either not interstate commerce or bore no sufficient nexus to interstate commerce. Thus, at one time, the Court held that mining or manufacturing, even when the product would move in interstate commerce, was not reachable under the commerce clause;[639] it held in-

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[633] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

[634] 22 U.S. at 190–94.

[635] 22 U.S. at 193.

[636] As we will see, however, in many later formulations the crossing of state lines is no longer the *sine qua non*; wholly intrastate transactions with substantial effects on interstate commerce may suffice.

[637] *E.g.*, United States v. Simpson, 252 U.S. 465 (1920); Caminetti v. United States, 242 U.S. 470 (1917).

[638] "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 549–550 (1944).

[639] Kidd v. Pearson, 128 U.S. 1 (1888); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); United States v. E. C. Knight Co., 156 U.S. 1 (1895); *and see* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

surance transactions carried on across state lines not commerce,[640] and that exhibitions of baseball between professional teams that travel from State to State were not in commerce,[641] and that similarly the commerce clause was not applicable to the making of contracts for the insertion of advertisements in periodicals in another State[642] or to the making of contracts for personal services to be rendered in another State.[643] Later decisions either have overturned or have undermined all of these holdings. The gathering of news by a press association and its transmission to client newspapers are interstate commerce.[644] The activities of a Group Health Association, which serves only its own members, are "trade" and capable of becoming interstate commerce;[645] the business of insurance when transacted between an insurer and an insured in different States is interstate commerce.[646] But most important of all there was the development of, or more accurately the return to,[647] the rationales by which manufacturing,[648] mining,[649] business transactions,[650] and the like, which are antecedent to or subse-

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[640] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); *and see* the cases to this effect cited in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 543–545, 567–568, 578 (1944).

[641] Federal Baseball League v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). When called on 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 and that the business had developed under the understanding that it was not subject to these laws, a reversal of which would have retroactive effect. Toolson v. New York Yankees, 346 U.S. 356 (1953). In Flood v. Kuhn, 407 U.S. 258 (1972), the Court recognized these decisions as aberrations, but it thought the doctrine entitled to the benefits of *stare decisis* inasmuch 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. National Football League, 352 U.S. 445 (1957), professional boxing, United States v. International Boxing Club, 348 U.S. 236 (1955), and legitimate theatrical productions. United States v. Shubert, 348 U.S. 222 (1955).

[642] Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436 (1920).

[643] Williams v. Fears, 179 U.S. 270 (1900). *See also* Diamond Glue Co. v. United States Glue Co., 187 U.S. 611 (1903); Browning v. City of Waycross, 233 U.S. 16 (1914); General Railway Signal Co. v. Virginia, 246 U.S. 500 (1918). *But see* York Manufacturing Co. v. Colley, 247 U.S. 21 (1918).

[644] Associated Press v. United States, 326 U.S. 1 (1945).

[645] American Medical Ass'n v. United States, 317 U.S. 519 (1943). *Cf.* United States v. Oregon Medical Society, 343 U.S. 326 (1952).

[646] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[647] "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824). *And see* id. at 195–196.

[648] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[649] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). *And see* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U. S. 264, 275–283 (1981). *See also* Mulford v. Smith, 307 U.S. 38 (1939) (agricultural production).

[650] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

quent to a move across state lines, are conceived to be part of an integrated commercial whole and therefore subject to the reach of the commerce power.

Among the Several States.—Continuing in *Gibbons v. Ogden*, Chief Justice Marshall observed that the phrase "among the several States" was "not one which would probably have been selected to indicate the completely interior traffic of a state." It must therefore have been selected to demark "the exclusively internal commerce of a state." While, of course, the phrase "may very properly be restricted to that commerce which concerns more states than one," it is obvious that "[c]ommerce among the states, cannot stop at the exterior boundary line of each state, but may be introduced into the interior." The Chief Justice then succinctly stated the rule, which, though restricted in some periods, continues to govern the interpretation of the clause. "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." [651]

Recognition of an "exclusively internal" commerce of a State, or "intrastate commerce" in today's terms, was at times regarded as setting out an area of state concern that Congress was precluded from reaching. [652] While these cases seemingly visualized Congress' power arising only when there was an actual crossing of state boundaries, this view ignored Marshall's equation of "intrastate commerce" which "affect[s] other states" or "with which it is necessary to interfere" in order to effectuate congressional power with those actions which are "purely" interstate. This equation came back into its own, both with the Court's stress on the "current of commerce" bringing each element in the current within Congress' regulatory power, [653] with the emphasis on the interrelationships of industrial production to interstate commerce [654] but especially with the emphasis that even minor transactions have an effect on inter-

[651] 22 U.S. (9 Wheat.) 1, 194, 195 (1824).

[652] 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); Illinois Central 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).

[653] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

[654] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

state commerce[655] and that the cumulative effect of many minor transactions with no separate effect on interstate commerce, when they are viewed as a class, may be sufficient to merit congressional regulation.[656] "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."[657]

Regulate.—"We are now arrived at the inquiry—" continued the Chief Justice, "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution ... If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."[658]

Of course, the power to regulate commerce is the power to prescribe conditions and rules for the carrying-on of commercial transactions, the keeping-free of channels of commerce, the regulating of prices and terms of sale. Even if the clause granted only this

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[655] 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. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

[656] 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).

[657] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). Commerce "among the several States" does not comprise commerce of the District of Columbia nor of the territories of the United States. Congress' power over their commerce is an incident of its general power over them. Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932); In re Bryant, 4 Fed. Cas. 514 (No. 2067) (D. Oreg. 1865). Transportation between two points in the same State, when a part of the route is a loop outside the State, is interstate commerce. Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617 (1903); Western 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. Public Service 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).

[658] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–197 (1824).

power, the scope would be wide, but it extends to include many more purposes than these. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."[659] Thus, in upholding a federal statute prohibiting the shipment in interstate commerce of goods made with child labor, not because the goods were intrinsically harmful but in order to extirpate child labor, the Court said: "It is no objection to the assertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."[660]

The power has been exercised to enforce majority conceptions of morality,[661] to ban racial discrimination in public accommodations,[662] and to protect the public against evils both natural and contrived by people.[663] The power to regulate interstate commerce is, therefore, rightly regarded as the most potent grant of authority in § 8.

Necessary and Proper Clause.—All grants of power to Congress in § 8, as elsewhere, must be read in conjunction with the final clause, cl. 18, of § 8, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." It will be recalled that Chief Justice Marshall alluded to the power thus enhanced by this clause when he said that the regulatory power did not extend "to those internal concerns [of a state] . . . with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[664] There are numerous cases permitting Congress to reach "purely" intrastate activities on the theory, combined with the previously mentioned emphasis on the cumulative effect of minor transactions, that it is necessary to regulate them in order

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[659] Brooks v. United States, 267 U.S. 432, 436–437 (1925).

[660] United States v. Darby, 312 U.S. 100, 114 (1941).

[661] *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 by Mormons); United States v. Simpson, 252 U.S. 465 (1920) (transportation of five quarts of whiskey across state line for personal consumption).

[662] 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).

[663] *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 loansharking).

[664] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

that the regulation of interstate activities might be fully effectuated.[665]

Federalism Limits on Exercise of Commerce Power.—As is recounted below, prior to reconsideration of the federal commerce power in the 1930s, the Court in effect followed a doctrine of "dual federalism," under which Congress' power to regulate much activity depended on whether it had a "direct" rather than an "indirect" effect on interstate commerce.[666] When the restrictive interpretation was swept away during and after the New Deal, the question of federalism limits respecting congressional regulation of private activities became moot. However, the States did in a number of instances engage in commercial activities that would be regulated by federal legislation if the enterprise were privately owned; the Court easily sustained application of federal law to these state proprietary activities.[667] However, as Congress began to extend regulation to state governmental activities, the judicial response was inconsistent and wavering.[668] While the Court may shift again to constrain federal power on federalism grounds, at the present time the rule is that Congress lacks authority under the commerce clause to regulate the States as States in some circumstances, when the federal statutory provisions reach only the States and do not bring the States under laws of general applicability.[669]

Illegal Commerce

That Congress' protective power over interstate commerce reaches all kinds of obstructions and impediments was made clear in *United States v. Ferger*.[670] The defendants had been indicted for

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[665] *E.g.*, Houston & Texas Ry. v. United States, 234 U.S. 342 (1914) (necessary for ICC to regulate rates of an intrastate train in order to effectuate its rate setting for a competing interstate train); Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922) (same); Southern Ry. v. United States, 222 U.S. 20 (1911) (upholding requirement of same safety equipment on intrastate as interstate trains). *See also* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942).

[666] *E.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918). Of course, there existed much of this time a parallel doctrine under which federal power was not so limited. *E.g.*, Houston & Texas Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

[667] *E.g.*, California v. United States, 320 U.S. 577 (1944); California v. Taylor, 353 U.S. 553 (1957).

[668] For example, federal regulation of the wages and hours of certain state and local governmental employees has alternatively been upheld and invalidated. *See* Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[669] New York v. United States, 505 U.S. 144 (1992). See also Printz v. United States, 521 U.S. 898 (1997). For elaboration, *see* the discussions under the supremacy clause and under the Tenth Amendment.

[670] 250 U.S. 199 (1919).

issuing a false bill of lading to cover a fictitious shipment in interstate commerce. Before the Court they argued that inasmuch as there could be no commerce in a fraudulent bill of lading, Congress had no power to exercise criminal jurisdiction over them. Said Chief Justice White: "But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce . . . and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."[671] Much of Congress' criminal legislation is based simply on the crossing of a state line as creating federal jurisdiction.[672]

Interstate Versus Foreign Commerce

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

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[671] 250 U.S. at 203.

[672] *E.g.*, Hoke v. United States, 227 U.S. 308 (1913) (transportation of women for purposes of prostitution); Gooch v. United States, 297 U.S. 124 (1936) (kidnapping); Brooks v. United States, 267 U.S. 432 (1925) (stolen autos). For example, in Scarborough v. United States, 431 U.S. 563 (1977), the Court upheld a conviction for possession of a firearm by a felon upon a mere showing that the gun had sometime previously traveled in interstate commerce, and Barrett v. United States, 423 U.S. 212 (1976), upheld a conviction for receipt of a firearm on the same showing. The Court does require Congress in these cases to speak plainly in order to reach such activity, inasmuch as historic state police powers are involved. United States v. Bass, 404 U.S. 336 (1971).

erally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case would not be necessary or proper in the other."[673]

And twelve years later Chief Justice White, speaking for the Court, expressed the same view, as follows: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand."[674]

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it."[675] And nearly fifty years later, Justice Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."[676] Today it is firmly established doctrine that the power to regulate commerce, whether with foreign nations or among the several States, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitations imposed upon Congress' powers, as by the due process clause of the Fifth Amendment, are not transgressed.[677]

Instruments of Commerce

The applicability of Congress' power to the agents and instruments of commerce is implied in Marshall's opinion in *Gibbons v. Ogden*,[678] where the waters of the State of New York in their quality as highways of interstate and foreign transportation were held to be governed by the overriding power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and

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[673] Lottery Case (Champion v. Ames), 188 U.S. 321, 373–374 (1903).

[674] Brolan v. United States, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in Japan Line v. County of Los Angeles, 441 U.S. 434, 448–451 (1979), a "dormant" commerce clause case involving state taxation with an impact on foreign commerce. In context, the distinction seems unexceptionable, but the language extends beyond context.

[675] License Cases, 46 U.S. (5 How.) 504, 578 (1847).

[676] Pittsburgh & Southern Coal Co. v. Bates, 156 U.S. 577, 587 (1895).

[677] United States v. Carolene Products Co., 304 U.S. 144, 147–148 (1938).

[678] 22 U.S. (9 Wheat.) 1, 217, 221 (1824).

other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the "principle" by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Waite in the case of the *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,[679] a case closely paralleling *Gibbons v. Ogden* in other respects also. "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."[680]

The Radio Act of 1927[681] 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.[682]

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[679] 96 U.S. 1 (1878). *See also* Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1882).

[680] 96 U.S. at 9. "Commerce embraces appliances necessarily employed in carrying on transportation by land and water." Railroad Co. v. Fuller, 84 U.S. (17 Wall.) 560, 568 (1873).

[681] 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.

[682] "No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communication." Chief Justice 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, 654–655 (1936).

Congressional Regulation of Waterways

Navigation.—In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[683] the Court granted an injunction requiring that a bridge erected over the Ohio River under a charter from the State of Virginia either be altered so as to admit of free navigation of the river or else be entirely abated. The decision was justified on the basis both of the commerce clause and of a compact between Virginia and Kentucky, whereby both these States had agreed to keep the Ohio River "free and common to the citizens of the United States." The injunction was promptly rendered inoperative by an act of Congress declaring the bridge to be "a lawful structure" and requiring all vessels navigating the Ohio to be so regulated as not to interfere with it.[684] This act the Court sustained as within Congress' power under the commerce clause, saying: "So far . . . as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, [it] is not so in the contemplation of law. . . . [Congress] having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and federal, which, if not sufficient, certainly none can be found in our system of government."[685] In short, it is Congress, and not the Court, which is authorized by the Constitution to regulate commerce.[686]

The law and doctrine of the earlier cases with respect to the fostering and protection of navigation are well summed up in a frequently cited passage from the Court's opinion in *Gilman v. Philadelphia*.[687] "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they

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[683] 54 U.S. (13 How.) 518 (1852).

[684] Ch. 111, §6, 10 Stat 112 (1852).

[685] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1856). "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject." Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883). *See also* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Robertson v. California, 328 U.S. 440 (1946).

[686] *But see* In re Debs, 158 U.S. 564 (1895), in which the Court held that in the absence of legislative authorization the Executive had power to seek and federal courts to grant injunctive relief to remove obstructions to interstate commerce and the free flow of the mail.

[687] 70 U.S. (3 Wall.) 713 (1866).

lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."[688]

Thus, Congress was within its powers in vesting the Secretary of War with power to determine whether a structure of any nature in or over a navigable stream is an obstruction to navigation and to order its abatement if he so finds.[689] Nor is the United States required to compensate the owners of such structures for their loss, since they were always subject to the servitude represented by Congress' powers over commerce, and the same is true of the property of riparian owners that is damaged.[690] And while it was formerly held that lands adjoining nonnavigable streams were not subject to the above mentioned servitude,[691] this rule has been impaired by recent decisions;[692] and at any rate it would not apply as to a stream rendered navigable by improvements.[693]

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

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[688] 70 U.S. at 724–25.

[689] Union Bridge Co. v. United States, 204 U.S. 364 (1907). *See also* Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910); Wisconsin v. Illinois, 278 U.S. 367 (1929). The United States may seek injunctive or declaratory relief requiring the removal of obstructions to commerce by those negligently responsible for them or it may itself remove the obstructions and proceed against the responsible party for costs. United States v. Republic Steel Corp., 362 U.S. 482 (1960); Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967). Congress' power in this area is newly demonstrated by legislation aimed at pollution and environmental degradation. In confirming the title of the States to certain waters under the Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. § 1301 *et seq*., Congress was careful to retain authority over the waters for purposes of commerce, navigation, and the like. United States v. Rands, 389 U.S. 121, 127 (1967).

[690] Gibson v. United States, 166 U.S. 269 (1897). *See also* Bridge Co. v. United States, 105 U.S. 470 (1882); United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); Seattle v. Oregon & W.R.R., 255 U.S. 56, 63 (1921); Economy Light Co. v. United States, 256 U.S. 113 (1921); United States v. River Rouge Co., 269 U.S. 411, 419 (1926); Ford & Son v. Little Falls Co., 280 U.S. 369 (1930); United States v. Commodore Park, 324 U.S. 386 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).

[691] United States v. Cress, 243 U.S. 316 (1917).

[692] United States v. Chicago, M., St. P. & P.R.R., 312 U.S. 592, 597 (1941); United States v. Willow River Co., 324 U.S. 499 (1945).

[693] United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).

plished are also subject to Congress' power if and when they enter into or form a part of "commerce among the several States." When does this happen? Words quoted above from the Court's opinion in the *Gilman* case answered this question to some extent; but the decisive answer to it was returned five years later in the case of *The Daniel Ball*.[694] Here the question at issue was whether an act of Congress, passed in 1838 and amended in 1852, which required that steam vessels engaged in transporting passengers or merchandise upon the "bays, lakes, rivers, or other navigable waters of the United States," applied to the case of a vessel that navigated only the waters of the Grand River, a stream lying entirely in the State of Michigan. The Court ruled: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; .... So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."[695]

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

[694] 77 U.S. (10 Wall.) 557 (1871).
[695] 77 U.S. at 565.

the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."[696] In short, it was admitted, inferentially, that the principle of the decision would apply to land transportation, but the actual demonstration of the fact still awaited some years.[697]

Hydroelectric Power; Flood Control.—As a consequence, in part, of its power to forbid or remove obstructions to navigation in the navigable waters of the United States, Congress has acquired the right to develop hydroelectric power and the ancillary right to sell it to all takers. By a long-standing doctrine of constitutional law, the States possess dominion over the beds of all navigable streams within their borders,[698] but because of the servitude that Congress' power to regulate commerce imposes upon such streams, the States, without the assent of Congress, practically are unable to utilize their prerogative for power development purposes. Sensing no doubt that controlling power to this end must be attributed to some government in the United States and that "in such matters there can be no divided empire,"[699] the Court held in *United States v. Chandler-Dunbar Co.*,[700] that in constructing works for the improvement of the navigability of a stream, Congress was entitled, as part of a general plan, to authorize the lease or sale of such excess water power as might result from the conservation of the flow of the stream. "If the primary purpose is legitimate," it said, "we can see no sound objection to leasing any excess of power over the

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[696] 77 U.S. at 566. "The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway." Justice Brewer for the Court in Monongahela Navigation Co. v. United States, 148 U.S. 312, 342 (1893).

[697] Congress had the right to confer upon the Interstate Commerce Commission the power to regulate interstate ferry rates, N.Y. Central R.R. v. Hudson County, 227 U.S. 248 (1913), and to authorize the Commission to govern the towing of vessels between points in the same State but partly through waters of an adjoining State. Cornell Steamboat Co. v. United States, 321 U.S. 634 (1944). Congress' power over navigation extends to persons furnishing wharfage, dock, warehouse, and other terminal facilities to a common carrier by water. Hence an order of the United States Maritime Commission banning certain allegedly "unreasonable practices" by terminals in the Port of San Francisco, and prescribing schedules of maximum free time periods and of minimum charges was constitutional. California v. United States, 320 U.S. 577 (1944). The same power also comprises regulation of the registry enrollment, license, and nationality of ships and vessels, the method of recording bills of sale and mortgages thereon, the rights and duties of seamen, the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime. *See* The Lottawanna, 88 U.S. (21 Wall.) 558, 577 (1875); Providence & N.Y. SS. Co. v. Hill Mfg. Co., 109 U.S. 578, 589 (1883); The Hamilton, 207 U.S. 398 (1907); O'Donnell v. Great Lakes Co., 318 U.S. 36 (1943).

[698] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Shively v. Bowlby, 152 U.S. 1 (1894).

[699] Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U.S. 58, 80 (1898).

[700] 229 U.S. 53 (1913).

needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments." [701]

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

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

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[701] 229 U.S. at 73, citing Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254 (1891).

[702] 283 U.S. 423 (1931).

[703] 311 U.S. 377 (1940).

[704] 283 U.S. at 455–456. *See also* United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).

[705] 311 U.S. at 407, 409–10.

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

Congressional Regulation of Land Transportation

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

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

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

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[706] 311 U.S. at 426.

[707] Oklahoma v. Atkinson Co., 313 U.S. 508, 523–33 passim (1941).

[708] Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

[709] *Cf.* Indiana v. United States, 148 U.S. 148 (1893).

[710] 12 Stat. 489 (1862); 13 Stat. 356 (1864); 14 Stat. 79 (1866).

[711] The result then as well as now might have followed from Congress' power of spending, independently of the commerce clause, as well as from its war and postal powers, which were also invoked by the Court in this connection.

[712] Thomson v. Union Pacific R.R., 76 U.S. (9 Wall.) 579 (1870); California v. Pacific R.R. Co. (Pacific Ry. Cases), 127 U.S. 1 (1888); Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641 (1890); Luxton v. North River Bridge Co., 153 U.S. 525 (1894).

By the Garfield Act, Congress authorized all railroad companies operating by steam to interconnect with each other "so as to form continuous lines for the transportation of passengers, freight, troops, governmental supplies, and mails, to their destination."[713] An act of the same year provided federal chartering and protection from conflicting state regulations to companies formed to construct and operate telegraph lines.[714] Another act regulated the transportation by railroad of livestock so as to preserve the health and safety of the animals.[715]

Congress' entry into the rate regulation field was preceded by state attempts to curb the abuses of the rail lines in the Middle West, which culminated in the "Granger Movement." Because the businesses were locally owned, the Court at first upheld state laws as not constituting a burden on interstate commerce;[716] but after the various business panics of the 1870s and 1880s drove numerous small companies into bankruptcy and led to consolidation, there emerged great interstate systems. Thus in 1886, the Court held that a State may not set charges for carriage even within its own boundaries of goods brought from without the State or destined to points outside it; that power was exclusively with Congress.[717] In the following year, Congress passed the original Interstate Commerce Act.[718] A Commission was authorized to pass upon the "reasonableness" of all rates by railroads for the transportation of goods or persons in interstate commerce and to order the discontinuance of all charges found to be "unreasonable." The Commission's basic authority was upheld in *ICC v. Brimson*,[719] in which the Court upheld the validity of the Act as a means "necessary and proper" for the enforcement of the regulatory commerce power and in which it also sustained the Commission's power to go to court to secure compliance with its orders. Later decisions circumscribed somewhat the ICC's power.[720]

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[713] 14 Stat. 66 (1866).
[714] 14 Stat. 221 (1866).
[715] 17 Stat. 353 (1873).
[716] Munn v. Illinois, 94 U.S. 113 (1877); Chicago B. & Q. R. Co. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & Nw. Ry. Co., 94 U.S. 164 (1877); Pickard v. Pullman Southern Car Co., 117 U.S. 34 (1886).
[717] Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886). A variety of state regulations have been struck down on the burdening-of-commerce rationale. *E.g.*, Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945) (train length); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926) (locomotive accessories); Pennsylvania R.R. v. Public Service Comm'n, 250 U.S. 566 (1919). But the Court has largely exempted regulations with a safety purpose, even a questionable one. Brotherhood of Firemen v. Chicago, R. I. & P. R. Co., 393 U.S. 129 (1968).
[718] 24 Stat. 379 (1887).
[719] 154 U.S. 447 (1894).
[720] ICC v. Alabama Midland Ry., 168 U.S. 144 (1897); Cincinnati, N.O. & Texas Pacific Ry. v. ICC, 162 U.S. 184 (1896).

Expansion of the Commission's authority came in the Hepburn Act of 1906[721] and the Mann-Elkins Act of 1910.[722] By the former, the Commission was explicitly empowered, after a full hearing on a complaint, "to determine and prescribe just and reasonable" maximum rates; by the latter, it was authorized to set rates on its own initiative and empowered to suspend any increase in rates by a carrier until it reviewed the change. At the same time, the Commission's jurisdiction was extended to telegraphs, telephones, and cables.[723] By the Motor Carrier Act of 1935,[724] the ICC was authorized to regulate the transportation of persons and property by motor vehicle common carriers.

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

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[721] 34 Stat. 584 (1906).

[722] 36 Stat. 539 (1910).

[723] These regulatory powers are now vested, of course, in the Federal Communications Commission.

[724] 49 Stat. 543 (1935).

[725] 41 Stat. 474 (1920).

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

[727] Disputes between the ICC and other Government agencies over mergers have occupied a good deal of the Court's time. *Cf.* United States v. ICC, 396 U.S. 491 (1970). *See also* County of Marin v. United States, 356 U.S. 412 (1958); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Penn-Central Merger & N & W Inclusion Cases, 389 U.S. 486 (1968).

[728] Among the various provisions of the Interstate Commerce Act which have been upheld are: a section penalizing shippers for obtaining transportation at less than published rates, Armour Packing Co. v. United States, 209 U.S. 56 (1908); a section construed as prohibiting the hauling of commodities in which the carrier had at the time of haul a proprietary interest, United States v. Delaware & Hudson Co., 213 U.S. 366 (1909); a section abrogating life passes, Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911); a section authorizing the ICC to regulate the entire bookkeeping system of interstate carriers, including intrastate accounts, ICC v. Goodrich Transit Co., 224 U.S. 194 (1912); a clause affecting the charging of rates different for long and short hauls. Intermountain Rate Cases, 234 U.S. 476 (1914).

Federal Regulation of Intrastate Rates (The Shreveport Doctrine).—Although its statutory jurisdiction did not apply to intrastate rate systems, the Commission early asserted the right to pass on rates, which, though in effect on intrastate lines, gave these lines competitive advantages over interstate lines the rates of which the Commission had set. This power the Supreme Court upheld in a case involving a line operating wholly intrastate in Texas but which paralleled within Texas an interstate line operating between Louisiana and Texas; the Texas rate body had fixed the rates of the intrastate line substantially lower than the rate fixed by the ICC on the interstate line. "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the States and not the Nation, would be supreme in the national field." [729]

The same holding was applied in a subsequent case in which the Court upheld the Commission's action in annulling intrastate passenger rates it found to be unduly low in comparison with the rates the Commission had established for interstate travel, thus tending to thwart, in deference to a local interest, the general purpose of the act to maintain an efficient transportation service for the benefit of the country at large. [730]

Federal Protection of Labor in Interstate Rail Transportation.—Federal entry into the field of protective labor legislation and the protection of organization efforts of workers began in connection with the railroads. The Safety Appliance Act of 1893, [731] applying only to cars and locomotives engaged in moving interstate traffic, was amended in 1903 so as to embrace much of the intrastate rail systems on which there was any connection with interstate commerce. [732] The Court sustained this extension in language much like that it would use in the *Shreveport* case three years

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[729] Houston & Texas Ry. v. United States, 234 U.S. 342, 351–352 (1914). *See also*, American Express Co. v. Caldwell, 244 U.S. 617 (1917); Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936); Weiss v. United States, 308 U.S. 321 (1939); Bethlehem Steel Co. v. State Board, 330 U.S. 767 (1947); United States v. Walsh, 331 U.S. 432 (1947).

[730] Wisconsin R.R. Comm'n v. Chicago, B. & Q. R. Co., 257 U.S. 563 (1922). *Cf.* Colorado v. United States, 271 U.S. 153 (1926), upholding an ICC order directing abandonment of an intrastate branch of an interstate railroad. *But see* North Carolina v. United States, 325 U.S. 507 (1945), setting aside an ICC disallowance of intrastate rates set by a state commission as unsupported by the evidence and findings.

[731] 27 Stat. 531, 45 U.S.C. §§ 1–7.

[732] 32 Stat. 943, 45 U.S.C. §§ 8–10.

later.[733] These laws were followed by the Hours of Service Act of 1907,[734] which prescribed maximum hours of employment for rail workers in interstate or foreign commerce. The Court sustained the regulation as a reasonable means of protecting workers and the public from the hazards which could develop from long, tiring hours of labor.[735]

Most far-reaching of these regulatory measures were the Federal Employers Liability Acts of 1906[736] and 1908.[737] These laws were intended to modify the common-law rules with regard to the liability of employers for injuries suffered by their employees in the course of their employment and under which employers were generally not liable. Rejecting the argument that regulation of such relationships between employers and employees was a reserved state power, the Court adopted the argument of the United States that Congress was empowered to do anything it might deem appropriate to save interstate commerce from interruption or burdening. Inasmuch as the labor of employees was necessary for the function of commerce, Congress could certainly act to ameliorate conditions that made labor less efficient, less economical, and less reliable. Assurance of compensation for injuries growing out of negligence in the course of employment was such a permissible regulation.[738]

Legislation and litigation dealing with the organizational rights of rail employees are dealt with elsewhere.[739]

Regulation of Other Agents of Carriage and Communications.—In 1914, the Court affirmed the power of Congress to regulate the transportation of oil and gas in pipelines from one State to another and held that this power applied to the transportation even though the oil or gas was the property of the lines.[740] Subse-

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[733] Southern Ry. v. United States, 222 U.S. 20 (1911). *See also* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916); United States v. California, 297 U.S. 175 (1936); United States v. Seaboard Air Line R.R., 361 U.S. 78 (1959).

[734] 34 Stat. 1415, 45 U.S.C. §§ 61–64.

[735] Baltimore & Ohio R.R. v. ICC, 221 U.S. 612 (1911).

[736] 34 Stat. 232, held unconstitutional in part in the Employers' Liability Cases, 207 U.S. 463 (1908).

[737] 35 Stat. 65, 45 U.S.C. §§ 51–60.

[738] The Second Employers' Liability Cases, 223 U.S. 1 (1912). For a longer period, a Court majority reviewed a surprising large number of FELA cases, almost uniformly expanding the scope of recovery under the statute. *Cf.* Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957). This practice was criticized both within and without the Court, *cf.* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96–98 (1959), and has been discontinued.

[739] *See* discussion under Railroad Retirement Act and National Labor Relations Act, infra.

[740] The Pipe Line Cases, 234 U.S. 548 (1914). *See also* State Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934); Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921); United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921); Pennsylvania v. West

quently, the Court struck down state regulation of rates of electric current generated within that State and sold to a distributor in another State as a burden on interstate commerce.[741] Proceeding on the assumption that the ruling meant the Federal Government had the power, Congress in the Federal Power Act of 1935 conferred on the Federal Power Commission authority to regulate the wholesale distribution of electricity in interstate commerce[742] and three years later vested the FPC with like authority over natural gas moving in interstate commerce.[743] Thereafter, the Court sustained the power of the Commission to set the prices at which gas originating in one State and transported into another should be sold to distributors wholesale in the latter State.[744] "The sale of natural gas originating in the State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress .... The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce."[745]

Other acts regulating commerce and communication originating in this period have evoked no basic constitutional challenge. These include the Federal Communications Act of 1934, providing for the regulation of interstate and foreign communication by wire and radio,[746] and the Civil Aeronautics Act of 1938, providing for the regulation of all phases of airborne commerce, foreign and interstate.[747]

Virginia, 262 U.S. 553 (1923); Missouri ex rel. Barrett v. Kansas Gas Co., 265 U.S. 298 (1924).

[741] Public Utilities Comm'n v. Attleboro Co., 273 U.S. 83 (1927). *See also* Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932); Pennsylvania Power Co. v. FPC, 343 U.S. 414 (1952).

[742] 49 Stat. 863, 16 U.S.C. §§ 791a–825u.

[743] 52 Stat. 821, 15 U.S.C. §§ 717–717w.

[744] FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

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

[746] 48 Stat. 1064, 47 U.S.C. § 151 et seq. *Cf.* United States v. Southwestern Cable Co., 392 U.S. 157 (1968), on the regulation of community antenna television systems (CATV).

[747] 52 Stat. 973, as amended. The CAB has now been abolished and its functions are exercised by the Federal Aviation Administration, 49 U.S.C. § 106, as part of the Department of Transportation.

Congressional Regulation of Commerce as Traffic

The Sherman Act: Sugar Trust Case.—Congress' chief effort to regulate commerce in the primary sense of "traffic" is embodied in the Sherman Antitrust Act of 1890, the opening section of which declares "every contract, combination in the form of trust or otherwise," or "conspiracy in restraint of trade and commerce among the several States, or with foreign nations" to be "illegal," while the second section makes it a misdemeanor for anybody to "monopolize or attempt to monopolize any part of such commerce."[748] The act was passed to curb the growing tendency to form industrial combinations, and the first case to reach the Court under it was the famous *Sugar Trust Case, United States v. E. C. Knight Co.*[749] Here the Government asked for the cancellation of certain agreements, whereby the American Sugar Refining Company, had "acquired," it was conceded, "nearly complete control of the manufacture of refined sugar in the United States."

The question of the validity of the Act was not expressly discussed by the Court but was subordinated to that of its proper construction. The Court, in pursuance of doctrines of constitutional law then dominant with it, turned the Act from its intended purpose and destroyed its effectiveness for several years, as that of the Interstate Commerce Act was being contemporaneously impaired. The following passage early in Chief Justice Fuller's opinion for the Court sets forth the conception of the federal system that controlled the decision: "It is vital that the independence of the commercial power and of the police power, and the delimination 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."[750]

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

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[748] 26 Stat. 209 (1890); 15 U.S.C. §§ 1–7.
[749] 156 U.S. 1 (1895).
[750] 156 U.S. at 13.

tination;" (3) the sale of a product is merely an incident of its production and, while capable of "bringing the operation of commerce into play," affects it only incidentally; (4) such restraint as would reach commerce, as above defined, in consequence of combinations to control production "in all its forms," would be "indirect, however inevitable and whatever its extent," and as such beyond the purview of the Act.[751] Applying the above reasoning to the case before it, the Court proceeded: "The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function."

"Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."[752]

Sherman Act Revived.—Four years later came the case of *Addyston Pipe and Steel Co. v. United States*,[753] in which the Antitrust Act was successfully applied as against an industrial com-

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[751] 156 U.S. at 13–16.

[752] 156 U.S. at 17. The doctrine of the case boiled down to the proposition that commerce was transportation only, a doctrine Justice Harlan undertook to refute in his notable dissenting opinion. "Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations" Id. at 22. "Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. McCulloch v. Maryland, 4 Wheat. 316, 405," Id. at 33.

[753] 175 U.S. 211 (1899).

bination for the first time. The agreements in the case, the parties to which were manufacturing concerns, effected a division of territory among them, and so involved, it was held, a "direct" restraint on the distribution and hence of the transportation of the products of the contracting firms. The holding, however, did not question the doctrine of the earlier case, which in fact continued substantially undisturbed until 1905, when *Swift & Co. v. United States*,[754] was decided.

The "Current of Commerce" Concept: The Swift Case.— Defendants in *Swift* were some thirty firms engaged in Chicago and other cities in the business of buying livestock in their stockyards, in converting it at their packing houses into fresh meat, and in the sale and shipment of such fresh meat to purchasers in other States. The charge against them was that they had entered into a combination to refrain from bidding against each other in the local markets, to fix the prices at which they would sell, to restrict shipments of meat, and to do other forbidden acts. The case was appealed to the Supreme Court on defendants' contention that certain of the acts complained of were not acts of interstate commerce and so did not fall within a valid reading of the Sherman Act. The Court, however, sustained the Government on the ground that the "scheme as a whole" came within the act, and that the local activities alleged were simply part and parcel of this general scheme.[755]

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

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

In Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 229–239 (1948), Justice Rutledge, for the Court, critically reviewed the jurisprudence of the limitations on the Act and 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); Hospital Building 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 194–199.

[755] Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

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

Thus, the concept of commerce as *trade*, that is, as *traffic*, again entered the constitutional law picture, with the result that conditions directly affecting interstate trade could not be dismissed on the ground that they affected interstate commerce, in the sense of interstate *transportation*, only "indirectly." Lastly, the Court added these significant words: "But we do not mean to imply that the rule which marks the point at which State taxation or 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."[758] That is to say, the line that confines state power from one side does not always confine national power from the other. Even though the line accurately divides the subject matter of the complementary spheres, national power is always entitled to take on the additional extension that is requisite to guarantee its effective exercise and is furthermore supreme.

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

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[756] 196 U.S. at 398–99.

[757] 196 U.S. at 399–401.

[758] 196 U.S. at 400.

[759] Loewe v. Lawlor (The Danbury Hatters Case), 208 U.S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Co. v. United Mine Workers, 268 U.S. 295 (1925); United States v. Bruins, 272 U.S. 549 (1926); Bedford Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Local 167 v. United States, 291 U.S. 293 (1934); Allen Bradley Co. v. Union, 325 U.S. 797 (1945); United States v. 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).

Stockyards and Grain Futures Acts.—In 1921 Congress passed the Packers and Stockyards Act[760] whereby the business of commission men and livestock dealers in the chief stockyards of the country was brought under national supervision, and in the year following it passed the Grain Futures Act[761] whereby exchanges dealing in grain futures were subjected to control. The decisions of the Court sustaining these measures both built directly upon the *Swift* case.

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

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

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

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[760] 42 Stat. 159, 7 U.S.C. §§ 171–183, 191–195, 201–203.

[761] 42 Stat. 998 (1922), 7 U.S.C. §§ 1–9, 10a–17.

[762] 258 U.S. 495 (1922).

[763] 258 U.S. at 514.

[764] 258 U.S. at 515–16. *See also* Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Minnesota v. Blasius, 290 U.S. 1 (1933).

[765] 262 U.S. 1 (1923).

[766] 262 U.S. at 35.

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

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

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

[767] 262 U.S. at 40.
[768] 262 U.S. at 37, quoting Stafford v. Wallace, 258 U.S. 495, 521 (1922).
[769] 48 Stat. 881, 15 U.S.C. § 77b et seq.
[770] 49 Stat. 803, 15 U.S.C. §§ 79–79z–6.

munication to certain types of public utility companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. All these provisions have been sustained,[771] *Gibbons v. Ogden* furnishing the Court its principle reliance.

Congressional Regulation of Production and Industrial Relations: Antidepression Legislation

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

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

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

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[771] Electric Bond Co. v. SEC, 303 U.S. 419 (1938); North American Co. v. SEC, 327 U.S. 686 (1946); American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[772] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933).

[773] 48 Stat. 195.

[774] 295 U.S. 495 (1935).

to govern business activities which "affected" interstate commerce. This, Chief Justice Hughes held, must be taken to mean "directly" affect such commerce: "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, . . . there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."[775] In short, the case was governed by the ideology of the *Sugar Trust* case, which was not mentioned in the Court's opinion.[776]

Agricultural Adjustment Act.—Congress' second attempt to combat the Depression comprised the Agricultural Adjustment Act of 1933.[777] As is pointed out elsewhere, the measure was set aside as an attempt to regulate production, a subject held to be "prohibited" to the United States by the Tenth Amendment.[778]

Bituminous Coal Conservation Act.—The third measure to be disallowed was the Guffey-Snyder Bituminous Coal Conservation Act of 1935.[779] The statute created machinery for the regulation of the price of soft coal, both that sold in interstate commerce and that sold "locally," and other machinery for the regulation of hours of labor and wages in the mines. The clauses of the act dealing with these two different matters were declared by the act itself to be separable so that the invalidity of the one set would not affect the validity of the other, but this strategy was ineffectual. A majority of the Court, speaking by Justice Sutherland, held that the act constituted one connected scheme of regulation, which, inasmuch as it invaded the reserved powers of the States over conditions of

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[775] 295 U.S. at 548. *See also* id. at 546.

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

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

[777] 48 Stat. 31 (1933).

[778] United States v. Butler, 297 U.S. 1, 63–64, 68 (1936).

[779] 49 Stat. 991 (1935).

employment in productive industry, was violative of the Constitution.[780] Justice Sutherland's opinion set out from Chief Justice Hughes' assertion in the *Schechter* case of the "fundamental" character of the distinction between "direct" and "indirect" effects, that is to say, from the doctrine of the *Sugar Trust* case. It then proceeded: "Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."[781]

Railroad Retirement Act.—Still pursuing the idea of protecting commerce and the labor engaged in it concurrently, Congress, by the Railroad Retirement Act of June 27, 1934,[782] ordered the compulsory retirement of superannuated employees of interstate carriers, and provided that they be paid pensions out of a fund comprising compulsory contributions from the carriers and their present and future employees. In *Railroad Retirement Board v. Alton R.R.*,[783] however, a closely divided Court held this legislation to be in excess of Congress' power to regulate commerce and contrary to the due process clause of the Fifth Amendment. Said Justice Roberts for the majority: "We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is

[780] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[781] 298 U.S. at 308–09.
[782] 48 Stat. 1283 (1934).
[783] 295 U.S. 330 (1935).

neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation."[784]

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

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

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[784] 295 U.S. at 374.

[785] 295 U.S. at 379, 384.

[786] 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. American Crystal Sugar Co., 334 U.S. 219, 230 (1948). *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[787] 301 U.S. 1 (1937). A major political event had intervened between this decision and those described in the preceding pages. President Roosevelt, angered at the Court's invalidation of much of his depression program, proposed a "reorganization" of the Court by which he would have been enabled to name one new Justice for each Justice on the Court who was more than 70 years old, in the name of "judicial efficiency." The plan was defeated in the Senate, in part, perhaps, because in such cases as *Jones & Laughlin* a Court majority began to demonstrate sufficient "judicial efficiency." *See* Leuchtenberg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, 1966 SUP. CT. REV. 347 (P. Kurland ed.); Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L. J. 791 (1952); 2 M. PUSEY, CHARLES EVANS HUGHES 759–765 (1951).

[788] 49 Stat. 449, as amended, 29 U.S.C. § 151 et seq.

which workers could choose exclusive bargaining representatives with which employers were required to bargain, and created a board to oversee all these processes.[789]

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

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[789] The NLRA was enacted not only against the backdrop of depression, although obviously it went far beyond being a mere antidepression measure, but Congress could as well look to its experience in railway labor legislation. In 1898, Congress passed the Erdman Act, 30 Stat. 424, which attempted to influence the unionization of railroad workers and facilitate negotiations with employers through mediation. The statute fell largely into disuse because the railroads refused to mediate. Additionally, in Adair v. United States, 208 U.S. 161 (1908), the Court struck down a section of the law outlawing "yellow-dog contracts," by which employers exacted promises of workers to quit or not to join unions as a condition of employment. The Court held the section not to be a regulation of commerce, there being no connection between an employee's membership in a union and the carrying on of interstate commerce. *Cf.* Coppage v. Kansas, 236 U.S. 1 (1915).

The Court did uphold in Wilson v. New, 243 U.S. 332 (1917), a congressional settlement of a threatened rail strike through the enactment of an eight-hour day and a time-and-a-half for overtime for all interstate railway employees. The national emergency confronting the Nation was cited by the Court but with the implication that the power existed in more normal times, suggesting that Congress' powers were not as limited as some judicial decisions had indicated.

Congress' enactment of the Railway Labor Act in 1926, 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*, was sustained by a Court decision admitting the connection between interstate commerce and union membership as a substantial one. Texas & N.L.R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548 (1930). A subsequent decision sustained the application of the Act to "back shop" employees of an interstate carrier who engaged in making heavy repairs on locomotives and cars withdrawn from service for long periods, the Court finding that the activities of these employees were related to interstate commerce. Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

that commerce must be appraised by a judgment that does not ignore actual experience." [790]

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

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

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

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[790] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38, 41–42 (1937).

[791] NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

[792] NLRB v. Fainblatt, 306 U.S. 601, 606 (1939).

[793] Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953).

[794] Journeymen Plumbers' Union v. County of Door, 359 U.S. 354 (1959).

[795] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963).

[796] 371 U.S. at 226. *See also* Guss v. Utah Labor Board, 353 U.S. 1, 3 (1957); NLRB v. Fainblatt, 306 U.S. 601, 607 (1939).

[797] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224, 225 n.2 (1963); Liner v. Jafco, 375 U.S. 301, 303 n. 2 (1964).

It was further provided that "for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [that is, for interstate commerce] if such employee was employed . . . in any process or occupation directly essential to the production thereof in any State."[798] Sustaining an indictment under the act, a unanimous Court, speaking through Chief Justice Stone, said: "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows."[799] In support of the decision the Court invoked Chief Justice Marshall's reading of the necessary-and-proper clause in *McCulloch v. Maryland* and his reading of the commerce clause in *Gibbons v. Ogden*.[800] Objections purporting to be based on the Tenth Amendment were met from the same point of view: "Our conclusion is unaffected by the Tenth Amendment which provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new National Government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers."[801]

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

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

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

[800] 312 U.S. at 113, 114, 118.

[801] 312 U.S. at 123–24.

[802] *E.g.*, Kirschbaum v. Walling, 316 U.S. 517 (1942) (operating and maintenance employees of building, part of which was rented to business producing goods for interstate commerce); Walton v. Southern Package Corp., 320 U.S. 540 (1944)

gress to some degree narrowed the permissible range of coverage and disapproved some of the Court's decisions.[803] But in 1961,[804] with extensions in 1966,[805] Congress itself expanded by several million persons the coverage of the Act, introducing the "enterprise" concept by which all employees in a business producing anything in commerce or affecting commerce were brought within the protection of the minimum wage-maximum hours standards.[806] The "enterprise concept" was sustained by the Court in *Maryland v. Wirtz*.[807] Justice Harlan for a unanimous Court on this issue found the extension entirely proper on the basis of two theories: one, a business' competitive position in commerce is determined in part by all its significant labor costs, and not just those costs attributable to its employees engaged in production in interstate commerce, and, two, labor peace and thus smooth functioning of interstate commerce was facilitated by the termination of substandard labor conditions affecting all employees and not just those actually engaged in interstate commerce.[808]

Agricultural Marketing Agreement Act.—After its initial frustrations, Congress returned to the task of bolstering agriculture by passing the Agricultural Marketing Agreement Act of June 3, 1937,[809] 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.*,[810] the Court sustained an order of

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(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. Michigan 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 & Associates, 358 U.S. 207 (1959) (nonprofessional employees of architectural firm working on plans for construction of air bases, bus terminals, and radio facilities).

[803] *Cf.* Mitchell v. H. B. Zachry Co., 362 U.S. 310, 317 (1960).

[804] 75 Stat. 65.

[805] 80 Stat. 830.

[806] 29 U.S.C. §§ 203(r), 203(s).

[807] 392 U.S. 183 (1968).

[808] Another aspect of this case was overruled in National League of Cities v. Usery, 426 U.S. 833 (1976), which itself was overruled in Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985).

[809] 50 Stat. 246, 7 U.S.C. § 601 et seq.

[810] 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).

the Secretary of Agriculture fixing the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground it applied to milk produced and sold intrastate. Sustaining the order, the Court said: "Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."[811]

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

[811] 315 U.S. at 118–19.
[812] 317 U.S. 111 (1942).
[813] 52 Stat. 31, 7 U.S.C. §§ 612c, 1281–1282 et seq.

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

Acts of Congress Prohibiting Commerce

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

[814] 317 U.S. at 128–29.

[815] 317 U.S. at 120–24. In United States v. Rock Royal Co-operative, 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, regulating the price of milk in certain instances. Said Justice Reed for the majority of the Court: "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond State lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within State lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the State of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales." Id. at 568–69.

under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the National Government, to whom the subject appears to be committed? . . . The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has contended, that they are not the proper objects of national regulation; and several acts of Congress have been made respecting them. . . . [Furthermore] if it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range."

"Congress has power to declare war. It, of course, has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion. . . . Under the Confederation, . . . we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power. . . . Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures—but this has never been claimed or pretended, since the adoption of the Federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, 'to regulate commerce.' Hence I infer, that the power, reserved to the States by the articles of Confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where."[816]

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

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[816] United States v. The William, 28 Fed. Cas. 614, 620–623 (No. 16,700) (D. Mass. 1808). *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 191 (1824); United States v. Marigold, 50 U.S. (9 How.) 560 (1850).

[817] 289 U.S. 48 (1933).

foreign commerce with the United States.... It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce.... It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, cl. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons v. Ogden*, 9 Wheat. 1, 202. 'Under the power to regulate foreign commerce Congress imposes duties on importations, give drawbacks, pass embargo and nonintercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves v. Slaughter*, 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power." 2 *Story on the Constitution*, 1088."[818]

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

In *Weber v. Freed*,[826] an act prohibiting the importation and interstate transportation of prize-fight films or of pictorial rep-

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[818] 289 U.S. at 57, 58.
[819] Ch. 270, § 28, 5 Stat. 566.
[820] 9 Stat. 237 (1848).
[821] 24 Stat. 409.
[822] 35 Stat. 614; 38 Stat. 275.
[823] 29 Stat. 605.
[824] 192 U.S. 470 (1904).
[825] 223 U.S. 166 (1912); *cf.* United States v. California, 332 U.S. 19 (1947).
[826] 239 U.S. 325 (1915).

resentation of prize fights was upheld. Chief Justice White grounded his opinion for a unanimous Court on the complete and total control over foreign commerce possessed by Congress, in contrast implicitly to the lesser power over interstate commerce.[827] And in *Brolan v. United States*,[828] the Court rejected as wholly inappropriate citation of cases dealing with interstate commerce on the question of Congress' power to prohibit foreign commerce. It has been earlier noted, however, that the purported distinction is one that the Court both previously to and subsequent to these opinions has rejected.

Interstate Commerce: Power to Prohibit Questioned.—The question whether Congress' power to regulate commerce "among the several States" embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution's interpretation, a debate the final resolution of which in favor of congressional power is an event of first importance for the future of American federalism. The issue was as early as 1841 brought forward by Henry Clay, in an argument before the Court in which he raised the specter of an act of Congress forbidding the interstate slave trade.[829] The debate was concluded ninety-nine years later by the decision in *United States v. Darby*,[830] in which the Fair Labor Standards Act was sustained.[831]

Interstate Commerce: National Prohibitions and State Police Power.—The earliest such acts were in the nature of quarantine regulations and usually dealt solely with interstate transportation. In 1884, the exportation or shipment in interstate commerce of livestock having any infectious disease was forbidden.[832] In 1903, power was conferred upon the Secretary of Agriculture to establish regulations to prevent the spread of such diseases through foreign or interstate commerce.[833] In 1905, the same official was authorized to lay an absolute embargo or quarantine upon

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[827] 239 U.S. at 329.

[828] 236 U.S. 216 (1915).

[829] Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 488–489 (1841).

[830] 312 U.S. 100 (1941).

[831] The judicial history of the argument may be examined in the majority and dissenting opinions in Hammer v. Dagenhart, 247 U.S. 251 (1918), a five-to-four decision, in which the majority held Congress not to be empowered to ban from the channels of interstate commerce goods made with child labor, since Congress' power was to prescribe the rule by which commerce was to be carried on and not to prohibit it, except with regard to those things the character of which—diseased cattle, lottery tickets—was inherently evil. With the majority opinion, *compare* Justice Stone's unanimous opinion in United States v. Darby, 312 U.S. 100, 112–124 (1941), overruling Hammer v. Dagenhart. *See also* Corwin, *The Power of Congress to Prohibit Commerce*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 103 (1938).

[832] 23 Stat. 31.

[833] 32 Stat. 791.

all shipments of cattle from one State to another when the public necessity might demand it.[834] A statute passed in 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.[835] In 1912, a similar exclusion of diseased nursery stock was decreed,[836] while by the same act and again by an act of 1917,[837] the Secretary of Agriculture was invested with powers of quarantine on interstate commerce for the protection of plant life from disease similar to those above described for the prevention of the spread of animal disease. While the Supreme Court originally held federal quarantine regulations of this sort to be constitutionally inapplicable to intrastate shipments of livestock, on the ground that federal authority extends only to foreign and interstate commerce,[838] this view has today been abandoned.

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

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

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[834] 33 Stat. 1264.
[835] 33 Stat. 1269.
[836] 37 Stat. 315.
[837] 39 Stat. 1165.
[838] Illinois Central R.R. v. McKendree, 203 U.S. 514 (1906). *See also* United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1870).
[839] Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
[840] 28 Stat. 963.
[841] 143 U.S. 110 (1892).

enacted under the police power. Early in the opinion, extensive quotation is made from Chief Justice Marshall's opinion in *Gibbons v. Ogden*,[842] with special stress upon the definition there given of the phrase "to regulate." Justice Johnson's assertion on the same occasion is also given: "The power of a sovereign State over commerce, . . . amounts to nothing more than a power to limit and restrain it at pleasure." Further along is quoted with evident approval Justice Bradley's statement in *Brown v. Houston*,[843] that "[t]he power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

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

In *Brooks v. United States*,[846] the Court sustained the National Motor Vehicle Theft Act[847] as a measure protective of owners of automobiles; that is, of interests in "the State of origin." The statute was designed to repress automobile motor thefts, notwith-

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[842] 22 U.S. (9 Wheat.) 1, 227 (1824).
[843] 114 U.S. 622, 630 (1885).
[844] Hoke v. United States, 227 U.S. 308, 322 (1913).
[845] United States v. Hill, 248 U.S. 420, 425 (1919).
[846] 267 U.S. 432 (1925).
[847] 41 Stat. 324 (1919), 18 U.S.C., §§ 2311–2313.

standing that such thefts antedate the interstate transportation of the article stolen. Speaking for the Court, Chief Justice Taft, at the outset, stated the general proposition that "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin." Noting "the radical change in transportation" brought about by the automobile, and the rise of "[e]laborately organized conspiracies for the theft of automobiles . . . and their sale or other disposition" in another jurisdiction from the owner's, the Court concluded that such activity "is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by anyone with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." The fact that stolen vehicles were "harmless" and did not spread harm to persons in other States on this occasion was not deemed to present any obstacle to the exercise of the regulatory power of Congress.[848]

The Darby Case.—In sustaining the Fair Labor Standards Act[849] in 1941,[850] the Court expressly overruled *Hammer v. Dagenhart*.[851] "The distinction on which the [latter case] . . . was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the States of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."[852]

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[848] 267 U.S. at 436–39. *See also* Kentucky Whip & Collar Co. v. I.C.R. Co., 299 U.S. 334 (1937).

[849] 29 U.S.C. §§ 201–219.

[850] United States v. Darby, 312 U.S. 100 (1941).

[851] 247 U.S. 251 (1918).

[852] 312 U.S. at 116–17.

The Commerce Clause as a Source of National Police Power

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

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

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

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

Second, it may not be persons who cross state lines but some object that will or has crossed state lines, and the regulation of a purely intrastate activity may be premised on the presence of the

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[853] *E.g.*, Brooks v. United States, 267 U.S. 432, 436–437 (1925); United States v. Darby, 312 U.S. 100, 114 (1941). *See* Cushman, *The National Police Power Under the Commerce Clause*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 62 (1938).

[854] New York v. United States, 505 U.S. 144, 158 (1992).

[855] 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).

object. Thus, the public accommodations law reached small establishments that served food and other items that had been purchased from interstate channels.[856] Congress has validly penalized convicted felons, who had no other connection to interstate commerce, for possession or receipt of firearms, which had been previously transported in interstate commerce independently of any activity by the two felons.[857] This reach is not of newly-minted origin. In *United States v. Sullivan*,[858] the Court sustained a conviction of misbranding, under the Federal Food, Drug and Cosmetic Act. Sullivan, a Columbus, Georgia, druggist had bought a properly labeled 1000–tablet bottle of sulfathiazole from an Atlanta wholesaler. The bottle had been shipped to the Atlanta wholesaler by a Chicago supplier six months earlier. Three months after Sullivan received the bottle, he made two retail sales of 12 tablets each, placing the tablets in boxes not labeled in strict accordance with the law. Upholding the conviction, the Court concluded that there was no question of "the constitutional power of Congress under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce."[859]

Third, Congress' power reaches not only transactions or actions that occasion the crossing of state or national boundaries but extends as well to activities that, though local, "affect" commerce, a combination of the commerce power enhanced by the necessary and proper clause. The seminal case, of course, is *Wickard v. Filburn*,[860] sustaining federal regulation of a crop of wheat grown on a farm and intended solely for home consumption. The premise was that if it were never marketed, it supplied a need otherwise to be satisfied only in the market, and that if prices rose it might be induced onto the market. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects

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[856] Katzenbach v. McClung, 379 U.S. 294, 298, 300–302 (1964); Daniel v. Paul, 395 U.S. 298, 305 (1969).

[857] 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.*, McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987). Congress has overturned the latter case. 102 Stat. 4508, § 7603, 18 U.S.C. § 1346.

[858] 332 U.S. 689 (1948).

[859] 332 U.S. at 698–99.

[860] 317 U.S. 111 (1942).

commerce among the States or with foreign nations."[861] Coverage under federal labor and wage-and-hour laws after the 1930s showed the reality of this doctrine.[862]

In upholding federal regulation of strip mining, the Court demonstrated the breadth of the "affects" standard. One case dealt with statutory provisions designed to preserve "prime farmland." The trial court had determined that the amount of such land disturbed annually amounted to 0.006% of the total prime farmland acreage in the Nation and, thus, that the impact on commerce was "infinitesimal" or "trivial." Disagreeing, the Court said: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[863] 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."[864] In a companion case, the Court reiterated that "[t]he denomination of an activity as a 'local' or 'intrastate' activity does not resolve the question whether Congress may regulate it under the Commerce Clause. As previously noted, the commerce power 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'"[865] Judicial review is narrow. Congress' determination of an "effect" must be deferred to if it is rational, and Congress must have acted reasonably in choosing the means.[866]

Fourth, a still more potent engine of regulation has been the expansion of the class-of-activities standard, which began in the "affecting" cases. In *Perez v. United States*,[867] the Court sustained the application of a federal "loan-sharking" law to a local culprit.

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[861] Fry v. United States, 421 U.S. 542, 547 (1975).

[862] *See* Maryland v. Wirtz, 392 U.S. 183, 188–193 (1968).

[863] Hodel v. Indiana, 452 U.S. 314, 323–324 (1981).

[864] 452 U.S. at 324.

[865] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281 (1981) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

[866] 452 U.S. at 276, 277. The scope of review is restated in Preseault v. ICC, 494 U.S. 1, 17 (1990). Then-Justice Rehnquist, concurring in the two *Hodel* cases, objected that the Court was making it appear that no constitutional limits existed under the commerce clause, whereas in fact it was necessary that a regulated activity must have a *substantial* effect on interstate commerce, not just *some* effect. He thought it a close case that the statutory provisions here met those tests. 452 U.S. at 307–313.

[867] 402 U.S. 146 (1971).

The Court held that, although individual loan-sharking activities might be intrastate in nature, still it was within Congress' power to determine that the activity was within a class the activities of which did affect interstate commerce, thus affording Congress the opportunity to regulate the entire class. While the *Perez* Court and the congressional findings emphasized that loan-sharking was generally part of organized crime operating on a national scale and that loan-sharking was commonly used to finance organized crime's national operations, subsequent cases do not depend upon a defensible assumption of relatedness in the class.

Thus, the Court applied the federal arson statute to the attempted "torching" of a defendant's two-unit apartment building. The Court merely pointed to the fact that the rental of real estate "unquestionably" affects interstate commerce and that "the local rental of an apartment unit is merely an element of a much broader commercial market in real estate."[868] The apparent test of whether aggregation of local activity can be said to affect commerce was made clear next in an antitrust context.[869] Allowing the continuation of an antitrust suit challenging a hospital's exclusion of a surgeon from practice in the hospital, the Court observed that in order to establish the required jurisdictional nexus with commerce, the appropriate focus is not on the actual effects of the conspiracy but instead is on the possible consequences for the affected market if the conspiracy is successful. The required nexus in this case was sufficient because competitive significance is to be measured by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the surgeon was being excluded.[870]

For the first time in almost sixty years,[871] the Court invalidated a federal law as exceeding Congress' authority under the commerce clause.[872] The statute was a provision making it a federal offense to possess a firearm within 1,000 feet of a school.[873]

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[868] 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.

[869] Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991). *See also* Jones v. United States, 529 U.S. 848 (2000)(an owner-occupied building is not "used" in interstate commerce within the meaning of the federal arson statute).

[870] 500 U.S. at 330–32. The decision was 5–to–4, with the dissenters of the view that, although Congress could reach the activity, it had not done so.

[871] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[872] United States v. Lopez, 514 U.S. 549 (1995). The Court was divided 5–to–4, with Chief Justice Rehnquist writing the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with dissents by Justices Stevens, Souter, Breyer, and Ginsburg.

[873] 18 U.S.C. § 922(q)(1)(A). Congress subsequently amended the section to make the offense jurisdictionally to turn on possession of "a firearm that has moved in

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.[874] The Court identified three broad categories of activity that Congress may regulate under its commerce power. "First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."[875]

Clearly, said the Court, the criminalized activity did not implicate the first two categories.[876] 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."[877] 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."[878] The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case. Finally, the Court rejected the arguments of the Government and of the dissent that there existed a sufficient connection between the offense and interstate commerce.[879] At base, the Court's concern was that accepting the attenuated connection argu-

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or that otherwise affects interstate or foreign commerce." Pub. L. 104–208, 110 Stat. 3009–370.

[874] 514 U.S. at 556–57, 559.

[875] 514 U.S. at 558–59. For a recent 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)

[876] 514 U.S. at 559.

[877] 514 U.S. at 559–61.

[878] 514 U.S. at 561.

[879] 514 U.S. at 563–68.

ments presented would result in the evisceration of federalism. "Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." [880]

Whether *Lopez* bespoke a Court determination to police more closely Congress' exercise of its commerce power, so that it would be a noteworthy case, [881] 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*, [882] however, suggests that stricter scrutiny of Congress's commerce power exercises is the chosen path, at least for legislation that falls outside the area of economic regulation. [883] The Court will no longer defer, via rational basis review, to every congressional finding of substantial effects on interstate commerce, but instead will examine the nature of the asserted nexus to commerce, and will also consider whether a holding of constitutionality is consistent with its view of the commerce power as being a limited power that cannot be allowed to displace all exercise of state police powers.

In *Morrison* the Court applied *Lopez* principles to invalidate a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity," [884] the Court explained, and there was allegedly no precedent for upholding commerce-power regulation of intrastate activity that was not economic in nature. The provision, like the invalidated provision of the Gun-Free School Zones Act, contained no jurisdictional element tying the regulated violence to interstate commerce. Unlike the Gun-Free School Zones Act, the VAWA did contain "numerous" congressional findings about the se-

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[880] 514 U.S. at 564.

[881] "Not every epochal case has come in epochal trappings." 514 U.S. at 615 (Justice Souter dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).

[882] 529 U.S. 598 (2000). Once again, the Justices were split 5–4, with Chief Justice Rehnquist's opinion of the Court being joined by Justices O'Connor, Scalia, Kennedy, and Thomas, and with Justices Souter, Stevens, Ginsburg, and Breyer dissenting.

[883] For an expansive interpretation in the area of economic regulation, decided during the same Term as *Lopez*, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

[884] 529 U.S. at 613.

rious effects of gender-motivated crimes,[885] 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."[886] 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.[887] 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."[888]

Civil Rights.—It had been generally established some time ago that Congress had power under the commerce clause to prohibit racial discrimination in the use of the channels of commerce.[889] The power under the clause to forbid discrimination within the States was firmly and unanimously sustained by the Court when Congress in 1964 enacted a comprehensive measure outlawing discrimination because of race or color in access to public accommodations with a requisite connection to interstate commerce.[890] Hotels and motels were declared covered, that is, de-

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[885] 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," infra. 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.

[886] 529 U.S. at 614.

[887] 529 U.S. 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.

[888] 529 U.S. at 618.

[889] 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).

[890] Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. § 2000a et seq.

cleared 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.[891] The Court sustained the Act as applied to a downtown Atlanta motel which did serve interstate travelers,[892] to an out-of-the-way restaurant in Birmingham that catered to a local clientele but which had spent 46 percent of its previous year's out-go on meat from a local supplier who had procured it from out-of-state,[893] and to a rurally-located amusement area operating a snack bar and other facilities, which advertised in a manner likely to attract an interstate clientele and that served food a substantial portion of which came from outside the State.[894]

Writing for the Court in *Heart of Atlanta Motel* and *McClung*, Justice Clark denied that Congress was disabled from regulating the operations of motels or restaurants because those operations may be, or may appear to be, "local" in character. "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[895]

But, it was objected, Congress is regulating on the basis of moral judgments and not to facilitate commercial intercourse. "That Congress [may legislate] . . . against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong."[896] The evidence did, in fact, noted the Justice, support Congress' conclusion that racial discrimination impeded interstate travel by more than 20 million black citizens, which was an impairment Congress could legislate to remove.[897]

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[891] 42 U.S.C. § 2000a (b).

[892] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[893] Katzenbach v. McClung, 379 U.S. 294 (1964).

[894] Daniel v. Paul, 395 U.S. 298 (1969).

[895] Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 301–304 (1964).

[896] Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964).

[897] 379 U.S. at 252–53; Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964).

The commerce clause basis for civil rights legislation in respect to private discrimination was important because of the understanding that Congress' power to act under the Fourteenth and Fifteenth Amendments was limited to official discrimination.[898] The Court's subsequent determination that Congress is not necessarily so limited in its power reduces greatly the importance of the commerce clause in this area.[899]

Criminal Law.—Federal criminal jurisdiction based on the commerce power, and frequently combined with the postal power, has historically been an auxiliary criminal jurisdiction. That is, Congress has made federal crimes of acts that constitute state crimes on the basis of some contact, however tangential, with a matter subject to congressional regulation even though the federal interest in the acts may be minimal.[900] Examples of this type of federal criminal statute abound, including the Mann Act designed to outlaw interstate white slavery,[901] the Dyer Act punishing interstate transportation of stolen automobiles,[902] and the Lindbergh Law punishing interstate transportation of kidnapped persons.[903] But, just as in other areas, Congress has passed beyond a proscription of the use of interstate facilities in the commission of a crime, it has in the criminal law area expanded the scope of its jurisdiction. Typical of this expansion is a statute making it a federal offense to "in any way or degree obstruct ... delay ... or affect ... commerce ... by robbery or extortion ...."[904] With the expansion of the scope of the reach of "commerce" the statute potentially could reach crimes involving practically all business concerns, although it appears to be used principally against organized crime.

To date, the most far-reaching measure to be sustained by the Court has been the "loan-sharking" prohibition of the Consumer

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[898] 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).

[899] The "open housing" provision of the 1968 Civil Rights Act, Title VIII, 82 Stat. 73, 81, 42 U.S.C. § 3601, was based on the commerce clause, but in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that antidiscrimination-in-housing legislation could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that although § 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of § 5. United States v. Guest, 383 U.S. 745, 761, 774 (1966) (concurring opinions); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[900] *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).

[901] 18 U.S.C. § 2421.

[902] 18 U.S.C. § 2312.

[903] 18 U.S.C. § 1201.

[904] 18 U.S.C. § 1951. *And see*, 18 U.S.C. § 1952.

Credit Protection Act.[905] The title affirmatively finds that extortionate credit transactions affect interstate commerce because loan sharks are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Upholding the statute, the Court found that though individual loan-sharking activities may be intrastate in nature, still it is within Congress' power to determine that it was within a class the activities of which did affect interstate commerce, thus affording Congress power to regulate the entire class.[906]

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

The grant of power to Congress over commerce, unlike that of power to levy customs duties, the power to raise armies, and some others, is unaccompanied by correlative restrictions on state power.[907] This circumstance does not, however, of itself signify that the States were expected to participate in the power thus granted Congress, subject only to the operation of the supremacy clause. As Hamilton pointed out in *The Federalist*,[908] while some of the powers which are vested in the National Government admit of their "concurrent" exercise by the States, others are of their very nature "exclusive," and hence render the notion of a like power in the States "contradictory and repugnant." As an example of the latter kind of power, Hamilton mentioned the power of Congress to pass a uniform naturalization law. Was the same principle expected to apply to the power over foreign and interstate commerce?

Unquestionably one of the great advantages anticipated from the grant to Congress of power over commerce was that state interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would be thereby brought to

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[905] Title II, 82 Stat. 159 (1968), 18 U.S.C. § 891 et seq.

[906] Perez v. United States, 402 U.S. 146 (1971). *See also* Russell v. United States, 471 U.S. 858 (1985).

[907] Thus, by Article I, § 10, cl. 2, States are denied the power to "lay any Imposts or Duties on Imports or Exports" except by the consent of Congress. The clause applies only to goods imported from or exported to another country, not from or to another State, Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869), which prevents its application to interstate commerce, although Chief Justice Marshall thought to the contrary, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827), and the contrary has been strongly argued. W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 295–323 (1953).

[908] THE FEDERALIST No. 32 (J. Cooke ed. 1961), 199–203. Note that in connection with the discussion that follows, Hamilton avowed that the taxing power of the States, save for imposts or duties on imports or exports, "remains undiminished." Id. at 201. The States "retain [the taxing] authority in the most absolute and unqualified sense[.]" Id. at 199.

an end. As Webster stated in his argument for appellant in *Gibbons v. Ogden*: "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law."[909] In other words, the constitutional grant was itself a regulation of commerce in the interest of uniformity.[910]

That, however, the commerce clause, unimplemented by congressional legislation, took from the States any and all power over foreign and interstate commerce was by no means conceded and was, indeed, counterintuitive, considering the extent of state regulation that previously existed before the Constitution.[911] Moreover, legislation by Congress regulative of any particular phase of commerce would raise the question whether the States were entitled to fill the remaining gaps, if not by virtue of a "concurrent" power over interstate and foreign commerce, then by virtue of "that immense mass of legislation" as Marshall termed it, "which embraces everything within the territory of a State, not surrendered to the general government,"[912] in a word, the "police power."

The text and drafting record of the commerce clause fails, therefore, without more ado, to settle the question of what power is left to the States to adopt legislation regulating foreign or interstate commerce in greater or lesser measure. To be sure, in cases

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[909] 22 U.S. (9 Wheat.) 1, 11 (1824). Justice Johnson's assertion, concurring, was to the same effect. Id. at 226. Late in life, James Madison stated that the power had been granted Congress mainly as "a negative and preventive provision against injustice among the States." 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14–15 (1865).

[910] It was evident from THE FEDERALIST that the principal aim of the commerce clause was the protection of the national market from the oppressive power of individual States acting to stifle or curb commerce. Id. at No. 7, 39–41 (Hamilton); No. 11, 65–73 (Hamilton); No. 22, 135–137 (Hamilton); No. 42, 283–284 (Madison); No. 53, 362–364 (Madison). *See* H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949). For a comprehensive history of the adoption of the commerce clause, which does not indicate a definitive answer to the question posed, *see* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941). Professor Abel discovered only nine references in the Convention records to the commerce clause, all directed to the dangers of interstate rivalry and retaliation. Id. at 470–71 & nn. 169–75.

[911] The strongest suggestion of exclusivity found in the Convention debates is a remark by Madison. "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (rev. ed. 1937). However, the statement is recorded during debate on the clause, Art. I, § 10, cl. 3, prohibiting States from laying tonnage duties. That the Convention adopted this clause, when tonnage duties would certainly be one facet of regulating interstate and foreign commerce, casts doubt on the assumption that the commerce power itself was intended to be exclusive.

[912] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

of flat conflict between an act or acts of Congress regulative of such commerce and a state legislative act or acts, from whatever state power ensuing, the act of Congress is today recognized, and was recognized by Marshall, as enjoying an unquestionable supremacy.[913] But suppose, first, that Congress has passed no act, or second, that its legislation does not clearly cover the ground traversed by previously enacted state legislation. What rules then apply? Since *Gibbons v. Ogden*, both of these situations have confronted the Court, especially as regards interstate commerce, hundreds of times, and in meeting them the Court has, first, determined that it has power to decide when state power is validly exercised, and, second, it has coined or given currency to numerous formulas, some of which still guide, even when they do not govern, its judgment.[914]

Thus, it has been judicially established that the commerce clause is not only a 'positive' grant of power to Congress, but it is also a 'negative' constraint upon the States; that is, the doctrine of the 'dormant' commerce clause, though what is dormant is the congressional exercise of the power, not the clause itself, under which the Court may police state taxation and regulation of interstate commerce, became well established.

Webster, in *Gibbons*, argued that a state grant of a monopoly to operate steamships between New York and New Jersey not only contravened federal navigation laws but violated the commerce clause as well, because that clause conferred an *exclusive* power upon Congress to make the rules for national commerce, although he conceded that the grant to regulate interstate commerce was so broad as to reach much that the States had formerly had jurisdiction over, the courts must be reasonable in interpretation.[915] But because he thought the state law was in conflict with the federal legislation, Chief Justice Marshall was not compelled to pass on Webster's arguments, although in dicta he indicated his considerable sympathy with them and suggested that the power to regulate

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[913] 22 U.S. at 210–11.

[914] The writings detailing the history are voluminous. *See, e.g.*, F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WHITE (1937); B. GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION (1932) (usefully containing appendices cataloguing every commerce clause decision of the Supreme Court to that time); Sholleys, *The Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936). Among the recent writings, *see* Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985) (a disputed conceptualization arguing the Court followed a consistent line over the years), and articles cited, id. at 887 n.4.

[915] 22 U.S. (9 Wheat.) at 13–14, 16.

commerce between the States might be an exclusively federal power.[916]

Chief Justice Marshall originated the concept of the "dormant commerce clause" in *Willson v. Black Bird Creek Marsh Co.*,[917] although in dicta. Attacked before the Court was a state law authorizing the building of a dam across a navigable creek, and it was claimed the law was in conflict with the federal power to regulate interstate commerce. Rejecting the challenge, Marshall said that the state act could not be "considered as repugnant to the [federal] power to regulate commerce in its dormant state[.]"

Returning to the subject in *Cooley v. Board of Wardens of Port of Philadelphia*,[918] the Court, upholding a state law that required ships to engage a local pilot when entering or leaving the port of Philadelphia, enunciated a doctrine of *partial* federal exclusivity. According to Justice Curtis' opinion, the state act was valid on the basis of a distinction between those subjects of commerce which "imperatively demand a single uniform rule" operating throughout the country and those which "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former, the Court held Congress' power to be "exclusive," as to the latter, it held that the States enjoyed a power of "concurrent legislation."[919] The Philadelphia pilotage requirement was of the latter kind.

Thus, the contention that the federal power to regulate interstate commerce was exclusive of state power yielded to a rule of partial exclusivity. Among the welter of such cases, the first actually to strike down a state law solely on commerce clause grounds

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[916] 22 U.S. at 17–18, 209. In Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193–196 (1819), Chief Justice Marshall denied that the grant of the bankruptcy power to Congress was exclusive. *See also* Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (militia).

[917] 27 U.S. (2 Pet.) 245, 252 (1829).

[918] 53 U.S. (12 How.) 299 (1851). The issue of exclusive federal power and the separate issue of the dormant commerce clause was present in the License Cases, 46 U.S. (5 How.) 504 (1847), and the Passenger Cases, 48 U.S. (7 How.) 283 (1849), but, despite the fact that much ink was shed in multiple opinions discussing the questions, nothing definitive emerged. Chief Justice Taney, in contrast to Marshall, viewed the clause only as a grant of power to Congress, containing no constraint upon the States, and the Court's role was to void state laws in contravention of federal legislation. 46 U.S. (5 How.) at 573; 48 U.S. (7 How.) at 464.

[919] 48 U.S. at 317–20. Although Chief Justice Taney had formerly taken the strong position that Congress' power over commerce was not exclusive, he acquiesced silently in the *Cooley* opinion. For a modern discussion of *Cooley*, *see* Goldstein v. California, 412 U.S. 546, 552–560 (1973), in which, in the context of the copyright clause, the Court, approving *Cooley* for commerce clause purposes, refused to find the copyright clause either fully or partially exclusive.

was the *State Freight Tax Case*.[920] The question before the Court was the validity of a nondiscriminatory[921] statute that required every company transporting freight within the State, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. Opining that a tax upon freight, or any other article of commerce, transported from State to State is a regulation of commerce among the States and, further, that the transportation of merchandise or passengers through a State or from State to State was a subject that required uniform regulation, the Court held the tax in issue to be repugnant to the commerce clause.

Whether exclusive or partially exclusive, however, the commerce clause as a restraint upon state exercises of power, absent congressional action, received no sustained justification or explanation; the clause, of course, empowers Congress to regulate commerce among the States, not the courts. Often, as in *Cooley*, and later cases, the Court stated or implied that the rule was imposed by the commerce clause.[922] In *Welton v. Missouri*,[923] the Court attempted to suggest a somewhat different justification. Challenged was a state statute that required a "peddler's" license for merchants selling goods that came from other states, but that required no license if the goods were produced in the State. Declaring that uniformity of commercial regulation is necessary to protect articles of commerce from hostile legislation and that the power asserted

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[920] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 (1873). For cases in which the commerce clause basis was intermixed with other express or implied powers, *see* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31 (1867); Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868). Chief Justice Marshall, in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 488–489 (1827), indicated, in dicta, that a state tax might violate the commerce clause.

[921] Just a few years earlier, the Court, in an opinion that merged commerce clause and import-export clause analyses, had seemed to suggest that it was a discriminatory tax or law that violates the commerce clause and not simply a tax on interstate commerce. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

[922] "Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the State." Leisy v. Hardin, 135 U.S. 100, 108–109 (1890). The commerce clause "remains in the Constitution as a grant of power to Congress . . . and as a diminution *pro tanto* of absolute state sovereignty over the same subject matter." Carter v. Virginia, 321 U.S. 131, 137 (1944). The commerce clause, the Court has celebrated, "does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given these great silences of the Constitution." H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534–535 (1949). More recently, the Court has taken to stating that "[t]he Commerce Clause 'has long been recognized as a *self-executing limitation* on the power of the States to enact laws imposing substantial burdens on such commerce.'" Dennis v. Higgins, 498 U.S. 439, 447 (1991) (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) (emphasis supplied).

[923] 91 U.S. 275 (1875).

by the State belonged exclusively to Congress, the Court observed that "[t]he fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject . . . is equivalent to a declaration that inter-State commerce shall be free and untrammelled." [924]

It has been evidently of little importance to the Court to explain. "Whether or not this long recognized distribution of power between the national and state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same." [925] Thus, "[f]or a hundred years it has been accepted constitutional doctrine . . . that . . . where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [926]

Two other justifications can be found throughout the Court's decisions, but they do not explain why the Court is empowered under a grant of power to Congress to police state regulatory and taxing decisions. For example, in *Welton v. Missouri*, [927] the statute under review, as observed several times by the Court, was clearly discriminatory as between instate and interstate commerce, but that point was not sharply drawn as the constitutional fault of the law. That the commerce clause had been motivated by the Framers' apprehensions about state protectionism has been frequently noted. [928] A relatively recent theme is that the Framers desired to create a national area of free trade, so that unreasonable burdens on interstate commerce violate the clause in and of themselves. [929]

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[924] 91 U.S. at 282. In Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31, 33 (1867), the Court stated that congressional silence with regard to matters of "local" concern may signify willingness that the States regulate. *Cf.* Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 479 n.1 (1939). The fullest development of the "silence" rationale was not by the Court but by a renowned academic, Professor Dowling. *Interstate Commerce and State Power*, 29 VA. L. REV. 1 (1940); *Interstate Commerce and State Power—Revisited Version*, 47 COLUM. L. REV. 546 (1947).

[925] Southern Pacific Co. v. Arizona, 325 U.S. 761, 768 (1945).

[926] 325 U.S. at 769. *See also* California v. Zook, 336 U.S. 725, 728 (1949).

[927] 91 U.S. 275, 277, 278, 279, 280, 281, 282 (1876).

[928] 91 U.S. at 280–81; Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 446 (1827) (Chief Justice Marshall); Guy v. City of Baltimore, 100 U.S. 434, 440 (1879); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 550, 552 (1935); Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

[929] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 440 (1939); McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330–331 (1944); Freeman v. Hewit, 329 U.S. 249, 252, 256 (1946); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538, 539 (1949); Dennis v. Higgins, 498 U.S. 439, 447–450 (1991). "[W]e have steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 280 (1987) (quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328 (1977)).

Nonetheless, the power of the Court is established and is freely exercised. No reservations can be discerned in the opinions for the Court.[930] Individual Justices, to be sure, have urged renunciation of the power and remission to Congress for relief sought by litigants.[931] That has not been the course followed.

The State Proprietary Activity Exception.—In a case of first impression, the Court held unaffected by the commerce clause— "the kind of action with which the Commerce Clause is not concerned"—a Maryland bounty scheme by which the State paid scrap processors for each "hulk" automobile destroyed. As first enacted, the bounty plan did not distinguish between in-state and out-of-state processors, but it was subsequently amended to operate in such a manner that out-of-state processors were substantially disadvantaged. The Court held that where a State enters into the market itself as a purchaser, in effect, of a potential article of interstate commerce, it does not, in creating a burden upon that com-

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[930] *E.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Natural Resources Dep't, 504 U.S. 353, 359 (1992); Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 309 (1992); Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992). Indeed, the Court, in Dennis v. Higgins, 498 U.S. 439, 447–450 (1991), broadened its construction of the clause, holding that it confers a "right" upon individuals and companies to engage in interstate trade. With respect to the *exercise* of the power, the Court has recognized Congress' greater expertise to act and noted its hesitancy to impose uniformity on state taxation. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978). *Cf.* Quill Corp., 504 U.S. at 318.

[931] In McCarroll v. Dixie Lines, 309 U.S. 176, 183 (1940), Justice Black, for himself and Justices Frankfurter and Douglas, dissented, taking precisely this view. *See also* Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) (Justice Black dissenting in part); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939) (Justice Black dissenting); Southern Pacific Co. v. Arizona, 325 U.S. 761, 784 (1945) (Justice Black dissenting); id. at 795 (Justice Douglas dissenting). Justices Douglas and Frankfurter subsequently wrote and joined opinions applying the dormant commerce clause. In Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954), the Court rejected the urging that it uphold all not-patently discriminatory taxes and let Congress deal with conflicts. More recently, Justice Scalia has taken the view that, as a matter of original intent, a "dormant" or "negative" commerce power cannot be justified in either taxation or regulation cases, but, yielding to the force of precedent, he will vote to strike down state actions that discriminate against interstate commerce or that are governed by the Court's precedents, without extending any of those precedents. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 94 (1987) (concurring); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259 (1987) (concurring in part and dissenting in part); Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 895 (1988) (concurring in judgment); American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 200 (1990) (concurring); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Justice Scalia concurring) (reiterating view); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Justice Scalia, with Justice Thomas joining) (same). Justice Thomas has written an extensive opinion rejecting both the historical and jurisprudential basis of the dormant commerce clause and expressing a preference for reliance on the imports-exports clause. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (dissenting; joined by Justice Scalia entirely and by Chief Justice Rehnquist as to the commerce clause but not the imports-exports clause).

merce by restricting its trade to its own citizens or businesses within the State, violate the commerce clause.[932]

Affirming and extending somewhat this precedent, the Court held that a State operating a cement plant could in times of shortage (and presumably at any time) confine the sale of cement by the plant to residents of the State.[933] "The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. ... There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[934] It is yet unclear how far this concept of the State as market participant rather than market regulator will be extended.[935]

Congressional Authorization of Impermissible State Action.—The Supreme Court has heeded the lesson that was administered to it by the Act of Congress of August 31, 1852,[936] which pronounced the Wheeling Bridge "a lawful structure," thereby setting aside the Court's determination to the contrary earlier the same year.[937] The lesson, subsequently observed the Court, is that "[i]t is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce."[938] Similarly, when in the late eighties and the early nineties statewide prohibition laws began making their appearance, Congress again approved state laws the Court had found to violate the dormant commerce clause.

The Court seized upon a previously rejected dictum of Chief Justice Marshall[939] and began applying it as a brake on the oper-

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[932] Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

[933] Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

[934] 447 U.S. at 436–37.

[935] *See also* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (city may favor its own residents in construction projects paid for with city funds); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (illustrating the deep divisions in the Court respecting the scope of the exception).

[936] 10 Stat. 112, § 6.

[937] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852), statute sustained in Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). The latter decision seemed facially contrary to a dictum of Justice Curtis in Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299, 318 (1851), *and cf.* Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 263 n. 4 (1987) (Justice Scalia concurring in part and dissenting in part), but if indeed the Court is interpreting the silence of Congress as a bar to action under the dormant commerce clause, then when Congress speaks it is enacting a regulatory authorization for the States to act.

[938] Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883).

[939] In Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827), in which the "original package" doctrine originated in the context of state taxing powers exercised on imports from a foreign country, Marshall in dictum indicated the same rule would apply to imports from sister States. The Court refused to follow the dictum in Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

ation of such laws with respect to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce." While holding that a State was entitled to prohibit the manufacture and sale within its limits of intoxicants,[940] even for an outside market, manufacture being no part of commerce,[941] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Ry. Co.*,[942] that, so long as Congress remained silent in the matter, a State lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the shipment into it of intoxicants from a sister State. This holding was soon followed by another to the effect that, so long as Congress remained silent, a State had no power to prevent the sale in the original package of liquors introduced from another State.[943] The effect of the latter decision was soon overcome by an act of Congress, the so-called Wilson Act, repealing its alleged silence,[944] but the *Bowman* decision still stood, the act in question being interpreted by the Court not to subject liquors from sister States to local authority until their arrival in the hands of the person to whom consigned.[945] Not until 1913 was the effect of the decision in the *Bowman* case fully nullified by the Webb-Kenyon Act,[946] which placed intoxicants entering a State from another State under the control of the former for all purposes whatsoever.[947]

Less than a year after the ruling in *United States v. South-Eastern Underwriters Ass'n*,[948] that insurance transactions across state lines constituted interstate commerce, thereby logically establishing their immunity from discriminatory state taxation, Congress passed the McCarran Act[949] authorizing state regulation and taxation of the insurance business. In *Prudential Ins. Co. v. Ben-*

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[940] Mugler v. Kansas, 123 U.S. 623 (1887).

[941] Kidd v. Pearson, 128 U.S. 1 (1888).

[942] 125 U.S. 465 (1888).

[943] Leisy v. Hardin, 135 U.S. 100 (1890).

[944] 26 Stat. 313 (1890), sustained in, In re Rahrer, 140 U.S. 545 (1891).

[945] Rhodes v. Iowa, 170 U.S. 412 (1898).

[946] 37 Stat. 699 (1913), sustained in James Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). *See also* Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

[947] National Prohibition, under the Eighteenth Amendment, first cast these conflicts into the shadows, and § 2 of the Twenty-first Amendment significantly altered the terms of the dispute. But that section is no authorization for the States to engage in mere economic protectionism separate from concerns about the effect of the traffic in liquor. Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. The Beer Institute, 491 U.S. 324 (1989).

[948] 322 U.S. 533 (1944).

[949] 59 Stat. 33, 15 U.S.C. § 1011–15.

jamin,[950] a statute of South Carolina that imposed on foreign insurance companies, as a condition of their doing business in the State, an annual tax of three percent of premiums from business done in South Carolina, while imposing no similar tax on local corporations, was sustained. "Obviously," said Justice Rutledge for the Court, "Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways:"

"One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several States in these respects.... The power of Congress over commerce exercised entirely without reference to coordinated action of the States is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons.... This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the States, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective."[951]

Thus, it is now well established that "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."[952] But the

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[950] 328 U.S. 408 (1946).

[951] 328 U.S. at 429–30, 434–35. The Act restored state taxing and regulatory powers over the insurance business to their scope prior to South-Eastern Underwriters. Discriminatory state taxation otherwise cognizable under the commerce clause must, therefore, be challenged under other provisions of the Constitution. *See* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981). An equal protection challenge was successful in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), invalidating a discriminatory tax and stating that a favoring of local industries "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Id. at 878. Controversial when rendered, *Ward* may be a sport in the law. *See* Northeast Bancorp v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 176–178 (1985).

[952] Northeast Bancorp v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985) (interpreting a provision of the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the State in which the acquired bank is located, as authorizing state laws

Court requires congressional intent to permit otherwise impermissible state actions to "be unmistakably clear."[953] The fact that federal statutes and regulations had restricted commerce in timber harvested from national forest lands in Alaska was, therefore, "insufficient indicium" that Congress intended to authorize the State to apply a similar policy for timber harvested from state lands. The rule requiring clear congressional approval for state burdens on commerce was said to be necessary in order to strengthen the likelihood that decisions favoring one section of the country over another are in fact "collective decisions" made by Congress rather than unilateral choices imposed on unrepresented out-of-state interests by individual States.[954] And Congress must be plain as well when the issue is not whether it has exempted a state action from the commerce clause but whether it has taken the less direct form of reduction in the level of scrutiny.[955]

State Taxation and Regulation: The Old Law

Although in previous editions of this volume considerable attention was paid to the development and circuitous paths of the law of the negative commerce clause, the value of this exegesis was doubtlessly quite limited. The Court itself has admitted that its "some three hundred full-dress opinions" as of 1959 have not resulted in "consistent or reconcilable" doctrine but rather in something more resembling a "quagmire."[956] Although many of the prin-

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that allow only banks within the particular region to acquire an in-state bank, on a reciprocal basis, since what the States could do entirely they can do in part).

[953] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90 (1984).

[954] 467 U.S. at 92. Earlier cases had required express statutory sanction of state burdens on commerce but under circumstances arguably less suggestive of congressional approval. *E.g.*, Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958–960 (1982) (congressional deference to state water law in 37 statutes and numerous interstate compacts did not indicate congressional sanction for *invalid* state laws imposing a burden on commerce); New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (disclaimer in Federal Power Act of intent to deprive a State of "lawful authority" over interstate transmissions held not to evince a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause"). *But see* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (Congress held to have sanctioned municipality's favoritism of city residents through funding statute under which construction funds were received).

[955] Maine v. Taylor, 477 U.S. 131 (1986) (holding that Lacey Act's reinforcement of state bans on importation of fish and wildlife neither authorizes state law otherwise invalid under the Clause nor shifts analysis from the presumption of invalidity for discriminatory laws to the balancing test for state laws that burden commerce only incidentally).

[956] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–458 (1959) (in part quoting Miller Bros. v. Maryland, 347 U.S. 340, 344 (1954)). Justice 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 pf preoccupation with

ciples still applicable in constitutional law may be found in the older cases, in fact the Court has worked a revolution in this area, though at different times for taxation and for regulation. Thus, in this section we summarize the "old" law and then deal more fully with the "modern" law of the negative commerce clause.

General Considerations.—The task of drawing the line 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.[957] With "commerce among the States" affairs are very different. Interstate commerce is conducted in the interior of the country, by persons and corporations that are ordinarily engaged also in local business; its usual incidents are acts that, if unconnected with commerce among the States, would fall within the State's powers of police and taxation, while the things it deals in and the instruments by which it is carried on 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 fluctuating and tentative, even contradictory, and this is particularly the case with respect to the infringement of interstate commerce by the state taxing power.[958]

Taxation.—The leading case dealing with the relation of the States' taxing power to interstate commerce, the case in which the Court first struck down a state tax as violative of the commerce clause, was the *State Freight Tax Case*.[959] Before the Court was the validity of a Pennsylvania statute that required every company transporting freight within the State, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. The Court's reasoning was forthright. Transportation of freight constitutes commerce.[960] A tax upon freight transported from one State to another effects a regulation of interstate commerce.[961] Under the *Cooley* doctrine, whenever the subject of a regulation of commerce is in its nature of national interest or admits of one uniform system or plan of regulation, that subject is within the exclu-

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their special facts." Freeman v. Hewit, 329 U.S. 249, 251–252 (1946). The comments in all three cases dealt with taxation, but they could just as well have included regulation.

[957] Infra pp. 240–42.

[958] In addition to the sources previously cited, *see* J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION—CASES AND MATERIALS ch. 6, 241 (5th ed. 1988) *passim*. For a succinct description of the history, *see* Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987).

[959] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 (1873).

[960] 82 U.S. at 275.

[961] 82 U.S. at 275–76, 279.

sive regulating control of Congress.[962] Transportation of passengers or merchandise through a State, or from one State to another, is of this nature.[963] Hence, a state law imposing a tax upon freight, taken up within the State and transported out of it or taken up outside the State and transported into it, violates the commerce clause.[964]

The principle thus asserted, that a State may not tax interstate commerce, confronted the principle that a State may tax all purely domestic business within its borders and all property "within its jurisdiction." Inasmuch as most large concerns prosecute both an interstate and a domestic business, while the instrumentalities of interstate commerce and the pecuniary returns from such commerce are ordinarily property within the jurisdiction of some State or other, the task before the Court was to determine where to draw the line between the immunity claimed by interstate business, on the one hand, and the prerogatives claimed by local power on the other. In the *State Tax on Railway Gross Receipts Case*,[965] decided the same day as the *State Freight Tax Case*, the issue was a tax upon gross receipts of all railroads chartered by the State, part of the receipts having been derived from interstate transportation of the same freight that had been held immune from tax in the first case. If the latter tax were regarded as a tax on interstate commerce, it too would fall. But to the Court, the tax on gross receipts of an interstate transportation company was not a tax on commerce. "[I]t is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."[966] A gross receipts tax upon a railroad company, which concededly affected commerce, was not a regulation "directly. Very manifestly it is a tax upon the railroad company.... That its ultimate effect may be to increase the cost of transportation must be admitted.... Still it is not a tax upon transportation, or upon commerce...."[967]

Insofar as there is a distinction between these two cases, the Court drew it in part on the basis of *Cooley*, that some subjects embraced within the meaning of commerce demand uniform, national regulation, while other similar subjects permit of diversity of treatment, until Congress acts, and in part on the basis of a concept of a "direct" tax on interstate commerce, which was impermissible,

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[962] 82 U.S. at 279–80.

[963] 82 U.S. at 280.

[964] 82 U.S. at 281–82.

[965] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 284 (1872).

[966] 82 U.S. at 293.

[967] 82 U.S. 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).

and an "indirect" tax, which was permissible until Congress acted.[968] Confusingly, the two concepts were sometimes conflated, sometimes treated separately. In any event, the Court itself was clear that interstate commerce could not be taxed at all, even if the tax was a nondiscriminatory levy applied alike to local commerce.[969] "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."[970] However, some taxes imposed only an "indirect" burden and were sustained; property taxes and taxes in lieu of property taxes applied to all businesses, including instrumentalities of interstate commerce, were sustained.[971] A good rule of thumb in these cases is that taxation was sustained if the tax was imposed on some local, rather than an interstate, activity or if the tax was exacted before interstate movement had begun or after it had ended.

An independent basis for invalidation was that the tax was discriminatory, that its impact was intentionally or unintentionally felt by interstate commerce and not by local, perhaps in pursuit of parochial interests. Many of the early cases actually involving discriminatory taxation were decided on the basis of the impermissibility of taxing interstate commerce at all, but the category was soon clearly delineated as a separate ground (and one of the most important today).[972]

Following the Great Depression and under the leadership of Justice, and later Chief Justice, Stone, the Court attempted to move away from the principle that interstate commerce may not be taxed and reliance on the direct-indirect distinction. Instead, a state or local levy would be voided only if in the opinion of the Court it created a risk of multiple taxation for interstate commerce

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[968] *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. Kansas Natural Gas Co., 265 U.S. 298, 307 (1924).

[969] Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

[970] The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 400–401 (1913).

[971] The Delaware R.R. Tax, 85 U.S. (18 Wall.) 206, 232 (1873). *See* Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U.S. 439 (1894); Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895). *See* cases cited in J. HELLERSTEIN & W. HELLERSTEIN, supra n. 891, at 215–219.

[972] *E.g.*, Welton v. Missouri, 91 U.S. 275 (1875); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908); Bethlehem Motors Corp. v. Flynt, 256 U.S. 421 (1921).

not felt by local commerce.[973] It became much more important to the validity of a tax that it be apportioned to an interstate company's activities within the taxing State, so as to reduce the risk of multiple taxation.[974] But, just as the Court had achieved constancy in the area of regulation, it reverted to the older doctrines in the taxation area and reiterated that interstate commerce may not be taxed at all, even by a properly apportioned levy, and reasserted the direct-indirect distinction.[975] The stage was set, following a series of cases in which through formalistic reasoning the States were permitted to evade the Court's precedents,[976] for the formulation of a more realistic doctrine.

Regulation.—Much more diverse were the cases dealing with regulation by the state and local governments. Taxation was one thing, the myriad approaches and purposes of regulations another. Generally speaking, if the state action was perceived by the Court to be a regulation of interstate commerce itself, it was deemed to impose a "direct" burden on interstate commerce and impermissible. If the Court saw it as something other than a regulation of interstate commerce, it was considered only to "affect" interstate commerce or to impose only an "indirect" burden on it in the proper exercise of the police powers of the States.[977] But the distinction

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[973] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

[974] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948). Notice the Court's distinguishing of *Central Greyhound* in Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 188–91 (1995).

[975] Freeman v. Hewit, 329 U.S. 249 (1946); Spector Motor Service v. O'Connor, 340 U.S. 602 (1951).

[976] Thus, the States carefully phrased tax laws so as to impose on interstate companies not a license tax for doing business in the State, which was not permitted, Railway Express Agency v. Virginia, 347 U.S. 359 (1954), but as a franchise tax on intangible property or the privilege of doing business in a corporate form, which was permissible. Railway Express Agency v. Virginia, 358 U.S. 434 (1959); Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). Also, the Court increasingly found the tax to be imposed on a local activity in instances it would previously have seen to be an interstate activity. *E.g.*, Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975).

[977] Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 924–925 (1985). In addition to the sources already cited, *see* the Court's summaries in The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913), and Southern Pacific Co. v. Arizona, 325 U.S. 761, 766–770 (1945). In the latter case, Chief Justice Stone was reconceptualizing the standards under the clause, but the summary represents a faithful recitation of the law.

between "direct" and "indirect" burdens was often perceptible only to the Court.[978]

A corporation's status as a foreign entity did not immunize it from state requirements, conditioning its admission to do a local business, to obtain a local license, and to furnish relevant information as well as to pay a reasonable fee.[979] But no registration was permitted of an out-of-state corporation, the business of which in the host State was purely interstate in character.[980] Neither did the Court permit a State to exclude from the its courts a corporation engaging solely in interstate commerce because of a failure to register and to qualify to do business in that State.[981]

Interstate transportation brought forth hundreds of cases. State regulation of trains operating across state lines resulted in divergent rulings. It was early held improper for States to prescribe charges for transportation of persons and freight on the basis that the regulation must be uniform and thus could not be left to the States.[982] The Court deemed "reasonable" and therefore constitutional many state regulations requiring a fair and adequate service for its inhabitants by railway companies conducting interstate service within its borders, as long as there was no unnecessary burden on commerce.[983] A marked tolerance for a class of regulations that arguably furthered public safety was long exhibited by the

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[978] *See* DiSanto v. Pennsylvania, 273 U.S. 34, 44 (1927) (Justice Stone dissenting). The dissent was the precurser to Chief Jusdtice Stone's reformulation of the standard in 1945. *DiSanto* was overruled in California v. Thompson, 313 U.S. 109 (1941).

[979] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926); Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944).

[980] Crutcher v. Kentucky, 141 U.S. 47 (1891); International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

[981] Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921); Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974). *But see* Eli Lilly & Co. v. Sav-on Drugs, 366 U.S. 276 (1961).

[982] Wabash, S. L. & P. Ry. v. Illinois, 118 U.S. 557 (1886). The power of the States generally to set rates had been approved in Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877), and Peik v. Chicago & N. W. Ry., 94 U.S. 164 (1877). After the *Wabash* decision, States retained power to set rates for passengers and freight taken up and put down within their borders. Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922).

[983] Generally, the Court drew the line at regulations that provided for adequate service, not any and all service. Thus, one class of cases dealt with requirements that trains stop at designated cities and towns. The regulations were upheld in such cases as Gladson v. Minnesota, 166 U.S. 142 (1897), and Lake Shore & Mich. South. Ry. v. Ohio, 173 U.S. 285 (1899), and invalidated in Illinois Central R. R. v. Illinois, 142 (1896). *See* Chicago, B. & Q. R.R. v. Wisconsin R.R. Comm'n, 237 U.S. 220, 226 (1915); St. Louis & S. F. Ry. v. Public Service Comm'n, 254 U.S. 535, 536–537 (1921). The cases were extremely fact particularistic.

Court,[984] even in instances in which the safety connection was tenuous.[985] Of particular controversy were "full-crew" laws, represented as safety measures, that were attacked by the companies as "feather-bedding" rules.[986]

Similarly, motor vehicle regulations have met mixed fates. Basically, it has always been recognized that States, in the interest of public safety and conservation of public highways, may enact and enforce comprehensive licensing and regulation of motor vehicles using its facilities.[987] Indeed, States were permitted to regulate many of the local activities of interstate firms and thus the interstate operations, in pursuit of these interests.[988] Here, too, safety concerns became overriding objects of deference, even in doubtful cases.[989] In regard to navigation, which had given rise to *Gibbons v. Ogden* and *Cooley*, the Court generally upheld much state regulation on the basis that the activities were local and did not demand uniform rules.[990]

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[984] *E.g.*, Smith v. Alabama, 124 U.S. 465 (1888) (required locomotive engineers to be examined and licensed by the State, until Congress should deem otherwise); New York, N. H. & H. R.R. v. New York, 165 U.S. 628 (1897) (fobidding heating of passenger cars by stoves); Chicago, R. I. & Pac. Ry. v. Arkansas, 219 U.S. 453 (1911) (requiring three brakemen on freight trains of more than 25 cars).

[985] *E.g.*, Terminal Ass'n v. Trainmen, 318 U.S. 1 (1943) (requiring railroad to provide caboose cars for its employees); Hennington v. Georgia, 163 U.S. 299 (1896) (forbidding freight trains to run on Sundays). *But see* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (voiding as too onerous on interstate transportation law requiring trains to come to almost a complete stop at all grade crossings, when there were 124 highway crossings at grade in 123 miles, doubling the running time).

[986] Four cases over a lengthy period sustained the laws. Chicago, R. I. & Pac. Ry. Co. v. Arkansas, 219 U.S. 453 (1911); St. Louis, Iron Mt. & S. Ry. v. Arkansas, 240 U.S. 518 (1916); Missouri Pacific Co. v. Norwood, 283 U.S. 249 (1931); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. I. & P. R.R., 382 U.S. 423 (1966). In the latter case, the Court noted the extensive and conflicting record with regard to safety, but it then ruled that with the issue in so much doubt it was peculiarly a legislative choice.

[987] Hendrick v. Maryland, 235 U.S. 610 (1915); Kane v. New Jersey, 242 U.S. 160 (1916).

[988] *E.g.*, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933) (State could deny an interstate firm a necessary certificate of convenience to operate as a common carrier on the basis that the route was overcrowded); Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (maximum hours for drivers of motor vehicles); Eichholz v. Public Service Comm'n, 306 U.S. 268 (1939) (reasonable regulations of traffic). *But compare* Michigan Comm'n v. Duke, 266 U.S. 570 (1925) (State may not impose common-carrier responsibilities on business operating between States that did not assume them); Buck v. Kuykendall, 267 U.S. 307 (1925) (denial of certificate of convenience under circumstances was a ban on competition).

[989] *E.g.*, Mauer v. Hamilton, 309 U.S. 598 (1940) (ban on oiperation of any motor vehicle carrying any other vehicle above the head of the operator). By far, the example of the greatest deference is South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938), in which the Court upheld, in a surprising Stone opinion, truck weight and width restrictions prescribed by practically no other State (in terms of the width, no other).

[990] *E.g.*, Transportation Co. v. City of Chicago, 99 U.S. 635 (1879); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888). *See* Kelly v. Washington, 302 U.S. 1

As a general rule, during this time, although the Court did not permit States to regulate a purely interstate activity or prescribe prices for purely interstate transactions,[991] it did sustain a great deal of price and other regulation imposed prior to or subsequent to the travel in interstate commerce of goods produced for such commerce or received from such commerce. For example, decisions late in the period upheld state price-fixing schemes applied to goods intended for interstate commerce.[992]

However, the States always had an obligation to act nondiscriminatorily. Just as in the taxing area, regulation that was parochially oriented, to protect local producers or industries, for instance, was not evaluated under ordinary standards but subjected to practically *per se* invalidation. The mirror image of *Welton v. Missouri*,[993] the tax case, was *Minnesota v. Barber*,[994] in which the Court invalidated a facially neutral law that in its practical effect discriminated against interstate commerce and in favor of local commerce. The law required fresh meat sold in the State to have been inspected by its own inspectors with 24 hours of slaughter. Thus, meat slaughtered in other States was excluded from the Minnesota market. The principle of the case has a long pedigree of application.[995] State protectionist regulation on behalf of local milk producers has occasioned judicial censure. Thus, in *Baldwin v. G.A.F. Seelig, Inc.*,[996] the Court had before it a complex state price-fixing scheme for milk, in which the State, in order to keep the price of milk artificially high within the State, required milk dealers buying out-of-state to pay producers, wherever they were, what

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(1937) (upholding state inspection and regulation of tugs operating in navigable waters, in absence of federal law).

[991] *E.g.*, Western Union Tel Co. v. Foster, 247 U.S. 105 (1918); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); State Corp. Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934).

[992] Milk Control Board v. Eisenberg Co., 306 U.S. 346 (1939) (milk); Parker v. Brown, 317 U.S. 341 (1943) (raisins).

[993] 91 U.S. 275 (1875).

[994] 136 U.S. 313 (1890).

[995] *E.g.*, Brimmer v. Rebman, 138 U.S. 78 (1891) (law requiring postslaughter inspection in each county of meat transported over 100 miles from the place of slaughter); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (city ordinance preventing selling of milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the central square of Madison). As the latter case demonstrates, it is constitutionally irrelevant that other Wisconsin producers were also disadvantaged by the law. For a modern application of the principle of these cases, *see* Fort Gratiot Sanitary Landfill v. Michigan Natural Resources Dept., 504 U.S. 353 (1992) (forbidding landfills from accepting out-of-county wastes). *And see* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) (discrimination against interstate commerce not preserved because local businesses also suffer).

[996] 294 U.S. 511 (1935). *See also* Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). With regard to products originating within the State, the Court had no difficulty with price fixing. Nebbia v. New York, 291 U.S. 502 (1934).

the dealers had to pay within the State, and, thus, in-state producers were protected. And in *H. P. Hood & Sons, Inc. v. Du Mond*,[997] the Court struck down a state refusal to grant an out-of-state milk distributor a license to operate a milk receiving station within the State on the basis that the additional diversion of local milk to the other State would impair the supply for the in-state market. A State may not bar an interstate market to protect local interests.[998]

State Taxation and Regulation: The Modern Law

General Considerations.—Transition from the old law to the modern standard occurred relatively smoothly in the field of regulation,[999] but in the area of taxation the passage was choppy and often witnessed retreats and advances.[1000] In any event, both taxation and regulation now are evaluated under a judicial balancing formula comparing the burden on interstate commerce with the importance of the state interest, save for discriminatory state action that cannot be justified at all.

Taxation.—During the 1940s and 1950s, there was engaged within the Court a contest between the view that interstate commerce could not be taxed at all, at least "directly," and the view that the negative commerce clause protected against the risk of double taxation.[1001] In *Northwestern States Portland Cement Co. v. Minnesota*,[1002] the Court reasserted the principle expressed earlier in *Western Live Stock*, that the Framers did not intend to immunize interstate commerce from its just share of the state tax burden even though it increased the cost of doing business.[1003] *Northwestern States* held that a State could constitutionally impose a

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[997] 336 U.S. 525 (1949). For the most recent case in this saga, *see* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

[998] And the Court does not permit a State to combat discrimination against its own products by admitting only products (here, again, milk) from States that have reciprocity agreements with it to protect its own dealers. Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).

[999] Formulation of a balancing test was achieved in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945),and was thereafter maintained more or less consistently. The Court's current phrasing of the test was in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[1000] Indeed, 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).

[1001] *Compare* Freeman v. Hewit, 329 U.S. 249, 252–256 (1946), *with* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258, 260 (1938).

[1002] 358 U.S. 450 (1959).

[1003] 358 U.S. at 461–62. *See* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). For recent reiterations of the principle, *see* Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 310 n.5 (1992) (citing cases).

nondiscriminatory, fairly apportioned net income tax on an out-of-state corporation engaged exclusively in interstate commerce in the taxing State. "For the first time outside the context of property taxation, the Court explicitly recognized that an exclusively interstate business could be subjected to the states' taxing powers."[1004] Thus, in *Northwestern States*, foreign corporations, which maintained a sales office and employed sales staff in the taxing State for solicitation of orders for their merchandise that, upon acceptance of the orders at their home office in another jurisdiction, were shipped to customers in the taxing State, were held liable to pay the latter's income tax on that portion of the net income of their interstate business as was attributable to such solicitation.

Yet, the following years saw inconsistent rulings that turned almost completely upon the use of or failure to use "magic words" by legislative drafters. That is, it was constitutional for the States to tax a corporation's net income, properly apportioned to the taxing State, as in *Northwestern States*, but no State could levy a tax on a foreign corporation for the privilege of doing business in the State, both taxes alike in all respects.[1005] In *Complete Auto Transit, Inc. v. Brady*,[1006] the Court overruled the cases embodying the distinction and articulated a standard that has governed the cases since. The tax in *Brady* was imposed on the privilege of doing business as applied to a corporation engaged in interstate transportation services in the taxing State; it was measured by the corporation's gross receipts from the service. The appropriate concern, the Court wrote, was to pay attention to "economic realities" and to "address the problems with which the commerce clause is concerned."[1007] The standard, a set of four factors that was distilled from precedent but newly applied, was firmly set out. A tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce,

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[1004] Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 54 (1987).

[1005] Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). The attenuated nature of the purported distinction was evidenced in Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975), in which the Court sustained a nondiscriminatory, fairly apportioned franchise tax that was measured by the taxpayer's capital stock, imposed on a pipeline company doing an exclusively interstate business in the taxing State, on the basis that it was a tax imposed on the privilege of conducting business in the corporate form.

[1006] 430 U.S. 274 (1977).

[1007] 430 U.S. at 279, 288. "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. Commissioner of Taxes, 445 U.S. 425, 443 (1980)).

and is fairly related to the services provided by the State." [1008] All subsequent cases have been decided in this framework.

Nexus.—Nexus is a requirement that flows from both the commerce clause and the due process clause of the Fourteenth Amendment. [1009] What is required is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." [1010] In its commerce-clause setting, the nexus requirement serves to effectuate the "structural concerns about the effects of state regulation on the national economy." [1011] That is, "the 'substantial-nexus' requirement . . . limit[s] the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce." [1012]

Often surfacing in cases having to do with the imposition of an obligation by a State on an out-of-state vendor to collect use taxes on goods sold to purchasers in the taxing State, the test is a "physical presence" standard. The Court has sustained the imposition on mail order sellers with retail outlets, solicitors, or property within the taxing State, [1013] but it has denied the power to a State when the only connection is that the company communicates with customers in the State by mail or common carrier as part of a general interstate business. [1014] The validity of general business taxes on interstate enterprises may also be determined by the nexus stand-

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[1008] 430 U.S. at 279. The rationale of these four parts of the test is set out in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 312-13 (1992). A recent application of the four-part Complete Auto Transit test is Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[1009] It had been thought that the tests of nexus under the commerce clause and the due process clause were identical, but, controversially, in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 306-08 (1992), *but compare* id. at 319 (Justice White concurring in part and dissenting in part), the Court, stating that the two "are closely related," (citing National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753, 756 (1967)), held that the two constitutional requirements "differ fundamentally" and it found a state tax met the due process test while violating the commerce clause.

[1010] National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753, 756 (1967). The phraseology is quoted from a due process case, Miller Bros. v. Maryland, 347 U.S. 340, 344–345 (1954), but as a statement it probably survives the bifurcation of the tests in Quill.

[1011] Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 312 (1992).

[1012] 504 U.S. at 313.

[1013] Scripto v. Carson, 362 U.S. 207 (1960); National Geographic Society v. California Bd. of Equalization,, 430 U.S. 551 (1977). The agents in the State in *Scripto* were independent contractors, rather than employees, but this distinction was irrelevant. *See also* Tyler Pipe Indus. v. Washington State Dept. of Revenue, 483 U.S. 232, 249–250 (1987) (reaffirming *Scripto* on this point). *See also* D. H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) (imposition of use tax on catalogs, printed outside State at direction of an in-state corporation and shipped to prospective customers within the State, upheld).

[1014] National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), reaffirmed with respect to the commerce clause in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298 (1992).

ard. However, again, only a minimal contact is necessary.[1015] 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.[1016] The application of a state business-and-occupation tax on the gross receipts from a large wholesale volume of pipe and drainage products in the State was sustained, even though the company maintained no office, owned no property, and had no employees in the State, its marketing activities being carried out by an in-state independent contractor.[1017] Also, the Court upheld a State's application of a use tax to aviation fuel stored temporarily in the State prior to loading on aircraft for consumption in interstate flights.[1018]

Given the complexity of modern corporations and their frequent diversification and control of subsidiaries, state treatment of businesses operating within and without their borders requires an appropriate definition of the scope of business operations. Thus, States may impose a tax in accordance with a "unitary business" apportionment formula on concerns carrying on part of their business within the taxing State based upon the company's entire proceeds. But there must be a nexus, or minimal connection, between the interstate activities and the taxing State and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.[1019]

Apportionment.—This requirement is of long standing,[1020] but its importance has broadened as the scope of the States' taxing powers has enlarged. It is concerned with what formulas the States must use to claim a share of a multistate business' tax base for the

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[1015] Some in-state contact is necessary in many instances by statutory compulson, Reacting to *Northwestern States*, Congress enacted P.L. 86–272, 15 U.S.C. § 381, providing that mere solicitation by a company acting outside the State did not support imposition of a state income tax on a company's proceeds. *See* Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972).

[1016] Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975). *See also* General Motors Corp. v. Washington, 377 U.S. 436 (1964).

[1017] Tyler Pipe Industries v. Dept. of Revenue, 483 U.S. 232, 249–251 (1987). The Court noted its agreement with the state court holding that "'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.'" Id. at 250.

[1018] United Air Lines v. Mahin, 410 U.S. 623 (1973).

[1019] Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 165–169 (1983); ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 316–17 (1982). Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 58 (2000) (interest deduction not properly apportioned between unitary and non-unitary business).

[1020] *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).

taxing State, when the business carries on a single integrated enterprise both within and without the State. A State may not exact from interstate commerce more than the State's fair share. Avoidance of multiple taxation, or the risk of multiple taxation, is the test of an apportionment formula. Generally speaking, this factor is both a commerce clause and a due process requisite, and it necessitates a rational relationship between the income attributed to the State and the intrastate values of the enterprise.[1021] 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.[1022]

Rather, "we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent."[1023] "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. . . ."

"The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity."[1024] In the latter case, the Court upheld as properly apportioned a state tax on the gross charge of any telephone call originated or terminated in the State and charged to an in-state service address, regardless of where the telephone call was billed or paid.[1025] A complex state tax imposed on trucks displays the operation of the test. Thus, a state registration tax met the internal consistency test because every State honored every other States', and a motor fuel tax similarly was sustained

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[1021] The recent cases are, Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207 (1980); ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); F. W. Woolworth Co. v. New Mexico Taxation & Revenue Dep't, 458 U.S. 354 (1982); Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983); Tyler Pipe Industries v. Dept. of Revenue, 483 U.S. 232, 251 (1987) Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992). *Cf.* American Trucking Ass'ns Inc. v. Scheiner, 483 U.S. 266 (1987).

[1022] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278–280 (1978).

[1023] Goldberg v. Sweet, 488 U.S. 252, 261 (1989).

[1024] 488 U.S. at 261, 262 (internal citations omitted).

[1025] Id. The tax law provided a credit for any taxpayer who was taxed by another State on the same call. Actual multiple taxation could thus be avoided, the risks of other multiple taxation was small, and it was impracticable to keep track of the taxable transactions.

because it was apportioned to mileage traveled in the State, whereas lump-sum annual taxes, an axle tax and an identification marker fee, being unapportioned flat taxes imposed for the use of the State's roads, were voided, under the internal consistency test, because if every State imposed them the burden on interstate commerce would be great. [1026]

A deference to state taxing authority was evident in a case in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the State but terminated in another State. The tax was unapportioned to reflect the intrastate travel and the interstate travel. [1027] The tax in this case was different from the tax upheld in *Central Greyhound*, the Court held. The previous tax constituted a levy on gross receipts, payable by the seller, whereas the present tax was a sales tax, also assessed on gross receipts, but payable by the buyer. The Oklahoma tax, the Court continued, was internally consistent, since if every State imposed a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one tax. The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the State, not a tax on the travel. [1028]

However, the Court found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the State's exposure to the state income tax. [1029]

Discrimination.—The "fundamental principle" governing this factor is simple. "'No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" [1030] That is, a tax which by its terms or operation imposes

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[1026] American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

[1027] Indeed, there seemed to be a precedent squarely on point, Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948). Struck down in that case was a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the State.

[1028] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995). Indeed, the Court analogized the tax to that in Goldberg v. Sweet, 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the State and that were bill to an in-state address.

[1029] Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The State had defended on the basis that the tax was a "compensatory" one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. Id. at 333–44. *See also* South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (tax not justified as compensatory).

[1030] Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457

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.[1031] In *Armco Inc. v. Hardesty*,[1032] the Court voided as discriminatory the imposition on an out-of-state wholesaler of a state tax that was levied on manufacturing and wholesaling but that relieved manufacturers subject to the manufacturing tax of liability for paying the wholesaling tax. Even though the former tax was higher than the latter, the Court found the imposition discriminated against the interstate wholesaler.[1033] A state excise tax on wholesale liquor sales, which exempted sales of specified local products, was held to violate the commerce clause.[1034] A state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the State, or if produced in another State that granted a similar credit to the State's ethanol fuel, was found discriminatory in violation of the clause.[1035] Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*[1036] applied its nondiscrimination element of the doctrine to invalidate the State's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily non-state residents. The

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(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).

[1031] Maryland v. Louisiana, 451 U.S. 725, 753–760 (1981). *But see* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617–619 (1981). *And see* Oregon Waste Systems, Inc. v. Department of Environmental 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).

[1032] 467 U.S. 638 (1984).

[1033] 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 Industries v. Dept. of Revenue, 483 U.S. 232 (1987); American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987); Amerada Hess Corp. v. Director, New Jersey Taxation Div., 490 U.S. 66 (1989); Kraft General Foods v. Iowa Dep't of Revenue, 505 U.S. 71 (1992)

[1034] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

[1035] 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* General 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).

[1036] 520 U.S. 564 (1997). The decision was a 5–to–4 one with a strong dissent by Justice Scalia, id. at 595, and a philosophical departure by Justice Thomas. Id. at 609.

claimant here operated a church camp for children, most of whom resided out-of-state. The discriminatory tax would easily have fallen had it been applied to profit-making firms, and the Court saw no reason to make an exception for nonprofits. The tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. "For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant." [1037]

Benefit Relationship.—Although, in all the modern cases, the Court has stated that a necessary factor to sustain state taxes having an interstate impact is that the levy be fairly related to benefits provided by the taxing State, it has declined to be drawn into any consideration of the amount of the tax or the value of the benefits bestowed. The test rather is whether, as a matter of the first factor, the business has the requisite nexus with the State; if it does, the tax meets the fourth factor simply because the business has enjoyed the opportunities and protections which the State has afforded it. [1038]

Regulation.—Adoption of the modern standard of commerce-clause review of state regulation of or having an impact on interstate commerce was achieved in *Southern Pacific Co. v. Arizona*, [1039] although it was presaged in a series of opinions, mostly dissents, by Chief Justice Stone. [1040] The *Southern Pacific* case tested the validity of a state train-length law, justified as a safety measure. Revising a hundred years of doctrine, the Chief Justice wrote that whether a state or local regulation was valid depended upon a "reconciliation of the conflicting claims of state and national power [that] is to be attained only by some appraisal and accommo-

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[1037] 520 U.S. at 586.

[1038] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–29 (1981). Two state taxes imposing flat rates on truckers, because they did not vary directly with miles traveled or with some other proxy for value obtained from the State, were found to violate this standard in American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 291 (1987), but this oblique holding was tagged onto an elaborate opinion holding the taxes invalid under two other *Brady* tests, and, thus, the precedential value is questionable.

[1039] 325 U.S. 761 (1945).

[1040] *E.g.*, DiSanto v. Pennsylvania, 273 U.S. 34, 43 (1927) (dissenting); California v. Thompson, 313 U.S. 109 (1941); Duckworth v. Arkansas, 314 U.S. 390 (1941); Parker v. Brown, 317 U.S. 341, 362–368 (1943) (alternative holding).

dation of the competing demands of the state and national interests involved." [1041] Save in those few cases in which Congress has acted, "this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [1042]

That the test to be applied was a balancing one, the Chief Justice made clear at length, stating that in order to determine whether the challenged regulation was permissible, "matters for ultimate determination are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference." [1043]

The test today continues to be the Stone articulation, although the more frequently quoted encapsulation of it is from *Pike v. Bruce Church, Inc.* [1044] "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Obviously, the test requires "even-handedness." *Discrimination* in regulation is another matter altogether. When on its face or in its effect a regulation betrays "economic protectionism," an intent to benefit in-state economic interests at the expense of out-of-state interests, no balancing is required. "When a state statute clearly discriminates against interstate commerce, it will be struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, ... Indeed, when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied." [1045] Thus, an Oklahoma

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[1041] Southern Pacific Co. v. Arizona, 325 U.S. 761, 768–769 (1941).

[1042] 325 U.S. at 769.

[1043] 325 U.S. at 770–71.

[1044] 397 U.S. 137, 142 (1970).

[1045] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). *See also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). In Maine v. Taylor, 477 U.S. 131 (1986), the Court did uphold a protectionist law, finding a valid jus-

law that required coal-fired electric utilities in the State, producing power for sale in the State, to burn a mixture of coal containing at least 10% Oklahoma-mined coal was invalidated at the behest of a State that had previously provided virtually 100% of the coal used by the Oklahoma utilities.[1046] Similarly, the Court invalidated a state law that permitted interdiction of export of hydroelectric power from the State to neighboring States, when in the opinion of regulatory authorities the energy was required for use in the State; a State may not prefer its own citizens over out-of-state residents in access to resources within the State.[1047]

States may certainly promote local economic interests and favor local consumers, but they may not do so by adversely regulating out-of-state producers or consumers. In *Hunt v. Washington State Apple Advertising Comm'n*,[1048] the Court confronted a state requirement that closed containers of apples offered for sale or shipped into North Carolina carry no grade other than the applicable U. S. grade. Washington State mandated that all apples produced in and shipped in interstate commerce pass a much more rigorous inspection than that mandated by the United States. The inability to display the recognized state grade in North Carolina impeded marketing of Washington apples. The Court obviously suspected the impact was intended, but, rather than strike the state requirement down as purposeful, it held that the regulation had the practical effect of discriminating, and, inasmuch as no defense based on possible consumer protection could be presented, the state

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tification aside from economic protectionism. The State barred the importation of out-of-state baitfish, and the Court credited lower-court findings that legitimate ecological concerns existed about the possible presence of parasites and nonnative species in baitfish shipments.

[1046] Wyoming v. Oklahoma, 502 U.S. 437 (1992). *See also* Maryland v. Louisiana, 451 U.S. 725 (1981) (a tax case, invalidating a state first-use tax, which, because of exceptions and credits, imposed a tax only on natural gas moving out-of-state, because of impermissible discrimination).

[1047] New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). *See also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (voiding 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 ground water from any well in the State intended for use in another State). These cases largely eviscerated a line of older cases recognizing a strong state interest in protection of animals and resources. *See* Geer v. Connecticut, 161 U.S. 519 (1896). New England Power had rather old antecedents. *E.g.*, West v. Kansas Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[1048] 432 U.S. 333 (1977). Other cases in which the State was attempting to promote and enhance local products and businesses include Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (State required producer of high-quality cantaloupes to pack them in the State, rather than in an adjacent State at considerably less expense, in order that the produce be identified with the producing State); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (State banned export of shrimp from State until hulls and heads were removed and processed, in order to favor canning and manufacture within the State).

law was invalidated.[1049] State actions to promote local products and producers, of everything from milk[1050] to alcohol,[1051] may not be achieved through protectionism.

Even garbage transportation and disposition is covered by the negative commerce clause. A state law that banned the importation of most solid or liquid wastes that originated outside the State was struck down, because the State could not justify it as a health or safety measure, in the form of a quarantine, inasmuch as it did not limit in-state disposal at its landfills; the State was simply attempting to conserve landfill space and lower costs to its residents by keeping out trash from other States.[1052] Further extending the limitation of the clause on waste disposal,[1053] the Court invalidated as a discrimination against interstate commerce a local "flow control" law, which required all solid waste within the town to be processed at a designated transfer station before leaving the municipality.[1054] The town's reason for the restriction was its decision to have built a solid waste transfer station by a private contractor, rather than with public funds by the town. To make the arrangement appetizing to the contractor, the town guaranteed it a minimum waste flow, for which it could charge a fee significantly higher than market rates. The guarantee was policed by the requirement that all solid waste generated within the town be processed at the contractor's station and that any person disposing of solid waste in any other location would be penalized.

The Court analogized the constraint as a form of economic protectionism, which bars out-of-state processors from the business of treating the localities solid waste, by hoarding a local resource for

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[1049] That discriminatory effects will result in invalidation, as well as purposeful discrimination, is also drawn from Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)

[1050] *E.g.*, H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). *See also* Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) (state effort to combat discrimination by other States against its milk through reciprocity provisions). In West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), the Court held invalidly discriminatory against interstate commerce a state milk pricing order, which imposed an assessment on all milk sold by dealers to in-state retailers, the entire assessment being distributed to in-state dairy farmers despite the fact that about two-thirds of the assessed milk was produced out of State. The avowed purpose and undisputed effect of the provision was to enable higher-cost in-state dairy farmers to compete with lower-cost dairy farmers in other States.

[1051] Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986). *And see* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (a tax case).

[1052] City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), reaffirmed and applied in Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), and Fort Gratiot Sanitary Landfill v. Michigan Natural Resources Dept., 504 U.S. 353 (1992).

[1053] *See also* Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) (discriminatory tax).

[1054] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

the benefit of local businesses that perform the service. The town's goal of revenue generation was not a local interest that could justify the discrimination. Moreover, the town had other means to accomplish this goal, such as subsidization of the local facility through general taxes or municipal bonds. The Court did not deal with, indeed, did not notice, the fact that the local law conferred a governmentally-granted monopoly, an exclusive franchise, indistinguishable from a host of local monopolies at the state and local level. [1055]

States may not interdict the movement of persons into the State, whatever the motive to protect themselves from economic or similar difficulties. [1056]

Drawing the line between discriminatory regulations that are almost *per se* invalid and regulations that necessitate balancing is not an easy task. Not every claim of protectionism is sustained. Thus, in *Minnesota v. Clover Leaf Creamery Co.*, [1057] there was attacked a state law banning the retail sale of milk products in plastic, nonreturnable containers but permitting sales in other nonreturnable, nonrefillable containers, such as paperboard cartons. The Court found no discrimination against interstate commerce, because both in-state and out-of-state interests could not use plastic containers, and it refused to credit a lower, state-court finding that the measure was intended to benefit the local pulpwood industry. In *Exxon Corp. v. Governor of Maryland*, [1058] the Court upheld a statute that prohibited producers or refiners of petroleum products from operating retail service stations in Maryland. No discrimination was found, first, because there were no local producers or refiners within Maryland and therefore since the State's entire gasoline supply flowed in interstate commerce there was no favoritism, and, second, although the bar on operating fell entirely on out-of-state concerns, there were out-of-state concerns that did not produce or refine gasoline and they were able to continue operating in the State, so that there was some distinction between all in-state

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[1055] *See The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 149–59 (1994). Weight was given to this consideration by Justice O'Connor, 511 U.S. at 401 (concurring) (local law an excessive burden on interstate commerce), and by Justice Souter, id. at 410 (dissenting).

[1056] Edwards v. California, 314 U.S. 160 (1941) (California effort to bar "Okies," persons fleeing the Great Plains dust bowl in the Depression). *Cf.* the notable case of Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (without tying it to any particular provision of Constitution, Court finds a protected right of interstate movement). The right of travel is now an aspect of equal protection jurisprudence.

[1057] 449 U.S. 456, 470–474 (1981).

[1058] 437 U.S. 117 (1978).

operators and some out-of-state operators as against some other out-of-state operators.

Still a model example of balancing is Chief Justice Stone's opinion in *Southern Pacific Co. v. Arizona*.[1059] At issue was the validity of Arizona's law barring the operation within the State of trains of more than 14 passenger cars, no other State had a figure this low, or 70 freight cars, only one other State had a cap this low. First, the Court observed that the law substantially burdened interstate commerce. Enforcement of the law in Arizona, while train lengths went unregulated or were regulated by varying standards in other States, meant that interstate trains of a length lawful in other States had to be broken up before entering the State; inasmuch as it was not practicable to break up trains at the border, that act had to be accomplished at yards quite removed, with the result that the Arizona limitation controlled train lengths as far east as El Paso, Texas, and as far west as Los Angeles. Nearly 95% of the rail traffic in Arizona was interstate. The other alternative was to operate in other States with the lowest cap, Arizona's, with the result that that State's law controlled the railroads' operations over a wide area.[1060] If other States began regulating at different lengths, as they would be permitted to do, the burden on the railroads would burgeon. Moreover, the additional number of trains needed to comply with the cap just within Arizona was costly, and delays were occasioned by the need to break up and remake lengthy trains.[1061]

Conversely, the Court found that as a safety measure the state cap had "at most slight and dubious advantage, if any, over unregulated train lengths." That is, while there were safety problems with longer trains, the shorter trains mandated by state law required increases in the numbers of trains and train operations and a consequent increase in accidents generally more severe than

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[1059] 325 U.S. 761 (1945). Interestingly, Justice Stone had written the opinion for the Court in South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938), in which, in a similar case involving regulation of interstate transportation and proffered safety reasons, he had eschewed balancing and deferred overwhelmingly to the state legislature. *Barnwell Bros*. involved a state law that prohibited use on state highways of trucks that were over 90 inches wide or that had a gross weight over 20,000 pounds, with from 85% to 90% of the Nation's trucks exceeding these limits. This deference and refusal to evaluate evidence resurfaced in a case involving an attack on railroad "full-crew" laws. Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. Railroad Co., 393 U.S. 129 (1968).

[1060] The concern about the impact of one State's regulation upon the laws of other States is in part a reflection of the *Cooley* national uniformity interest and partly a hesitation about the autonomy of other States, *E.g.*, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88–89 (1987); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 583–584 (1986).

[1061] Southern Pacific Co. v. Arizona, 325 U.S. 761, 771–75 (1945).

those attributable to longer trains. In short, the evidence did not show that the cap lessened rather than increased the danger of accidents. [1062]

Conflicting state regulations appeared in *Bibb v. Navajo Freight Lines.* [1063] There, Illinois required the use of contour mudguards on trucks and trailers operating on the State's highways, while adjacent Arkansas required the use of straight mudguards and banned contoured ones. At least 45 States authorized straight mudguards. The Court sifted the evidence and found it conflicting on the comparative safety advantages of contoured and straight mudguards. But, admitting that if that were all that was involved the Court would have to sustain the costs and burdens of outfitting with the required mudguards, the Court invalidated the Illinois law, because of the massive burden on interstate commerce occasioned by the necessity of truckers to shift cargoes to differently designed vehicles at the State's borders.

Arguably, the Court in more recent years has continued to stiffen the scrutiny with which it reviews state regulation of interstate carriers purportedly for safety reasons. [1064] Difficulty attends any evaluation of the possible developing approach, inasmuch as the Court has spoken with several voices. A close reading, however, indicates that while the Court is most reluctant to invalidate regulations that touch upon safety and that if safety justifications are not illusory it will not second-guess legislative judgment, nonetheless, the Court will not accept, without more, state assertions of safety motivations. "Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." Rather, the asserted safety purpose must be weighed against the degree of interference with interstate commerce. "This 'weighing' . . . requires . . . a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." [1065]

Balancing has been used in other than transportation-industry cases. Indeed, the modern restatement of the standard was in such

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[1062] 325 U.S. at 775–79, 781–84.

[1063] 359 U.S. 520 (1959).

[1064] Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

[1065] Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670–671 (1981), (quoting Raymond Motor Transp. v. Rice, 434 U.S. 429, 441, 443 (1978)). Both cases invalidated state prohibitions of the use of 65–foot single-trailer trucks on state highways.

a case.[1066] There, the State required cantaloupes grown in the State to be packed there, rather than in an adjacent State, so that in-state packers' names would be associated with a superior product. Promotion of a local industry was legitimate, the Court, said, but it did not justify the substantial expense the company would have to incur to comply. State efforts to protect local markets, concerns, or consumers against outside companies have largely been unsuccessful. Thus, a state law that prohibited ownership of local investment-advisory businesses by out-of-state banks, bank-holding companies, and trust companies was invalidated.[1067] The Court plainly thought the statute was protectionist, but instead of voiding it for that reason it held that the legitimate interests the State might have did not justify the burdens placed on out-of-state companies and that the State could pursue the accomplishment of legitimate ends through some intermediate form of regulation. In *Edgar v. Mite Corp.*,[1068] an Illinois regulation of take-over attempts of companies that had specified business contacts with the State, as applied to an attempted take-over of a Delware corporation with its principal place of business in Connecticut, was found to constitute an undue burden, with special emphasis upon the extraterritorial effect of the law and the dangers of disuniformity. These problems were found lacking in the next case, in which the state statute regulated the manner in which purchasers of corporations chartered within the State and with a specified percentage of in-state shareholders could proceed with their take-over efforts. The Court emphasized that the State was regulating only its own corporations, which it was empowered to do, and no matter how many other States adopted such laws there would be no conflict. The burdens on interstate commerce, and the Court was not that clear that the effects of the law were burdensome in the appropriate context, were justified by the State's interests in regulating its corporations and resident shareholders.[1069]

In other areas, while the Court repeats balancing language, it has not applied it with any appreciable bite,[1070] but in most respects the state regulations involved are at most problematic in the context of the concerns of the commerce clause.

[1066] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[1067] Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980).

[1068] 457 U.S. 624 (1982) (plurality opinion).

[1069] CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

[1070] *E.g.*, Northwest Central Pipeline Corp. v. Kansas Corp. Comm'n, 489 U.S. 493, 525–526 (1989); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472–474 (1981); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127–128 (1978). *But see* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988).

Foreign Commerce and State Powers

State taxation and regulation of commerce from abroad are also subject to negative commerce clause constraints. In the seminal case of *Brown v. Maryland*,[1071] in the course of striking down a state statute requiring "all importers of foreign articles or commodities," preparatory to selling the goods, to take out a license, Chief Justice Marshall developed a lengthy exegesis explaining why the law was void under both the import-export clause[1072] and the commerce clause. According to the Chief Justice, an inseparable part of the right to import was the right to sell, and a tax on the sale of an article is a tax on the article itself. Thus, the taxing power of the States did not extend in any form to imports from abroad so long as they remain "the property of the importer, in his warehouse, in the original form or package" in which they were imported, hence, the famous "original package" doctrine. Only when the importer parts with his importations, mixes them into his general property by breaking up the packages, may the State treat them as taxable property.

Obviously, to the extent that the import-export clause was construed to impose a complete ban on taxation of imports so long as they were in their original packages, there was little occasion to develop a commerce-clause analysis that would have reached only discriminatory taxes or taxes upon goods in transit.[1073] 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,*[1074] the Court held that, in addition to satisfying the four requirements that govern the permissibility of state taxation of interstate commerce,[1075] "When a State seeks to tax the instrumentalities of for-

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[1071] 25 U.S. (12 Wheat.) 419 (1827).

[1072] Article I, § 10, cl. 2. This aspect of the doctrine of the case was considerably expanded in Low v. Austin, 80 U.S. (13 Wall.) 29 (1872), and subsequent cases, to bar States from levying nondiscriminatory, *ad valorem* property taxes upon goods that are no longer in import transit. This line of cases was overruled in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

[1073] *See, e.g.*, Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963); Minnesota v. Blasius, 290 U.S. 1 (1933). After the holding in *Michelin Tire*, the two clauses are now congruent. The Court has observed that the two clauses are animated by the same policies. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449–50 n.14 (1979).

[1074] 441 U.S. 434 (1979).

[1075] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). A state tax failed to pass the nondiscrimination standard in Kraft General Foods, Inc. v. Iowa Dept. of Revenue & Finance, 505 U.S. 71 (1992). Iowa imposed an income tax on a unitary business operating throughout the United States and in several foreign countries. It included in the tax base of corporations the dividends the companies received from subsidiaries operating in foreign countries, but it allowed exclusions from the base of dividends received from domestic subsidiaries. A domestic sub-

eign commerce, two additional considerations . . . come into play. The first is the enhanced risk of multiple taxation. . . . Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." [1076] Multiple taxation is to be avoided with respect to interstate commerce by apportionment so that no jurisdiction may tax all the property of a multistate business, and the rule of apportionment is enforced by the Supreme Court with jurisdiction over all the States. However, the Court is unable to enforce such a rule against another country, and the country of the domicile of the business may impose a tax on full value. Uniformity could be frustrated by disputes over multiple taxation, and trade disputes could result.

Applying both these concerns, the Court invalidated a state tax, a nondiscriminatory, *ad valorem* property tax, on foreign-owned instrumentalities, i.e., cargo containers, of international commerce. The containers were used exclusively in international commerce and were based in Japan, which did in fact tax them on full value. Thus, there was the actuality, not only the risk, of multiple taxation. National uniformity was endangered, because, while California taxed the Japanese containers, Japan did not tax American containers, and disputes resulted. [1077]

On the other hand, the Court has upheld a state tax on all aviation fuel sold within the State as applied to a foreign airline operating charters to and from the United States. The Court found the *Complete Auto* standards met, and it similarly decided that the two standards specifically raised in foreign commerce cases were not violated. First, there was no danger of double taxation because the tax was imposed upon a discrete transaction, the sale of fuel, that occurred within one jurisdiction only. Second, the one-voice standard was satisfied, inasmuch as the United States had never entered into any compact with a foreign nation precluding such state taxation, having only signed agreements with others, having no force of law, aspiring to eliminate taxation that constituted impediments to air travel. [1078] Also, a state unitary-tax scheme that used a worldwide-combined reporting formula was upheld as ap-

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sidiary doing business in Iowa was taxed but not ones that did no business. Thus, there was a facial distinction between foreign and domestic commerce.

[1076] 441 U.S. at 446, 448. *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (sustaining state sales tax as applied to lease of containers delivered within the State and used in foreign commerce).

[1077] 441 U.S. at 451–57. For income taxes, the test is more lenient, accepting not only the risk but the actuality of some double taxation as something simply inherent in accounting devices. Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 187–192 (1983).

[1078] Wardair Canada v. Florida Dep't of Revenue, 477 U.S. 1 (1986).

plied to the taxing of the income of a domestic-based corporate group with extensive foreign operations.[1079]

Extending *Container Corp.*, the Court in *Barclays Bank v. Franchise Tax Bd. of California*,[1080] 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 nor prevent the Federal Government from speaking with one voice in international trade. The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[1081]

The power to regulate foreign commerce was always broader than the States' power to tax it, an exercise of the "police power" recognized by Chief Justice Marshall in *Brown v. Maryland*.[1082] 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.[1083] On the other hand, quarantine legislation to protect the States' residents from disease and other hazards was commonly upheld though it regulated international commerce.[1084] A state game-season law applied to criminalize the possession of a dead grouse imported from Russia was

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[1079] 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.

[1080] 512 U.S. 298 (1994).

[1081] *The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 139–49 (1993).

[1082] 25 U.S. (12 Wheat.) 419, 443–444 (1827).

[1083] New York City v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding reporting requirements imposed on ships' masters), *overruled* in Henderson v. New York, 92 U.S. 259 (1876); Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 282 (1849); Chy Lung v. Freeman, 92 U.S. 275 (1876).

[1084] 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).

upheld because of the practical necessities of enforcement of domestic law.[1085]

Nowadays, state regulation of foreign commerce is likely to be judged by the extra factors set out in *Japan Line*.[1086] Thus, the application of a state civil rights law to a corporation transporting passengers outside the State to an island in a foreign province was sustained in an opinion emphasizing that, because of the particularistic geographic situation the foreign commerce involved was more conceptual than actual, there was only a remote hazard of conflict between state law and the law of the other country and little if any prospect of burdening foreign commerce.

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

In *Gibbons v. Ogden*,[1087] the Court, speaking by Chief Justice Marshall, held that New York legislation that excluded from the navigable waters of that State steam vessels enrolled and licensed under an act of Congress to engage in the coasting trade was in conflict with the federal law and hence void.[1088] The result, said the Chief Justice, was required by the supremacy clause, which proclaimed not only that the Constitution itself but statutes enacted pursuant to it and treaties superseded state laws that "interfere with, or are contrary to the laws of Congress .... In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[1089]

[1085] New York ex rel. Silz v. Hesterberg, 211 U.S. 31 (1908).

[1086] 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).

[1087] 22 U.S. (9 Wheat.) 1 (1824).

[1088] A modern application of *Gibbons v. Ogden* is Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), in which the Court, in reliance on the present version of the licensing statute utilized by Chief Justice Marshall, struck down state laws curtailing the operations of federally licensed vessels. In the course of the Douglas opinion, the Court observed that "[a]lthough it is true that the Court's view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly reenacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as *Gibbons*. We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny." Id. at 278–79.

[1089] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). Although preemption is basically constitutional in nature, deriving its forcefulness from the supremacy clause, it is much more like statutory decisionmaking, inasmuch as it depends upon an interpretation of an act of Congress in determining whether a state law is ousted. *E.g.*, Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271–72 (1977). *See also* Swift & Co. v. Wickham, 382 U.S. 111 (1965). "Any such pre-emption or conflict claim is of course

Since the turn of the century, federal legislation, primarily but not exclusively under the commerce clause, has penetrated deeper and deeper into areas once occupied by the regulatory power of the States. One result is that state laws on subjects about which Congress has legislated have been more and more frequently attacked as being incompatible with the acts of Congress and hence invalid under the supremacy clause. [1090]

"The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." [1091] As Justice Black once explained in a much quoted exposition of the matter: "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [1092]

Before setting out in their various forms the standards and canons to which the Court formally adheres, one must still recognize the highly subjective nature of their application. As an astute observer long ago observed, "the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by metaphorical sign-language of 'occupation of the field.' And it

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grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. The basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." Id. at 120.

[1090] Cases considered under this heading are overwhelmingly about federal legislation based on the commerce clause, but the principles enunciated are identical whatever source of power Congress utilizes. Therefore, cases arising under legislation based on other powers are cited and treated interchangeably.

[1091] Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 285–286 (1971).

[1092] Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This case arose under the immigration power of cl. 4.

would seem that this is largely unavoidable. The Court, in order to determine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social values that Congress has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor." [1093]

Preemption Standards.—Until roughly the New Deal, as recited above, the Supreme Court applied a doctrine of "dual federalism," under which the Federal Government and the States were separate sovereigns, each preeminent in its own fields but lacking authority in the other's. This conception affected preemption cases, with the Court taking the view, largely, that any congressional regulation of a subject effectively preempted the field and ousted the States. [1094] Thus, when Congress entered the field of railroad regulation, the result was invalidation of many previously enacted state measures. Even here, however, safety measures tended to survive, and health and safety legislation in other areas was protected from the effects of federal regulatory actions.

In the 1940s, the Court began to develop modern standards for determining when preemption occurred, which are still recited and relied on. [1095] All modern cases recite some variation of the basic standards. "[T]he question whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." [1096] Congress' intent to supplant state au-

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[1093] Cramton, Pennsylvania v. Nelson: *A Case Study in Federal Preemption*, 26 U. CHI. L. REV. 85, 87–88 (1956). "The [Court] appears to use essentially the same reasoning process in a case nominally hinging on preemption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce. [The] Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the preemption argument and allowed state regulation to stand." Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 217 (1959) (quoted approvingly as a "thoughtful student comment" in G. GUNTHER, CONSTITUTIONAL LAW 297 (12th ed. 1991)).

[1094] *E.g.*, Charleston & W. Car. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915). *But see* Corn Products Refining Co. v. Eddy, 249 U.S. 427, 438 (1919).

[1095] *E.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); California v. Zook, 336 U.S. 725 (1949).

[1096] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (internal quotation marks and case citations omitted). Recourse to legislative history as one

thority in a particular field may be express in the terms of the statute.[1097] Since preemption cases, when the statute contains no express provision, theoretically turn on statutory construction, generalizations about them can carry one only so far. Each case must construe a different federal statute with a distinct legislative history. If the statute and the legislative history are silent or unclear, the Supreme Court has developed over time general criteria which it purports to utilize in determining the preemptive effect of federal legislation.

"Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, . . . and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[1098] "Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakably so ordained."[1099] However, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."[1100]

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means of ascertaining congressional intent, although contested, is permissible. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 606–612 & n.4 (1991).

[1097] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); FMC Corp. v. Holliday, 498 U.S. 52, 56–57 (1991); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604–605 (1991).

[1098] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and case citations omitted). The same or similar language is used throughout the preemption cases. *E.g.*, Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992); id. at 532-33 (Justice Blackmun concurring and dissenting); id. at 545 (Justice Scalia concurring and dissenting); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604–605 (1991); English v. General Electric Co., 496 U.S. 72, 78–80 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Comm'n, 461 U.S. 190, 203–204 (1983); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[1099] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963);, Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). Where Congress legislates in a field traditionally occupied by the States, courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190, 206 (1983) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[1100] Free v. Brand, 369 U.S. 633, 666 (1962).

In the final conclusion, "the generalities" that may be drawn from the cases do not decide them. Rather, "the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances." [1101]

The Standards Applied.—As might be expected from the *caveat* just quoted, any overview of the Court's preemption decisions can only make the field seem muddled, and to some extent it is. But some guidelines may be extracted.

Express Preemption. Of course, it is possible for Congress to write preemptive language that clearly and cleanly prescribes or does not prescribe displacement of state laws in an area. [1102] Provisions governing preemption can be relatively interpretation free. [1103] For example, a prohibition of state taxes on carriage of air passengers "or on the gross receipts derived therefrom" was held to preempt a state tax on airlines, described by the State as a personal property tax, but based on a percentage of the airline's gross income; "the manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose

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[1101] Union Brokerage Co. v. Jensen, 322 U.S. 202, 211 (1944) (per Justice Frankfurter).

[1102] Not only congressional enactments can preempt. Agency regulations, when Congress has expressly or implied empowered these bodies to preempt, are "the supreme law of the land" under the supremacy clause and can displace state law. *E.g.*, Smiley v. Citibank, 517 U.S. 735 (1996); City of New York v. FCC, 486 U.S. 57, 63–64 (1988); Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982). Federal common law, i.e., law promulgated by the courts respecting uniquely federal interests and absent explicit statutory directive by Congress, can also displace state law. *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (Supreme Court promulgated common-law rule creating government-contractor defense in tort liability suits, despite Congress having considered and failed to enact bills doing precisely this); Westfall v. Erwin, 484 U.S. 292 (1988) (civil liability of federal officials for actions taken in the course of their duty). Finally, ordinances of local governments are subject to preemption under the same standards as state law. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707 (1985).

[1103] Thus, § 408 of the Federal Meat Inspection Act, as amended by the Wholesome Meat Act, 21 U.S. C. § 678, provides that "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any state . . . ." *See* Jones v. Rath Packing Co., 430 U.S. 519, 528–532 (1977). Similarly, much state action is saved by the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which states that "[n]othing in this chapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." For examples of other express preemptive provisions, *see* Norfolk & Western Ry. v. American Train Dispatchers' Ass'n, 499 U.S. 117 (1991); Exxon Corp. v. Hunt, 475 U.S. 355 (1986). *And see* Department of Treasury v. Fabe, 508 U.S. 491 (1993).

and effect of the provision are to impose a levy upon the gross receipts of airlines." [1104] But, more often than not, express preemptive language may be ambiguous or at least not free from conflicting interpretation. Thus, the Court was divided with respect to whether a provision of the Airline Deregulation Act proscribing the States from having and enforcing laws "relating to rates, routes, or services of any air carrier" applied to displace state consumer-protection laws regulating airline fare advertising. [1105] A basic issue is whether preemption or saving language applicable to a "state" applies as well to local governments. In a case involving statutory language preserving "state" authority, the Court created a presumption favoring applicability to local governments: "[a]bsent a clear statement to the contrary, Congress' reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." [1106]

Perhaps the broadest preemption section ever enacted, § 514 of the Employment Retirement Income Security Act of 1974 (ERISA), is so constructed that the Court has been moved to comment that the provisions "are not a model of legislative drafting." [1107] The section declares that the statute shall "supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan," but saves to the States the power to enforce "law[s] . . . which regulates insurance, banking, or securities," except that an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts. [1108] Interpretation of the provisions has resulted in contentious and divided Court opinions. [1109]

[1104] Aloha Airlines v. Director of Taxation, 464 U.S. 7, 13–14 (1983).

[1105] Morales v. TWA, 504 U.S. 374 (1992). The section, 49 U.S.C. § 1305(a)(1), was held to preempt state rules on advertising. *See also* American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).

[1106] City of Columbus v. Ours Garage and Wrecker Serv., 122 S. Ct. 2226, 2230 (2002).

[1107] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985), repeated in FMC Corp. v. Holliday, 498 U.S. 52, 58 (1991).

[1108] 29 U.S.C. §§ 1144(a), 1144(b)(2)(A), 1144(b)(2)(B). The Court has described this section as a "virtually unique pre-emption provision." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983). *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138–139 (1990); *and see* id. at 142–45 (describing and applying another preemption provision of ERISA).

[1109] Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) (ERISA preempts state common-law claim of wrongful discharge to prevent employee attaining benefits under plan covered by ERISA); FMC Corp. v. Holliday, 498 U.S. 52 (1990) (provision of state motor-vehicle financial-responsibility law barring subrogation and reimbursement from claimant's tort recovery for benefits received from a self-insured

Illustrative of the judicial difficulty with ambiguous preemption language are the fractured opinions in the *Cipollone* case, in which the Court had to decide whether sections of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 and 1969, preempted state common-law actions against a cigarette company for the alleged harm visited on a smoker.[1110] The 1965 provision barred the requirement of any "statement" relating to smoking health, other than what the federal law imposed, and the 1969 provision barred the imposition of any "requirement or prohibition based on smoking and health" by any "State law." It was, thus, a fair question whether common-law claims, based on design defect, failure to warn, breach of express warranty, fraudulent misrepre-

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health-care plan preempted by ERISA); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing held not preempted by 5–4 vote); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state law mandating that certain minimum mental-health-care benefits be provided to those insured under general health-insurance policy or employee health-care plan is a law "which regulates insurance" and is not preempted); Shaw v. Delta Air Lines, 463 U.S. 85 (1983) (state law forbidding discrimination in employee benefit plans on the basis of pregnancy not preempted, because of another saving provision in ERISA, and provision requiring employers to pay sick-leave benefits to employees unable to work because of pregnancy not preempted under construction of coverage sections, but both laws "relate to" employee benefit plans); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (state law prohibiting plans from reducing benefits by amount of workers' compensation awards "relates to" employee benefit plan and is preempted); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992) (law requiring employers to provide health insurance coverage, equivalent to existing coverage, for workers receiving workers' compensation benefits); John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank, 510 U.S. 86 (1993) (ERISA's fiduciary standards, not conflicting state insurance laws, apply to insurance company's handling of general account assets derived from participating group annuity contract); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (no preemption of statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients covered by Blue Cross/Blue Shield plan); De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997); California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316 (1997); Boggs v. Boggs, 520 U.S. 833 (1997) (decided not on the basis of the express preemption language but instead by implied preemption analysis).

[1110] Cipollone v. Liggett Group, 505 U.S. 504 (1992). The decision as a canon of construction promulgated two controversial rules. First, the courts should interpret narrowly provisions that purport to preempt state police-power regulations, and, second, that when a law has express preemption language courts should look only to that language and presume that when the preemptive reach of a law is defined Congress did not intend to go beyond that reach, so that field and conflict preemption will not be found. Id. at 517; and id. at 532-33 (Justice Blackmun concurring and dissenting). Both parts of this canon are departures from established law. Narrow construction when state police powers are involved has hitherto related to *implied* preemption, not *express* preemption, and courts generally have applied ordinary-meaning construction to such statutory language; further, courts have not precluded the finding of conflict preemption, though perhaps field preemption, because of the existence of some express preemptive language. *See* id. at 546-48 (Justice Scalia concurring and dissenting).

sentation, and conspiracy to defraud, were preempted or whether only positive state enactments came within the scope of the clauses. Two groups of Justices concluded that the 1965 section reached only positive state law and did not preempt common-law actions;[1111] different alignments of Justices concluded that the 1969 provisions did reach common-law claims, as well as positive enactments, and did preempt some of the claims insofar as they in fact constituted a requirement or prohibition based on smoking health.[1112]

Little clarification of the confusing *Cipollone* decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in *Medtronic, Inc. v. Lohr*, was[1113] the Medical Device Amendments (MDA) of 1976, which prohibited States from adopting or continuing in effect "with respect to a [medical] device" any "requirement" that is "different from, or in addition to" the applicable federal requirement and that relates to the safety or effectiveness of the device.[1114] The issue, then, was whether a common-law tort obligation imposed a "requirement" that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as determined by the FDA to be "substantially equivalent" to a device previously on the market, a situation of some import to at least some of the Justices.

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent States from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4–1-4 with respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them

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[1111] 505 U.S. at 518-19 (opinion of the court), 533-34 (Justice Blackmun concurring).

[1112] 505 U.S. at 520-30 (plurality opinion), 535-43 (Justice Blackmun concurring and dissenting), 548-50 (Justice Scalia concurring and dissenting).

[1113] 518 U.S. 470 (1996). *See also* CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) (under Federal Railroad Safety Act, a state common-law claim alleging negligence for operating a train at excessive speed is preempted, but a second claim alleging negligence for failure to maintain adequate warning devices at a grade crossing is not preempted); Norfolk So. Ry. v. Shanklin, 529 U.S. 344 (2000) (applying Easterwood).

[1114] 21 U.S.C. § 350k(a).

from the category of requirements "with respect to" specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, "requirements" that were preempted, though they did not agree on the application of that view.[1115]

Following *Cipollone*, the Court observed that while it "need not go beyond" the statutory preemption language, it did need to "identify the domain expressly pre-empted" by the language, so that "our interpretation of that language does not occur in a contextual vacuum." That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not cavalierly preempt common-law causes of action and the principle that it is Congress' purpose that is the ultimate touchstone.[1116]

The Court continued to struggle with application of express preemption language to state common-law tort actions in *Geier v. American Honda Motor Co.*[1117] The National Traffic and Motor Vehicle Safety Act contained both a preemption clause, prohibiting states from applying "any safety standard" different from an applicable federal standard, and a "saving clause," providing that "compliance with" a federal safety standard "does not exempt any person from any liability under common law." The Court determined that the express preemption clause was inapplicable. However, despite the saving clause, the Court ruled that a common law tort action seeking damages for failure to equip a car with an airbag was preempted because its application would frustrate the purpose of a Federal Motor Vehicle Safety Standard that had allowed manufacturers to choose from among a variety of "passive restraint" systems for the applicable model year.[1118] The Court's holding makes clear, contrary to the suggestion in *Cipollone*, that existence of ex-

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[1115] The dissent, by Justice O'Connor and three others, would have held preempted the latter claims, 518 U.S. at 509, whereas Justice Breyer thought that common-law claims would sometimes be preempted, but not here. Id. at 503 (concurring).

[1116] 518 U.S. at 484–85. *See also* id. at 508 (Justice Breyer concurring); Freightliner Corp. v. Myrick, 514 U.S. 280, 288–89 (1995); Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316, 334 (1997) (Justice Scalia concurring); Boggs v. Boggs, 520 U.S. 833 (1997) (using "stands as an obstacle" preemption analysis in an ERISA case, having express preemptive language, but declining to decide when implied preemption may be used despite express language), and id. at 854 (Justice Breyer dissenting) (analyzing the preemption issue under both express and implied standards).

[1117] 529 U.S. 861 (2000).

[1118] The Court focused on the word "exempt" to give the saving clause a narrow application – as "simply bar[ring] a special kind of defense, . . . that compliance with a federal safety standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one." 529 U.S. at 869.

press preemption language does not foreclose operation of conflict (in this case "frustration of purpose") preemption.

Field Preemption. Where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"[1119] States are ousted from the field. Still a paradigmatic example of field preemption is *Hines v. Davidowitz*,[1120] in which the Court held that a new federal law requiring the registration of all aliens in the country precluded enforcement of a pre-existing state law mandating registration of aliens within the State. Adverting to the supremacy of national power in foreign relations and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs, the Court had little difficulty declaring the entire field to have been occupied by federal law.[1121] Similarly, in *Pennsylvania v. Nelson*,[1122] the Court invalidated as preempted a state law punishing sedition against the National Government. The Court enunciated a three-part test: 1) the pervasiveness of federal regulation; 2) federal occupation of the field as necessitated by the need for national uniformity; and 3) the danger of conflict between state and federal administration.[1123]

The *Rice* case itself held that a federal system of regulating the operations of warehouses and the rates they charged completely occupied the field and ousted state regulation.[1124] However, it is often a close decision whether a federal law has regulated part of a field, however defined, or the whole area, so that state law cannot even supplement the federal.[1125] Illustrative of this point is the

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[1119] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The case also is the source of the oft-quoted maxim that when Congress legislates in a field traditionally occupied by the States, courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id.

[1120] 312 U.S. 52 (1941).

[1121] The Court also said that courts must look to see whether under the circumstances of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. That standard is obviously drawn from conflict preemption, for the two standards are frequently intermixed. Nonetheless, not all state regulation is precluded. De Canas v. Bica, 424 U.S. 351 (1976) (upholding a state law penalizing the employment of an illegal alien, the case arising before enactment of the federal law doing the same thing).

[1122] 350 U.S. 497 (1956).

[1123] 350 U.S. at 502–05. Obviously, there is a noticeable blending into conflict preemption.

[1124] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[1125] *Compare* Campbell v. Hussey, 368 U.S. 297 (1961) (state law requiring tobacco of a certain type to be marked by white tags, ousted by federal regulation that occupied the field and left no room for supplementation), *with* Florida Lime & Avocado Growers, Inc., 373 U.S. 132 (1963) (state law setting minimum oil content for avocados certified as mature by federal regulation is complementary to federal law,

Court's holding that the Atomic Energy Act's preemption of the safety aspects of nuclear power did not invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities were available to treat nuclear wastes, since "economic" regulation of power generation has traditionally been left to the States - an arrangement maintained by the Act - and since the state law could be justified as an economic rather than a safety regulation.[1126]

A city's effort to enforce stiff penalties for ship pollution that resulted from boilers approved by the Federal Government was held not preempted, the field of boiler safety, but not boiler pollution, having been occupied by federal regulation.[1127] A state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which textually presupposed federal-state cooperation.[1128] On the other hand, a comprehensive regulation of the design, size, and movement of oil tankers in Puget Sound was found, save in one respect, to be either expressly or implicitly preempted by federal law and regulations. Critical to the determination was the Court's conclusion that Congress, without actually saying so, had intended to mandate exclusive standards and a single federal decisionmaker for safety purposes in vessel regulation.[1129] Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew

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since federal standard was a minimum one, the field having not been occupied). One should be wary of assuming that a state law that has dual purposes and impacts will not, just for the duality, be held to be preempted. *See* Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992); Perez v. Campbell, 402 U.S. 637 (1971) (under bankruptcy clause).

[1126] Pacific Gas & Elec. Co. v. Energy Resources Comm'n, 461 U.S. 190 (1983). Neither does the same reservation of exclusive authority to regulate nuclear safety preempt imposition of punitive damages under state tort law, even if based upon the jury's conclusion that a nuclear licensee failed to follow adequate safety precautions. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). *See also* English v. General Electric Co., 496 U.S. 72 (1990) (employee's state-law claim for intentional infliction of emotional distress for her nuclear-plant employer's actions retaliating for her whistleblowing is not preempted as relating to nuclear safety).

[1127] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[1128] Askew v. American Waterways Operators, 411 U.S. 325 (1973).

[1129] Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). United States v. Locke, 529 U.S. 89 (2000) (applying *Ray*). *See also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (preempting a state ban on pass-through of a severance tax on oil and gas, because Congress has occupied the field of wholesale sales of natural gas in interstate commerce); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) (Natural Gas Act preempts state regulation of securities issuance by covered gas companies); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (under patent clause, state law extending patent-like protection to unpatented designs invades an area of pervasive federal regulation).

on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.[1130]

Congress may preempt state regulation without itself prescribing a federal standard; it may deregulate a field and thus occupy it by opting for market regulation and precluding state or local regulation.[1131]

Conflict Preemption. Several possible situations will lead to a holding that a state law is preempted as in conflict with federal law. First, it may be that the two laws, federal and state, will actually conflict. Thus, in *Rose v. Arkansas State Police*,[1132] federal law provided for death benefits for state law enforcement officers "in addition to" any other compensation, while the state law required a reduction in state benefits by the amount received from other sources. The Court, in a brief, *per curiam* opinion, had no difficulty finding the state provision preempted.[1133]

Second, conflict preemption may occur when it is practically impossible to comply with the terms of both laws. Thus, where a federal agency had authorized federal savings and loan associations to include "due-on-sale" clauses in their loan instruments and where the State had largely prevented inclusion of such clauses, while it was literally possible for lenders to comply with both rules, the federal rule being permissive, the state regulation prevented the exercise of the flexibility the federal agency had conferred and was preempted.[1134] On the other hand, it was possible for an employer to comply both with a state law mandating leave and rein-

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[1130] City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[1131] Transcontinental Gas Pipe Line Corp. v. Mississippi Oil & Gas Board, 474 U.S. 409 (1986); Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988).

[1132] 479 U.S. 1 (1986).

[1133] *See also* Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256 (1985) (state law requiring local governments to distribute federal payments in lieu of taxes in same manner as general state-tax revenues conflicts with federal law authorizing local governments to use the payments for any governmental purpose); Southland Corp. v. Keating, 465 U.S. 1 (1984) (state franchise law requiring judicial resolution of claims preempted by federal arbitration law precluding adjudication in state or federal courts of claims parties had contracted to submit to arbitration); Perry v. Thomas, 482 U.S. 483 (1987) (federal arbitration law preempts state law providing that court actions for collection of wages may be maintained without regard to agreements to arbitrate); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (federal arbitration law preempts state law invalidating predispute arbitration agreements that were not entered into in contemplation of substantial interstate activity); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) (federal arbitration law preempts state statute that conditioned enforceability of arbitration clause on compliance with special notice requirement). *See also* Free v. Brand, 369 U.S. 663 (1962).

[1134] Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141 (1982).

statement to pregnant employees and with a federal law prohibiting employment discrimination on the basis of pregnancy.[1135] Similarly, when faced with both federal and state standards on the ripeness of avocados, the Court discerned that the federal standard was a "minimum" one rather than a "uniform" one and decided that growers could comply with both.[1136]

Third, a fruitful source of preemption is found when it is determined that the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[1137] Thus, the Court voided a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal law permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the State allowed no such deviation. Although it was possible for a producer to satisfy the federal standard while satisfying the tougher state standard, the Court discerned that to do so defeated one purpose of the federal requirement—the facilitating of value comparisons by shoppers. Because different producers in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers would not be comparing packages containing identical amounts of flour solids.[1138] In *Felder v. Casey*,[1139] a state notice-of-claim statute was found to frustrate the remedial objectives of civil rights laws as applied to actions brought in state court under 42 U. S. C. §1983. A state law recognizing the validity of an unrecorded oral sale of an aircraft was held preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft's title readily available by requiring that all transfers be documented and recorded.[1140]

In *Boggs v. Boggs*,[1141] the Court, 5–to–4, applied the "stands as an obstacle" test for conflict even though the statute (ERISA)

[1135] California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). *Compare* Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942) (federal law preempts more exacting state standards, even though both could be complied with and state standards were harmonious with purposes of federal law).

[1136] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).

[1137] The standard is, of course, drawn from Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See also* Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) (federal law empowering national banks in small towns to sell insurance preempts state law prohibiting banks from dealing in insurance; despite explicit preemption provision, state law stands as an obstacle to accomplishment of federal purpose).

[1138] Jones v. Rath Packing Co., 430 U.S. 519, 532–543 (1977).

[1139] 487 U.S. 131 (1988).

[1140] Philco Aviation v. Shacket, 462 U.S. 406 (1983).

[1141] 520 U.S. 833 (1997).

contains an express preemption section. The dispute arose in a community-property State, in which heirs of a deceased wife claimed property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law "relate[d] to" a covered pension plan or because state law had an impermissible "connection with" a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. "We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption." [1142]

Similarly, the Court found it unnecessary to consider field preemption due to its holding that a Massachusetts law barring state agencies from purchasing goods or services from companies doing business with Burma imposed obstacles to the accomplishment of Congress's full objectives under the federal Burma sanctions law. [1143] The state law was said to undermine the federal law in several respects that could have implicated field preemption – by limiting the President's effective discretion to control sanctions, and by frustrating the President's ability to engage in effective diplomacy in developing a comprehensive multilateral strategy – but the Court "decline[d] to speak to field preemption as a separate issue." [1144]

Also, a state law making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers was held to counter a strong federal policy protecting the right of farmers to join or not join such asso-

[1142] Id. at 841. The dissent, id. at 854 (Justice Breyer), agreed that conflict analysis was appropriate, but he did not find that the state law achieved any result that ERISA required.

[1143] Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

[1144] 530 U.S. at 374 n.8.

ciations.[1145] And a state assertion of the right to set minimum stream-flow requirements different from those established by FERC in its licensing capacity was denied as being preempted under the Federal Power Act, despite language requiring deference to state laws "relating to the control, appropriation, use, or distribution of water."[1146]

Contrarily, a comprehensive federal regulation of insecticides and other such chemicals was held not to preempt a town ordinance that required a permit for the spraying of pesticides, there being no conflict between requirements.[1147] The application of state antitrust laws to authorize indirect purchasers to recover for all overcharges passed on to them by direct purchasers was held to implicate no preemption concerns, inasmuch as the federal antitrust laws had been interpreted as not permitting indirect purchasers to recover under *federal* law; state law may be inconsistent with federal law but in no way did it frustrate federal objectives and policies.[1148] The effect of federal policy was not strong enough to warrant a holding of preemption when a State authorized condemnation of abandoned railroad property after conclusion of an ICC proceeding permitting abandonment, although the railroad's opportunity costs in the property had been considered in the decision on abandonment.[1149]

Federal Versus State Labor Laws.—One group of cases, which has caused the Court much difficulty over the years, concerns the effect of federal labor laws on state power to govern labor-management relations. Although the Court some time ago

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[1145] Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd., 467 U.S. 461 (1984). *See also* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (state allocation of costs for purposes of setting retail electricity rates, by disallowing costs permitted by FERC in setting wholesale rates, frustrated federal regulation by possibly preventing the utility from recovering in its sales the costs of paying the FERC-approved wholesale rate); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (state ban on cable TV advertising frustrates federal policy in the copyright law by which cable operators pay a royalty fee for the right to retransmit distant broadcast signals upon agreement not to delete commercials); International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (damage action based on common law of downstream State frustrates Clean Water Act's policies favoring permitting State in interstate disputes and favoring predictability in permit process).

[1146] California v. FERC, 495 U.S. 490 (1990). The savings clause was found inapplicable on the basis of an earlier interpretation of the language in First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946).

[1147] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 614–616 (1991).

[1148] California v. ARC America Corp., 490 U.S. 93 (1989).

[1149] Hayfield Northern Ry. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984). *See also* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (federal law's broad purpose of protecting shareholders as a group is furthered by state anti-takeover law); Rose v. Rose, 481 U.S. 619 (1987) (provision governing veterans' disability benefits protects veterans' families as well as veterans, hence state child-support order resulting in payment out of benefits is not preempted).

reached a settled rule, changes in membership on the Court reopened the issue and modified the rules.

With the enactment of the National Labor Relations Act and subsequent amendments, Congress declared a national policy in labor-management relations and established the NLRB to carry out that policy.[1150] It became the Supreme Court's responsibility to determine what role state law on labor-management relations was to play. At first, the Court applied a test of determination whether the state regulation was in direct conflict with the national regulatory scheme. Thus, in one early case, the Court held that an order by a state board which commanded a union to desist from mass picketing of a factory and from assorted personal threats was not in conflict with the national law that had not been invoked and that did not touch on some of the union conduct in question.[1151] A "cease and desist" order of a state board implementing a state provision making it an unfair labor practice for employees to conduct a slowdown or to otherwise interfere with production while on the job was found not to conflict with federal law,[1152] while another order of the board was also sustained in its prohibition of the discharge of an employee under a maintenance-of-membership clause inserted in a contract under pressure from the War Labor Board and which violated state law.[1153]

On the other hand, a state statute requiring business agents of unions operating in the State to file annual reports and to pay an annual fee of one dollar was voided as in conflict with federal law.[1154] And state statutes providing for mediation and outlawing

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[1150] Throughout the ups-and-downs of federal labor-law preemption, it remains the rule that the Board remains preeminent and almost exclusive. *See, e.g.*, Wisconsin Dep't of Industry v. Gould, Inc., 475 U.S. 282 (1986) (States may not supplement Board enforcement by debarring from state contracts persons or firms that have violated the NLRA); Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (City may not condition taxicab franchise on settlement of strike by set date, since this intrudes into collective-bargaining process protected by NLRA). On the other hand, the NLRA's protection of associational rights is not so strong as to outweigh the Social Security Act's policy permitting States to determine whether to award unemployment benefits to persons voluntarily unemployed as the result of a labor dispute. New York Tel. Co. v. New York Labor Dep't, 440 U.S. 519 (1979); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977); Baker v. General Motors Corp., 478 U.S. 621 (1986).

[1151] Allen-Bradley Local No. 1111 v. WERB, 315 U.S. 740 (1942).

[1152] United Automobile Workers v. WERB, 336 U.S. 245 (1949), *overruled by* Machinists & Aerospace Workers v. WERC, 427 U.S. 132 (1976).

[1153] Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949).

[1154] Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945). More recently, the Court has held that Hill's premise that the NLRA grants an unqualified right to select union officials has been removed by amendments prohibiting some convicted criminals from holding union office. Partly because the federal disqualification standard was itself dependent upon application of state law, the Court ruled that more stringent state disqualification provisions, also aimed at individuals who had been in-

public utility strikes were similarly voided as being in specific conflict with federal law.[1155] A somewhat different approach was noted in several cases in which the Court held that the federal act had so occupied the field in certain areas as to preclude state regulation.[1156] The latter approach was predominant through the 1950s as the Court voided state court action in enjoining[1157] or awarding damages[1158] for peaceful picketing, in awarding of relief by damages or otherwise for conduct which constituted an unfair labor practice under federal law,[1159] or in enforcing state antitrust laws so as to affect collective bargaining agreements[1160] or to bar a strike as a restraint of trade,[1161] even with regard to disputes over which the NLRB declined to assert jurisdiction because of the degree of effect on interstate commerce.[1162]

In *San Diego Building Trades Council v. Garmon*,[1163] the Court enunciated the rule, based on its previous decade of adjudication. "When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the

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volved in racketeering and other criminal conduct, were not inconsistent with federal law. Brown v. Hotel Employees, 468 U.S. 491 (1984).

[1155] United Automobile Workers v. O'Brien, 339 U.S. 454 (1950); Bus Employees v. WERB, 340 U.S. 383 (1951). *See also* Bus Employees v. Missouri, 374 U.S. 74 (1963).

[1156] Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953); Bethlehem Steel Co. v. New York Employment Relations Bd., 330 U.S. 767 (1947). *See also* Livadas v. Bradshaw, 512 U.S. 107 (1994) (finding preempted because it stood as an obstacle to the achievement of the purposes of NLRA a practice of a state labor commissioner). Of course, where Congress clearly specifies, the Court has had no difficulty. Thus, in the NLRA, Congress provided, 29 U.S.C. § 164(b), that state laws on the subject could override the federal law on union security arrangements and the Court sustained those laws. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). When Congress in the Railway Labor Act, 45 U.S.C.§ 152, Eleventh, provided that the federal law on union security was to override contrary state laws, the Court sustained that determination. Railway Employees' Department v. Hanson, 351 U.S. 225 (1956). The Court has held that state courts may adjudicate questions relating to the permissibility of particular types of union security arrangements under state law even though the issue involves as well an interpretation of federal law., Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (1963).

[1157] Garner v. Teamsters Local 776, 346 U.S. 485 (1953); United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62 (1956); Meat Cutters v. Fairlawn Meats, 353 U.S. 20 (1957); Construction Laborers v. Curry, 371 U.S. 542 (1963).

[1158] San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).

[1159] Guss v. Utah Labor Board, 353 U.S. 1 (1957).

[1160] Teamsters Union v. Oliver, 358 U.S. 283 (1959).

[1161] Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

[1162] Guss v. Utah Labor Board, 353 U.S. 1 (1957). The "no-man's land" thus created by the difference between the reach of Congress' commerce power and the NLRB's finite resources was closed by 73 Stat. 541, 29 U.S.C. § 164(c), which authorized the States to assume jurisdiction over disputes which the Board had indicated through promulgation of jurisdictional standards that it would not treat.

[1163] 359 U.S. 236 (1959).

National Labor Relations Board if the danger of state interference with national policy is to be averted." [1164]

For much of the period since *Garmon*, the dispute in the Court concerned the scope of the few exceptions permitted in the *Garmon* principle. First, when picketing is not wholly peaceful but is attended by intimidation, violence, and obstruction of the roads affording access to the struck establishment, state police powers have been held not disabled to deal with the conduct and narrowly-drawn injunctions directed against violence and mass picketing have been permitted [1165] as well as damages to compensate for harm growing out of such activities. [1166]

A 1958 case permitted a successful state court suit for reinstatement and damages for lost pay because of a wrongful expulsion, leading to discharge from employment, based on a theory that the union constitution and by-laws constitute a contract between the union and the members the terms of which can be enforced by state courts without the danger of a conflict between state and federal law. [1167] The Court subsequently narrowed the interpretation of this ruling by holding in two cases that members who alleged union interference with their existing or prospective employment relations could not sue for damages but must file unfair labor practice charges with the NLRB. [1168] *Gonzales* was said to be limited to "purely internal union matters." [1169] Finally, *Gonzales*, was abandoned in a five-to-four decision in which the Court held that a person who alleged that his union had misinterpreted its constitution and its collective bargaining agreement with the individual's employer in expelling him from the union and causing him to be discharged from his employment because he was late paying his dues had to pursue his federal remedies. [1170] While it was not likely that in *Gonzales*, a state court resolution of the scope of duty owed the

[1164] 359 U.S. at 245. The rule is followed in, *e.g.*, Radio & Television Technicians v. Broadcast Service of Mobile, 380 U.S. 255 (1965); Hattiesburg Building & Trades Council v. Broome, 377 U.S. 126 (1964); Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970); Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). *Cf.* Nash v. Florida Industrial Comm., 389 U.S. 235 (1967).

[1165] United Automobile Workers v. WERB, 351 U.S. 266 (1956); Youngdahl v. Rainfair, 355 U.S. 131 (1957).

[1166] United Automobile Workers v. Russell, 356 U.S. 634 (1958); United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[1167] International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

[1168] Journeymen Local 100 v. Borden, 373 U.S. 690 (1963); Iron Workers Local 207 v. Perko, 373 U.S. 701 (1963). Applying *Perko*, the Court held that a state court action by a supervisor alleging union interference with his contractual relationship with his employer is preempted by the NLRA. Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669 (1983).

[1169] 373 U.S. at 697(*Borden*), and 705 (*Perko*).

[1170] Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971).

member by the union would implicate principles of federal law, Justice Harlan wrote for the Court, state court resolution in this case involved an interpretation of the contract's union security clause, a matter on which federal regulation is extensive.[1171]

One other exception has been based, like the violence cases, on the assumption that it concerns areas traditionally left to local law into which Congress would not want to intrude. In *Linn v. Plant Guard Workers*,[1172] the Court permitted a state court adjudication of a defamation action arising out of a labor dispute. And in *Letter Carriers v. Austin*,[1173] the Court held that federal law preempts state defamation laws in the context of labor disputes to the extent that the State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of truth or falsity.

However, a state tort action for the intentional infliction of emotional distress occasioned through an alleged campaign of personal abuse and harassment of a member of the union by the union and its officials was held not preempted by federal labor law. Federal law was not directed to the "outrageous conduct" alleged, and NLRB resolution of the dispute would neither touch upon the claim of emotional distress and physical injury nor award the plaintiff any compensation. But state court jurisdiction, in order that there not be interference with the federal scheme, must be premised on tortious conduct either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.[1174]

A significant retrenchment of *Garmon* occurred in *Sears, Roebuck & Co. v. Carpenters*,[1175] in the context of state court assertion of jurisdiction over trespassory picketing. Objecting to the company's use of nonunion work in one of its departments, the union picketed the store, using the company's property, the lot area surrounding the store, instead of the public sidewalks, to walk on. After the union refused to move its pickets to the sidewalk, the company sought and obtained a state court order enjoining the

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[1171] 403 U.S. at 296.

[1172] 383 U.S. 53 (1966).

[1173] 418 U.S. 264 (1974).

[1174] Farmer v. Carpenters, 430 U.S. 290 (1977). Following this case, the Court held that a state court action for misrepresentation and breach of contract, brought by replacement workers promised permanent employment when hired during a strike, was not preempted. The action for breach of contract by replacement workers having no remedies under the NLRA was found to be deeply rooted in local law and of only peripheral concern under the Act. Belknap, Inc. v. Hale, 463 U.S. 491 (1983). *See also* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986).

[1175] 436 U.S. 180 (1978).

picketing on company property. Depending upon the union motivation for the picketing, it was either arguably prohibited or arguably protected by federal law, the trespassory nature of the picketing being one factor the NLRB would have looked to in determining at least the protected nature of the conduct. The Court held, however, that under the circumstances, neither the arguably prohibited nor the arguably protected rationale of *Garmon* was sufficient to deprive the state court of jurisdiction.

First, as to conduct arguably prohibited by NLRA, the Court seemingly expanded the *Garmon* exception recognizing state court jurisdiction for conduct that touches interests "deeply rooted in local feeling" [1176] in holding that where there exists "a significant state interest in protecting the citizens from the challenged conduct" and there exists "little risk of interference with the regulatory jurisdiction" of the NLRB, state law is not preempted. Here, there was obviously a significant state interest in protecting the company from trespass; the second, "critical inquiry" was whether the controversy presented to the state court was identical to or different from that which could have been presented to the Board. The Court concluded that the controversy was different. The Board would have been presented with determining the motivation of the picketing and the location of the picketing would have been irrelevant; the motivation was irrelevant to the state court and the situs of the picketing was the sole inquiry. Thus, there was deemed to be no realistic risk of state interference with Board jurisdiction. [1177]

Second, in determining whether the picketing was protected, the Board would have been concerned with the situs of the picketing, since under federal labor laws the employer has no absolute right to prohibit union activity on his property. Preemption of state court jurisdiction was denied, nonetheless, in this case on two joined bases. One, preemption is not required in those cases in which the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. In this case, the union could have filed with the Board when the company demanded removal of the pickets, but did not, and the company could not file with the Board at all. Two, even if the matter is not presented to the Board, preemption is called for if there is a risk of erroneous state court adjudication of the protection issue that is unacceptable, so that one must look to the strength of the argument that the activity is protected. While the state court had to make an initial determination

[1176] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959).
[1177] Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 190–98 (1978).

that the trespass was not protected under federal law, the same determination the Board would have made, in the instance of trespassory conduct, the risk of erroneous determination is small, because experience shows that a trespass is far more likely to be unprotected than protected.[1178]

Introduction of these two balancing tests into the *Garmon* rationale substantially complicates determining when state courts do not have jurisdiction, and will no doubt occasion much more litigation in state courts than has previously existed.

Another series of cases involves not a Court-created exception to the *Garmon* rule but the applicability and interpretation of § 301 of the Taft-Hartley Act,[1179] which authorizes suits in federal, and state,[1180] courts to enforce collective bargaining agreements. The Court has held that in enacting § 301, Congress authorized actions based on conduct arguably subject to the NLRA, so that the *Garmon* preemption doctrine does not preclude judicial enforcement of duties and obligations which would otherwise be within the exclusive jurisdiction of the NLRB so long as those duties and obligations are embodied in a collective-bargaining agreement, perhaps as interpreted in an arbitration proceeding.[1181]

Here, too, the permissible role of state tort actions has been in great dispute. Generally, a state tort action as an alternative to a § 301 arbitration or enforcement action is preempted if it is substantially dependent upon analysis of the terms of a collective-bargaining agreement.[1182] Thus, a state damage action for the bad-faith handling of an insurance claim under a disability plan that was part of a collective-bargaining agreement was preempted because it involved interpretation of that agreement and because state enforcement would frustrate the policies of § 301 favoring uniform federal-law interpretation of collective-bargaining agreements and favoring arbitration as a predicate to adjudication.[1183]

[1178] 436 U.S. at 199–207.

[1179] 61 Stat. 156 (1947), 29 U.S.C. § 185(a).

[1180] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). The state courts must, however, apply federal law. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

[1181] Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Humphrey v. Moore, 375 U.S. 335 (1964); Vaca v. Sipes, 386 U.S. 171 (1967).

[1182] *See* the analysis in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (state tort action for retaliatory discharge for exercising rights under a state workers' compensation law is not preempted by § 301, there being no required interpretation of a collective-bargaining agreement).

[1183] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). *See also* Int'l Brotherhood of Electric Workers v. Hechler, 481 U.S. 851 (1987) (state-law claim that union breached duty to furnish employee a reasonably safe workplace preempted); United Steelworkers of America v. Rawson, 495 U.S. 362 (1990) (state-law claim that union

Finally, the Court has indicated that with regard to some situations, Congress has intended to leave the parties to a labor dispute free to engage in "self-help," so that conduct not subject to federal law is nonetheless withdrawn from state control.[1184] However, the NLRA is concerned primarily "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," so States are free to impose minimum labor standards.[1185]

COMMERCE WITH INDIAN TRIBES

Congress' power to regulate commerce "with the Indian tribes," once almost rendered superfluous by Court decision,[1186] has now been resurrected and made largely the basis for informing judicial judgment with respect to controversies concerning the rights and obligations of Native Americans. Although Congress in 1871 forbade the further making of treaties with Indian tribes,[1187] cases disputing the application of the old treaties and especially their effects upon attempted state taxation and regulation of on-reservation activities continue to be a staple of the Court's docket.[1188] But this clause is one of the two bases now found sufficient to empower Federal Government authority over Native Americans. "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[1189] Forsaking reliance upon

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was negligent in inspecting a mine, the duty to inspect being created by the collective-bargaining agreement preempted).

[1184] Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969); Machinists & Aerospace Workers v. WERC, 427 U.S. 132 (1976); Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986). And, *cf.* New York Telephone Co. v. New York Labor Dept., 440 U.S. 519 (1979).

[1185] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (upholding a state requirement that health-care plans, including those resulting from collective bargaining, provide minimum benefits for mental-health care).

[1186] United States v. Kagama, 118 U.S. 375 (1886). Rejecting the commerce clause as a basis for congressional enactment of a system of criminal laws for Indians living on reservations, the Court nevertheless sustained the act on the ground that the Federal Government had the obligation and thus the power to protect a weak and dependent people. *Cf.* United States v. Holiday, 70 U.S. (3 Wall.) 407 (1866); United States v. Sandoval, 231 U.S. 28 (1913). This special fiduciary responsibility can also be created by statute. *E.g.*, United States v. Mitchell, 463 U.S. 206 (1983).

[1187] 16 Stat. 544, 566, 25 U.S.C. § 71.

[1188] *E.g.*, Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Montana v. United States, 450 U.S. 544 (1981).

[1189] McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 n. 7 (1973). *See also* Morton v. Mancari, 417 U.S. 535, 551–553 (1974); United States v. Mazurie,

other theories and rationales, the Court has established the preemption doctrine as the analytical framework within which to judge the permissibility of assertions of state jurisdiction over the Indians. However, the "semi-autonomous status" of Indian tribes erects an "independent but related" barrier to the exercise of state authority over commercial activity on an Indian reservation.[1190] Thus, the question of preemption is not governed by the standards of preemption developed in other areas. "Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts, inform the preemption analysis that governs this inquiry. . . . As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity."[1191] A corollary is that the preemption doctrine will not be applied strictly to prevent States from aiding Native Americans.[1192] However, the protective rule is inapplicable to state regulation of liquor transactions, since there has been no tradition of tribal sovereignty with respect to that subject.[1193]

The scope of state taxing powers—the conflict of "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations"[1194] —has been often litigated. Absent cession of jurisdiction or other congressional consent, States possess no power to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.[1195] Off-reservation Indian

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419 U.S. 544, 553–556 (1974); Bryan v. Itasca County, 426 U.S. 373, 376 n. 2 (1976); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837 (1982).

[1190] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–143 (1980); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837–838 (1982). "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." Id. at 837, (quoting, White Mountain, 448 U.S. at 143).

[1191] Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982). *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[1192] Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984) (upholding state-court jurisdiction to hear claims of Native Americans against non-Indians involving transactions that occurred in Indian country). However, attempts by States to retrocede jurisdiction favorable to Native Americans may be held to be preempted. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986).

[1193] Rice v. Rehner, 463 U.S. 713 (1983).

[1194] McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 165 (1973).

[1195] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Bryan v. Itasca County, 426 U.S. 373 (1976); Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Montana v. Blackfeet

activities require an express federal exemption to deny state taxing power.[1196] Subjection to taxation of non-Indians doing business with Indians on the reservation involves a close analysis of the federal statutory framework, although the operating premise was for many years to deny state power because of its burdens upon the development of tribal self-sufficiency as promoted through federal law and its interference with the tribes' ability to exercise their sovereign functions.[1197]

That operating premise, however, seems to have been eroded. For example, in *Cotton Petroleum Corp. v. New Mexico*,[1198] the Court held that, in spite of the existence of multiple taxation occasioned by a state oil and gas severance tax applied to on-reservation operations by non-Indians, which was already taxed by the tribe,[1199] the impairment of tribal sovereignty was "too indirect and too insubstantial" to warrant a finding of preemption. The fact that the State provided significant services to the oil and gas lessees justified state taxation and also distinguished earlier cases in which the State had "asserted no legitimate regulatory interest that might justify the tax."[1200] Still further erosion, or relaxation, of the principle of construction may be found in a later case, in which the Court, confronted with arguments that the imposition of particular state taxes on Indian property on the reservation was inconsistent with self-determination and self-governance, denominated these as "policy" arguments properly presented to Congress rather than the Court.[1201]

The impact on tribal sovereignty is also a prime determinant of relative state and tribal regulatory authority.[1202]

Tribe, 471 U.S. 759 (1985). *See also* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). A discernable easing of the reluctance to find congressional cession is reflected in more recent cases. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

[1196] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–149 (1973).

[1197] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).

[1198] 490 U.S. 163 (1989).

[1199] Held permissible in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[1200] 490 U.S. at 185 (distinguishing Bracker and Ramah Navaho School Bd).

[1201] County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992). To be sure, this response was in the context of the reading of statutory texts and giving effect to them, but the unqualified designation is suggestive. For recent tax controversies, *see* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Department of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[1202] *E.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

Since *Worcester v. Georgia*,[1203] it has been recognized that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.[1204] They are, of course, no longer possessed of the full attributes of sovereignty,[1205] having relinquished some part of it by their incorporation within the territory of the United States and their acceptance of its protection. By specific treaty provision, they yielded up other sovereign powers, and Congress has removed still others. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."[1206]

In a case of major import for the settlement of Indian land claims, the Court ruled in *County of Oneida v. Oneida Indian Nation*,[1207] that an Indian tribe may obtain damages for wrongful possession of land conveyed in 1795 without the federal approval required by the Nonintercourse Act.[1208] The Act reflected the accepted principle that extinguishment of the title to land by Native Americans required the consent of the United States and left intact a tribe's common-law remedies to protect possessory rights. The Court reiterated the accepted rule that enactments are construed liberally in favor of Native Americans and that Congress may abro-

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[1203] 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 do. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512–513 (1940). The Court has repeatedly rejected arguments to abolish tribal sovereign immunity or at least to curtail it. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991).

[1204] United States v. Wheeler, 435 U.S. 313 (1978) (inherent sovereign power to punish tribal offenders). But tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *And see* Duro v. Reina, 495 U.S. 676 (1990) (tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reservation; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction). *Compare* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (state regulation of on-reservation bingo is preempted as basically civil/regulatory rather than criminal/prohibitory), *with* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (extensive ownership of land within "open areas" of reservation by non-members of tribe precludes application of tribal zoning within such areas). *And see* Hagen v. Utah, 510 U.S. 399 (1994). Among the fundamental attributes of sovereignty which a tribe possesses unless divested of it by federal law is the power to tax non-Indians entering the reservation to engage in economic activities. Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[1205] United States v. Kagama, 118 U.S. 375, 381 (1886); United States v. Wheeler, 435 U.S. 313, 323 (1978).

[1206] United States v. Wheeler, 435 U.S. 313, 323 (1978). *See* South Dakota v. Bourland, 508 U.S. 679 (1993) (abrogation of Indian treaty rights and reduction of sovereignty).

[1207] 470 U.S. 226 (1985).

[1208] 1 Stat. 379 (1793).

gate Indian treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land-conveyance treaties containing references to earlier conveyances that had violated the Nonintercourse Act did not constitute ratification of the invalid conveyances.[1209] Similarly, the Court refused to apply the general rule for borrowing a state statute of limitations for the federal common-law action, and it rejected the dissent's view that, given "the extraordinary passage of time," the doctrine of laches should have been applied to bar the claim.[1210]

While the power of Congress over Indian affairs is broad, it is not limitless.[1211] The Court has promulgated a standard of review that defers to the legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . ."[1212] A more searching review is warranted when it is alleged that the Federal Government's behavior toward the Indians has been in contravention of its obligation and that it has in fact taken property from a tribe which it had heretofore guaranteed to the tribe, without either compensating the tribe or otherwise giving the Indians the full value of the land.[1213]

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.

[1209] 470 U.S. at 246–48.

[1210] 470 U.S. at 255, 257 (Justice Stevens).

[1211] "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Alcea Bank of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion), (quoted with approval in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

[1212] Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court applied the standard to uphold a statutory classification that favored Indians over non-Indians. But in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), the same standard was used to sustain a classification that disfavored, although inadvertently, one group of Indians as against other groups. While Indian tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" statute covering them. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[1213] United States v. Sioux Nation, 448 U.S. 371 (1980). *See also* Solem v. Bartlett, 465 U.S. 463, 472 (1984) (there must be "substantial and compelling evidence of congressional intention to diminish Indian lands" before the Court will hold that a statute removed land from a reservation).

NATURALIZATION AND CITIZENSHIP

Nature and Scope of Congress' Power

Naturalization has been defined by the Supreme Court as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." [1214] In the *Dred Scott* case, [1215] the Court asserted that the power of Congress under this clause applies only to "persons born in a foreign country, under a foreign government." [1216] These dicta are much too narrow to describe the power that Congress has actually exercised on the subject. The competence of Congress in this field merges, in fact, with its indefinite, inherent powers in the field of foreign relations. "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries." [1217]

Congress' power over naturalization is an exclusive power; no State has the power to constitute a foreign subject a citizen of the United States. [1218] But power to naturalize aliens may be, and was early, devolved by Congress upon state courts of record. [1219] And States may confer the right of suffrage upon resident aliens who have declared their intention to become citizens and many did so until recently. [1220]

Citizenship by naturalization is a privilege to be given, qualified, or withheld as Congress may determine; an individual may claim it as a right only upon compliance with the terms Congress imposes. [1221] This interpretation makes of the naturalization power the only power granted in § 8 of Article I that is unrestrained by constitutional limitations on its exercise. Thus, the first naturalization act enacted by the first Congress restricted naturalization to

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[1214] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 162 (1892).

[1215] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[1216] 60 U.S. at 417, 419.

[1217] Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

[1218] Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898).

[1219] The first naturalization act, 1 Stat. 103 (1790), so provided. *See* 8 U.S.C. § 1421. In Holmgren v. United States, 217 U.S. 509 (1910), it was held that Congress may provide for the punishment of false swearing in the proceedings in state courts.

[1220] Spragins v. Houghton, 3 Ill. 377 (1840); Stewart v. Foster, 2 Binn. (Pa.) 110 (1809). *See* K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES ch. 5 (1918).

[1221] United States v. MacIntosh, 283 U.S. 605, 615 (1931); Fong Yue Ting v. United States, 149 U.S. 698, 707–708 (1893). A *caveat* to this statement is that with regard to persons naturalized in the United States the qualification may only be a condition precedent and not a condition subsequent, Schneider v. Rusk, 377 U.S. 163 (1964), whereas persons born abroad who are made citizens at birth by statute if one or both of their parents are citizens are subject to conditions subsequent. Rogers v. Bellei, 401 U.S. 815 (1971).

"free white persons[s]," [1222] which was expanded in 1870 so that persons of "African nativity and . . . descent" were entitled to be naturalized. [1223] Orientals were specifically excluded from eligibility in 1882, [1224] and the courts enforced these provisions without any indication that constitutional issues were thereby raised. [1225] These exclusions are no longer law. Present naturalization statutes continue and expand on provisions designed to bar subversives, dissidents, and radicals generally from citizenship. [1226]

Although the usual form of naturalization is through individual application and official response on the basis of general congressional rules, naturalization is not so limited. Citizenship can be conferred by special act of Congress, [1227] it can be conferred collectively either through congressional action, such as the naturalization of all residents of an annexed territory or of a territory made a State, [1228] or through treaty provision. [1229]

Categories of Citizens: Birth and Naturalization

The first sentence of § 1 of the Fourteenth Amendment contemplates two sources of citizenship and two only: birth and naturalization. [1230] This contemplation is given statutory expression in § 301 of the Immigration and Nationality Act of 1952, [1231] which itemizes those categories of persons who are citizens of the United States at birth; all other persons in order to become citizens must pass through the naturalization process. The first category merely tracks the language of the first sentence of § 1 of the Fourteenth Amendment in declaring that all persons born in the United States

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[1222] 1 Stat. 103 (1790).

[1223] Act of July 14, 1870, § 7, 16 Stat. 254, 256.

[1224] Act of May 6, 1882, § 1, 22 Stat. 58.

[1225] *Cf.* Ozawa v. United States, 260 U.S. 178 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923); Toyota v. United States, 268 U.S. 402 (1925); Morrison v. California, 291 U.S. 82 (1934). The Court refused to review the only case in which the constitutional issue was raised and rejected. Kharaiti Ram Samras v. United States, 125 F. 2d 879 (C.A. 9, 1942), *cert. denied*, 317 U.S. 634 (1942).

[1226] The Alien and Sedition Act of 1798, 1 Stat. 570, empowered the President to deport any alien he found dangerous to the peace and safety of the Nation. In 1903, Congress provided for denial of naturalization and for deportation for mere belief in certain doctrines, i.e., anarchy. Act of March 3, 1903, 32 Stat. 1214. *See* United States ex rel. Turner v. Williams, 194 U.S. 279 (1904). The range of forbidden views was broadened in 1918. Act of October 15, 1918, § 1, 40 Stat. 1012. The present law is found in 8 U.S.C. § 1424 and is discussed in The Naturalization of Aliens, infra.

[1227] *E.g.*, 77 Stat. 5 (1963) (making Sir Winston Churchill an "honorary citizen of the United States.").

[1228] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892); Contzen v. United States, 179 U.S. 191 (1900).

[1229] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 164, 168–169 (1892).

[1230] United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898).

[1231] 66 Stat. 235, 8 U.S.C. § 1401.

and subject to the jurisdiction thereof are citizens by birth.[1232] But there are six other categories of citizens by birth. They are: (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe, (3) a person born outside the United States of citizen parents one of whom has been resident in the United States, (4) a person born outside the United States of one citizen parent who has been continuously resident in the United States for one year prior to the birth and of a parent who is a national but not a citizen, (5) a person born in an outlying possession of the United States of one citizen parent who has been continuously resident in the United States or an outlying possession for one year prior to the birth, (6) a person of unknown parentage found in the United States while under the age of five unless prior to his twenty-first birthday he is shown not to have been born in the United States, and (7) a person born outside the United States of an alien parent and a citizen parent who has been resident in the United States for a period of ten years, provided the person is to lose his citizenship unless he resides continuously in the United States for a period of five years between his fourteenth and twenty-eighth birthdays.

Subsection (7) citizens must satisfy the condition subsequent of five years continuous residence within the United States between the ages of fourteen and twenty-eight, a requirement held to be constitutional,[1233] which means in effect that for constitutional purposes, according to the prevailing interpretation, there is a difference between persons born or naturalized in, that is, within, the United States and persons born outside the confines of the United States who are statutorily made citizens.[1234] The principal difference is that the former persons may not be involuntarily expatriated whereas the latter may be, subject only to due process protections.[1235]

[1232] § 301(a)(1), 8 U.S.C. § 1401(a)(1).

[1233] Rogers v. Bellei, 401 U.S. 815 (1971).

[1234] *Compare* Schneider v. Rusk, 377 U.S. 163 (1964); Afroyim v. Rusk, 387 U.S. 253 (1967). It will be noted that in practically all cases persons statutorily made citizens at birth will be dual nationals, having the citizenship of the country where they were born. Congress has never required a citizen having dual nationality to elect at some point one and forsake the other but it has enacted several restrictive statutes limiting the actions of dual nationals which have occasioned much litigation. *E.g.*, Savorgnan v. United States, 338 U.S. 491 (1950); Kawakita v. United States, 343 U.S. 717 (1952); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Schneider v. Rusk, 377 U.S. 163 (1964); Rogers v. Bellei, 401 U.S. 815 (1971).

[1235] *Cf.* Rogers v. Bellei, 401 U.S. 815, 836 (1971); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Perez v. Brownell, 356 U.S. 44, 58–62 (1958).

The Naturalization of Aliens

Although, as has been noted, throughout most of our history there were significant racial and ethnic limitations upon eligibility for naturalization, the present law prohibits any such discrimination.

"The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[1236] However, any person "who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches . . . opposition to all organized government," or "who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches the overthrow by force or violence or other unconstitutional means of the Government of the United States" or who is a member of or affiliated with the Communist Party, or other communist organizations, or other totalitarian organizations is ineligible.[1237] These provisions moreover are "applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be, within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes."[1238]

Other limitations on eligibility are also imposed. Eligibility may turn upon the decision of the responsible officials whether the petitioner is of "good moral character."[1239] The immigration and nationality laws themselves include a number of specific congressional determinations that certain persons do not possess "good moral character," including persons who are "habitual drunkards,"[1240] adulterers,[1241] polygamists or advocates of polygamy,[1242] gamblers,[1243] convicted felons,[1244] and homosexuals.[1245] In order to petition for naturalization, an alien must have been resident for at

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[1236] § 311, 66 Stat. 239 (1952), 8 U.S.C. § 1422.

[1237] § 313(a), 66 Stat. 240 (1952), 8 U.S.C. § 1424(a). Whether "mere" membership is sufficient to constitute grounds for ineligibility is unclear. *Compare* Galvan v. Press, 347 U.S. 522 (1954), *with* Berenyi v. Immigration Director, 385 U.S. 630 (1967).

[1238] § 313(c), 66 Stat. 241 (1952), 8 U.S.C. § 1424(c).

[1239] § 316(a)(3), 66 Stat. 242, 8 U.S.C. § 1427(a)(3).

[1240] § 101(f)(1), 66 Stat. 172, 8 U.S.C. § 1101(f)(1).

[1241] § 101(f)(2), 66 Stat. 172, 8 U.S.C. § 1101(f)(2).

[1242] § 212(a)(11), 66 Stat. 182, 8 U.S.C. § 1182(a)(11).

[1243] § 101(f)(4) and (5), 66 Stat. 172, 8 U.S.C. § 1101(f)(4) and (5).

[1244] § 101(f)(7) and (8), 66 Stat. 172, 8 U.S.C. § 1101(f)(7) and (8).

[1245] § 212(a)(4), 66 Stat. 182, 8 U.S.C. § 1182(a)(4), barring aliens afflicted with "psychopathic personality," a congressional euphemism including homosexuality. Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967).

least five years and to have possessed "good moral character" for all of that period.

The process of naturalization culminates in the taking in open court of an oath "(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by law." [1246]

Any naturalized person who takes this oath with mental reservations or conceals or misrepresents beliefs, affiliations, and conduct, which under the law disqualify one for naturalization, is subject, upon these facts being shown in a proceeding brought for the purpose, to have his certificate of naturalization cancelled. [1247] Moreover, if within a year of his naturalization a person joins an organization or becomes in any way affiliated with one which was a disqualification for naturalization if he had been a member at the time, the fact is made *prima facie* evidence of his bad faith in taking the oath and grounds for instituting proceedings to revoke his admission to citizenship. [1248]

Rights of Naturalized Persons

Chief Justice Marshall early stated in dictum that "[a] naturalized citizen . . . becomes a member of the society, possessing all the

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[1246] § 337(a), 66 Stat. 258 (1952), 8 U.S.C. § 1448(a). In United States v. Schwimmer, 279 U.S. 644 (1929), and United States v. MacIntosh, 283 U.S. 605 (1931), a divided Court held that clauses (3) and (4) of the oath, as then prescribed, required the candidate for naturalization to be willing to bear arms for the United States, thus disqualifying conscientious objectors. These cases were overturned, purely as a matter of statutory interpretation by Girouard v. United States, 328 U.S. 61 (1946), and Congress codified the result, 64 Stat. 1017 (1950), as it now appears in the cited statute.

[1247] § 340(a), 66 Stat. 260 (1952), 8 U.S.C. § 1451(a). *See* Kungys v. United States, 485 U.S. 759 (1988) (badly fractured Court opinion dealing with the statutory requirements in a denaturalization proceeding under this section). *And see* Johannessen v. United States, 225 U.S. 227 (1912). Congress has imposed no time bar applicable to proceedings to revoke citizenship, so that many years after naturalization has taken place a naturalized citizen remains subject to divestment upon proof of fraud. Costello v. United States, 365 U.S. 265 (1961); Polites v. United States, 364 U.S. 426 (1960); Knauer v. United States, 328 U.S. 654 (1946); Fedorenko v. United States, 449 U. S. 490 (1981).

[1248] 340(c), 66 Stat. 261 (1952), 8 U.S.C. § 1451(c). The time period had previously been five years.

rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[1249] A similar idea was expressed in *Knauer v. United States*.[1250] "Citizenship obtained through naturalization is not a second-class citizenship.... [It] carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government."

Despite these dicta, it is clear that particularly in the past but currently as well a naturalized citizen has been and is subject to requirements not imposed on native-born citizens. Thus, as we have noted above, a naturalized citizen is subject at any time to have his good faith in taking the oath of allegiance to the United States inquired into and to lose his citizenship if lack of such faith is shown in proper proceedings.[1251] And the naturalized citizen within a year of his naturalization will join a questionable organization at his peril.[1252] In *Luria v. United States*,[1253] the Court sustained a statute making *prima facie* evidence of bad faith a naturalized citizen's assumption of residence in a foreign country within five years after the issuance of a certificate of naturalization. But in *Schneider v. Rusk*,[1254] the Court voided a statute that provided that a naturalized citizen should lose his United States citizenship if following naturalization he resided continuously for three years in his former homeland. "We start," Justice Douglas wrote for the

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[1249] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737, 827 (1824). One must be aware, however, that this language does not appear in any case having to do with citizenship or naturalization or the rights of naturalized citizens and its force may be therefore questioned. *Compare* Afroyim v. Rusk, 387 U.S. 253, 261 (1967) (Justice Black for the Court: "a mature and well-considered dictum ..."), *with* id. at 275–276 (Justice Harlan dissenting: the dictum, "cannot have been intended to reach the question of citizenship."). The issue in Osborn was the right of the Bank to sue in federal court. Osborn had argued that the fact that the bank was chartered under the laws of the United States did not make any legal issue involving the bank one arising under the laws of the United States for jurisdictional purposes; to argue the contrary, Osborn contended, was like suggesting that the fact that persons were naturalized under the laws of Congress meant such persons had an automatic right to sue in federal courts, unlike natural-born citizens. The quoted language of Marshall's rejects this attempted analogy.

[1250] 328 U.S. 654, 658 (1946).

[1251] Johannessen v. United States, 225 U.S. 227 (1912); Knauer v. United States, 328 U.S. 654 (1946); Costello v. United States, 365 U.S. 265 (1961).

[1252] *See* 8 U.S.C. § 1451(c).

[1253] 231 U.S. 9 (1913). The provision has been modified to reduce the period to one year. 8 U.S.C. § 1451(d).

[1254] 377 U.S. 163 (1964).

Court, "from the premise that the rights of citizenship of the native-born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President." [1255] The failure of the statute, the Court held, was that it impermissibly distinguished between native-born and naturalized citizens, denying the latter the equal protection of the laws. [1256] "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native-born. This is an assumption that is impossible for us to make. . . . A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance." [1257]

The *Schneider* equal protection rationale was abandoned in the next case in which the Court held that the Fourteenth Amendment forbade involuntary expatriation of naturalized persons. [1258] But in *Rogers v. Bellei*, [1259] the Court refused to extend this holding to persons statutorily naturalized at birth abroad because one of their parents was a citizen and similarly refused to apply *Schneider*. Thus, one who failed to honor a condition subsequent had his citizenship revoked. "Neither are we persuaded that a condition subsequent in this area impresses one with 'second-class citizenship.' That cliche is too handy and too easy, and, like most cliches, can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not 'second-class.'" [1260]

[1255] 377 U.S. at 165.

[1256] While there is no equal protection clause specifically applicable to the Federal Government, it is established that the due process clause of the Fifth Amendment forbids discrimination in much the same manner as the equal protection clause of the Fourteenth Amendment.

[1257] Schneider v. Rusk, 377 U.S. 163, 168–169 (1964).

[1258] Afroyim v. Rusk, 387 U.S. 253 (1967).

[1259] 401 U.S. 815 (1971).

[1260] 401 U.S. at 835–36.

It is not clear where the progression of cases has left us in this area. Clearly, naturalized citizens are fully entitled to all the rights and privileges of those who are citizens because of their birth here. But it seems equally clear that with regard to retention of citizenship, naturalized citizens are not in the secure position of citizens born here.[1261]

On another point, the Court has held that, absent a treaty or statute to the contrary, a child born in the United States who is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, does not thereby lose his American citizenship and that it is not necessary for him to make an election and return to the United States.[1262] On still another point, it has been held that naturalization is so far retroactive as to validate an acquisition of land prior to naturalization as to which the alien was under a disability.[1263]

Expatriation: Loss of Citizenship

The history of the right of expatriation, voluntarily on the part of the citizen or involuntarily under duress of statute, is shadowy in United States constitutional law. Justice Story, in the course of an opinion,[1264] and Chancellor Kent, in his writings,[1265] accepted the ancient English doctrine of perpetual and unchangeable allegiance to the government of one's birth, a citizen being precluded from renouncing his allegiance without permission of that government. The pre-Civil War record on the issue is so vague because there was wide disagreement on the basis of national citizenship in the first place, with some contending that national citizenship was derivative from state citizenship, which would place the power of providing for expatriation in the state legislatures, and with others contending for the primacy of national citizenship, which would place the power in Congress.[1266] The citizenship basis was settled by the first sentence of § 1 of the Fourteenth Amendment, but expatriation continued to be a muddled topic. An 1868 statute specifically recognized "the right of expatriation" by individuals, but it

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[1261] At least, there is a difference so long as *Afroyim* prevents Congress from making expatriation the consequence of certain acts when done by natural born citizens as well.

[1262] Perkins v. Elg, 307 U.S. 325 (1939). The qualifying phrase "absent a treaty or statute . . ." is error now, so long as *Afroyim* remains in effect. But note Rogers v. Bellei, 401 U.S. 815, 832–833 (1971).

[1263] Governeur v. Robertson, 24 U.S. (11 Wheat.) 332 (1826); Osterman v. Baldwin, 73 U.S. (6 Wall.) 116 (1867); Manuel v. Wulff, 152 U.S. 505 (1894).

[1264] Shanks v. DuPont, 28 U.S. (3 Pet.) 242, 246 (1830).

[1265] 2 J. KENT, COMMENTARIES 49–50 (1827).

[1266] J. TENBROEK, ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 71–94 (1951); *see generally* J. ROCHE, THE EARLY DEVELOPMENT OF UNITED STATES CITIZENSHIP (1949).

was directed to affirming the right of foreign nationals to expatriate themselves and to become naturalized United States citizens.[1267] An 1865 law provided for the forfeiture of the "rights of citizenship" of draft-dodgers and deserters, but whether the statute meant to deprive such persons of citizenship or of their civil rights is unclear.[1268] Beginning in 1940, however, Congress did enact laws designed to strip of their citizenship persons who committed treason,[1269] deserted the armed forces in wartime,[1270] left the country to evade the draft,[1271] or attempted to overthrow the Government by force or violence.[1272] In 1907, Congress provided that female citizens who married foreign citizens were to have their citizenship held "in abeyance" while they remained wedded but to be entitled to reclaim it when the marriage was dissolved.[1273]

About the simplest form of expatriation, the renunciation of citizenship by a person, there is no constitutional difficulty. "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance."[1274] But while the Court has hitherto insisted on the voluntary character of the renunciation, it has sustained the power of Congress to prescribe conditions and circumstances the voluntary entering into of which constitutes renunciation; the person need not intend to renounce so long as he intended to do what he did in fact do.[1275]

The Court first encountered the constitutional issue of forced expatriation in the rather anomalous form of the statute,[1276] which placed in limbo the citizenship of any American female who married a foreigner. Sustaining the statute, the Court relied on the

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[1267] Act of July 27, 1868, 15 Stat. 223. While the Act's preamble rhetorically proclaims the "natural and inherent right of all people" to expatriate themselves, its title is "An Act concerning the Rights of American Citizens in foreign States" and its operative parts are concerned with that subject. It has long been taken, however, as a general proclamation of United States recognition of the right of United States citizens to expatriate themselves. Mackenzie v. Hare, 239 U.S. 299, 309 (1915); Mandoli v. Acheson, 344 U.S. 133, 135–136 (1952). *Cf.* Savorgnan v. United States, 338 U.S. 491, 498 n. 11 (1950).

[1268] The Enrollment Act of March 3, 1865, § 21, 13 Stat. 487, 490. The language of the section appears more consistent with a deprivation of civil rights than of citizenship. Note also that § 14 of the Wade-Davis Bill, pocket-vetoed by President Lincoln, specifically provided that any person holding office in the Confederate Government "is hereby declared not to be a citizen of the United States." 6 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 223 (1899).

[1269] Nationality Act of 1940, 54 Stat. 1169.

[1270] Id.

[1271] 58 Stat. 746 (1944).

[1272] 68 Stat. 1146 (1954).

[1273] 34 Stat. 1228 (1907), repealed by 42 Stat. 1021 (1922).

[1274] Perkins v. Elg, 307 U.S. 325, 334 (1939).

[1275] Mackenzie v. Hare, 239 U.S. 299, 309, 311–312 (1915); Savorgnan v. United States, 338 U.S. 491, 506 (1950).

[1276] 34 Stat. 1228 (1907).

congressional foreign relations power exercised in order to prevent the development of situations that might entangle the United States in embarrassing or hostile relationships with a foreign country. Noting too the fictional merging of identity of husband and wife, the Court thought it well within congressional power to attach certain consequences to these actions, despite the woman's contrary intent and understanding at the time she entered the relationship.[1277]

Beginning in 1958, the Court had a running encounter with the provisions of the 1952 Immigration and Nationality Act, which prescribed expatriation for a lengthy series of actions.[1278] In 1958, a five-to-four decision sustained the power to divest a dual national of his United States citizenship because he had voted in an election in the other country of which he was a citizen.[1279] But at the same time, another five-to-four decision, in which a majority rationale was lacking, struck down punitive expatriation visited on persons convicted by court-martial of desertion from the armed forces in wartime.[1280] In the next case, the Court struck down another puni-

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[1277] Mackenzie v. Hare, 239 U.S. 299 (1915).

[1278] *See generally* 8 U.S.C. §§ 1481–1489. Among the acts for which loss of citizenship is prescribed are (1) obtaining naturalization in a foreign state, (2) taking an oath of allegiance to a foreign state, (3) serving in the armed forces of a foreign state without authorization and with consequent acquisition of foreign nationality, (4) assuming public office under the government of a foreign state for which only nationals of that state are eligible, (5) voting in an election in a foreign state, (6) formally renouncing citizenship before a United states foreign service officer abroad, (7) formally renewing citizenship within the United States in time of war, subject to approval of the Attorney General, (8) being convicted and discharged from the armed services for desertion in wartime, (9) being convicted of treason or of an attempt to overthrow forcibly the Government of the United States, (10) fleeing or remaining outside the United States in wartime or a proclaimed emergency in order to evade military service, and (11) residing abroad if a naturalized citizen, subject to certain exceptions, for three years in the country of his birth or in which he was formerly a national or for five years in any other foreign state. Several of these sections have been declared unconstitutional, as explained in the text.

[1279] Perez v. Brownell, 356 U.S. 44 (1958). For the Court, Justice Frankfurter sustained expatriation as a necessary exercise of the congressional power to regulate the foreign relations of the United States to prevent the embarrassment and potential for trouble inherent in our nationals voting in foreign elections. Justice Whittaker dissented because he saw no problem of embarrassment or potential trouble if the foreign state permitted aliens or dual nationals to vote. Chief Justice Warren and Justices Black and Douglas denied that expatriation is within Congress' power to prescribe for an act, like voting, which is not necessarily a sign of intention to relinquish citizenship.

[1280] Trop v. Dulles, 356 U.S. 86 (1958). Chief Justice Warren for himself and three Justices held that expatriation for desertion was a cruel and unusual punishment proscribed by the Eighth Amendment. Justice Brennan concurred on the ground of a lack of the requisite relationship between the statute and Congress' war powers. For the four dissenters, Justice Frankfurter argued that Congress had power to impose loss of citizenship for certain activity and that there was a rational nexus between refusal to perform a duty of citizenship and deprivation of citizenship. Justice Frankfurter denied that the penalty was cruel and unusual punish-

tive expatriation visited on persons who, in time of war or emergency, leave or remain outside the country in order to evade military service.[1281] And in the following year, the Court held unconstitutional a section of the law that expatriated a naturalized citizen who returned to his native land and resided there continuously for a period of three years.[1282]

The cases up to this point had lacked a common rationale and would have seemed to permit even punitive expatriation under the proper circumstances. But, in *Afroyim v. Rusk*,[1283] a five-to-four majority overruled the 1958 decision permitting expatriation for voting in a foreign election and announced a constitutional rule against all but purely voluntary renunciation of United States citizenship. The majority ruled that the first sentence of § 1 of the Fourteenth Amendment constitutionally vested citizenship in every person "born or naturalized in the United States" and that Congress was powerless to take that citizenship away.[1284] The continuing vitality of this decision was called into question by another five-to-four decision in 1971, which technically distinguished *Afroyim* in upholding a congressionally-prescribed loss of citizenship visited upon a person who was statutorily naturalized "outside" the United States, and held not within the protection of the first sentence of § 1 of the Fourteenth Amendment.[1285] Thus, while *Afroyim* was distinguished, the tenor of the majority opinion was hostile to its holding, and it may be that in a future case it will be overruled.

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ment and denied that it was punishment at all "in any valid constitutional sense." Id. at 124.

[1281] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). For the Court Justice Goldberg held that penal expatriation effectuated solely by administrative determination violated due process because of the absence of procedural safeguards. Justices Black and Douglas continued to insist Congress could not deprive a citizen of his nationality at all. Justice Harlan for the dissenters thought the statute a valid exercise of Congress' war powers but the four dissenters divided two-to-two on the validity of a presumption spelled out in the statute.

[1282] Schneider v. Rusk, 377 U.S. 163 (1964).

[1283] 387 U.S. 253 (1967).

[1284] Justice Harlan, for himself and Justices Clark, Stewart, and White, argued in dissent that there was no evidence that the drafters of the Fourteenth Amendment had at all the intention ascribed to them by the majority. He would have found in Afroyim's voluntary act of voting in a foreign election a voluntary renunciation of United States citizenship. 387 U.S. at 268.

[1285] Rogers v. Bellei, 401 U.S. 815 (1971). The three remaining *Afroyim* dissenters plus Chief Justice Burger and Justice Blackmun made up the majority, the three remaining Justices of the *Afroyim* majority plus Justice Marshall made up the dissenters. The continuing vitality of *Afroyim* was assumed in Vance v. Terrazas, 444 U. S. 252 (1980), in which a divided Court upheld a congressionally-imposed standard of proof, preponderance of evidence, by which to determine whether one had by his actions renounced his citizenship.

The issue, then, of the constitutionality of congressionally-prescribed expatriation must be taken as unsettled.

ALIENS

The Power of Congress to Exclude Aliens

The power of Congress "to exclude aliens from the United States and to prescribe the terms and conditions on which they come in" is absolute, being an attribute of the United States as a sovereign nation. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power.... The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." [1286]

[1286] Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603, 604 (1889); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Bugajewitz v. Adams, 228 U.S. 585 (1913); Hines v. Davidowitz, 312 U.S. 52 (1941); Kleindienst v. Mandel, 408 U. S. 753 (1972). In Galvan v. Press, 347 U.S. 522, 530–531 (1954), Justice Frankfurter for the Court wrote: "[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens.... But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' ... but a whole volume.... [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Although the issue of racial discrimination was before the Court in Jean v. Nelson, 472 U.S. 846 (1985), in the context of parole for undocumented aliens, the Court avoided it, holding that statutes and regulations precluded INS considerations of race or national origin. Justices Marshall and Brennan, in dissent, argued for reconsideration of the long line of precedents and for constitutional restrictions on the Government. Id. at 858. That there exists *some* limitation upon exclusion of aliens is one permissible interpretation of Reagan v. Abourezk, 484 U.S. 1 (1987), *affg. by an equally divided Court*, 785 F.2d 1043 (D.C.Cir. 1986), holding that mere membership in the Communist Party could not be used to exclude an alien on the ground that his activities might be prejudicial to the interests of the United States.

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a "fundamental sovereign attribute" which is "of a political character and therefore subject only to narrow judicial review." Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n. 21 (1976); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977). Although aliens are "an identifiable class of persons," who aside from the classification at issue "are already subject to disadvantages not shared by the remainder of the community," Hampton v. Mow Sun Wong, 426 U.S.

Except for the Alien Act of 1798,[1287] Congress went almost a century without enacting laws regulating immigration into the United States. The first such statute, in 1875, barred convicts and prostitutes[1288] and was followed by a series of exclusions based on health, criminal, moral, economic, and subversion considerations.[1289] Another important phase was begun with passage of the Chinese Exclusion Act in 1882,[1290] which was not repealed until 1943.[1291] In 1924, Congress enacted into law a national origins quota formula which based the proportion of admittable aliens on the nationality breakdown of the 1920 census, which, of course, was heavily weighed in favor of English and northern European ancestry.[1292] This national origins quota system was in effect until it was repealed in 1965.[1293] The basic law remains the Immigration and Nationality Act of 1952,[1294] which, with certain revisions in 1965 and later piecemeal alterations, regulates who may be admitted and under what conditions; the Act, it should be noted, contains a list of 31 excludable classes of aliens.[1295]

Numerous cases underscore the sweeping nature of the powers of the Federal Government to exclude aliens and to deport by ad-

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at 102, Congress may treat them in ways that would violate the equal protection clause if a State should do it. *Diaz*, (residency requirement for welfare benefits); *Fiallo*, (sex and illegitimacy classifications). Nonetheless in Mow Sun Wong, 426 U.S. at 103, the Court observed that when the Federal Government asserts an overriding national interest as justification for a discriminatory rule that would violate the equal protection clause if adopted by a State, due process requires that it be shown that the rule was actually intended to serve that interest. The case struck down a classification that the Court thought justified by the interest asserted but that had not been imposed by a body charged with effectuating that interest. *See* Vergara v. Hampton, 581 F.2d 1281 (C.A. 7, 1978). *See* Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (construing statutes and treaty provisions restrictively to affirm presidential power to interdict and seize fleeing aliens on high seas to prevent them from entering U.S. waters).

[1287] Act of June 25, 1798, 1 Stat. 570. The Act was part of the Alien and Sedition Laws and authorized the expulsion of any alien the President deemed dangerous.

[1288] Act of March 3, 1875, 18 Stat. 477.

[1289] 22 Stat. 214 (1882) (excluding idiots, lunatics, convicts, and persons likely to become public charges); 23 Stat. 332 (1885), and 24 Stat. 414 (1887) (regulating importing cheap foreign labor); 26 Stat. 1084 (1891) (persons suffering from certain diseases, those convicted of crimes involving moral turpitude, paupers, and polygamists); 32 Stat. 1213 (1903) (epileptics, insane persons, professional beggars, and anarchists); 34 Stat. 898 (1907) (feeble-minded, children unaccompanied by parents, persons suffering with tuberculosis, and women coming to the United States for prostitution or other immoral purposes).

[1290] Act of May 6, 1882, 22 Stat. 58.

[1291] Act of December 17, 1943, 57 Stat. 600.

[1292] Act of May 26, 1924, 43 Stat. 153.

[1293] Act of October 3, 1965, P.L. 89–236, 79 Stat. 911.

[1294] Act of June 27, 1952, P.L. 82–414, 66 Stat. 163, 8 U.S.C. §§ 1101 et seq. as amended.

[1295] The list of excludable aliens may be found at 8 U.S.C. § 1182. The list has been modified and classified by category in recent amendments.

ministrative process persons in excluded classes. For example, in *United States ex rel. Knauff v. Shaughnessy*,[1296] an order of the Attorney General excluding, on the basis of confidential information he would not disclose, a wartime bride, who was *prima facie* entitled to enter the United States,[1297] was held to be unreviewable by the courts. Nor were regulations on which the order was based invalid as an undue delegation of legislative power. "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interest of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent."[1298] However, when Congress has spelled out the basis for exclusion or deportation, the Court remains free to interpret the statute and review the administration of it and to apply it, often in a manner to mitigate the effects of the law on aliens.[1299]

Congress' power to admit aliens under whatever conditions it lays down is exclusive of state regulation. The States "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid."[1300] This principle, however, has not precluded all state regulations dealing with aliens.[1301] The power of Congress to legislate with respect to the conduct of alien residents is a concomitant of its power to prescribe the terms and conditions on

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[1296] 338 U.S. 537 (1950). *See also* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), in which the Court majority upheld the Government's power to exclude on the basis of information it would not disclose a permanent resident who had gone abroad for about nineteen months and was seeking to return on a new visa. But the Court will frequently read the applicable statutes and regulations strictly against the Government for the benefit of persons sought to be excluded. *Cf.* Delgadillo v. Carmichael, 332 U.S. 388 (1947); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Rosenburg v. Fleuti, 374 U.S. 449 (1963).

[1297] Under the War Brides Act of 1945, 59 Stat. 659.

[1298] 338 U.S. at 543.

[1299] *E.g.*, Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966).

[1300] Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976); Toll v. Moreno, 458 U.S. 1, 12–13 (1982). *See also* Hines v. Davidowitz, 312 U.S. 52, 66 (1941); Graham v. Richardson, 403 U.S. 365, 376–380 (1971).

[1301] *E.g.*, Heim v. McCall, 239 U.S. 175 (1915); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927); Sugarman v. Dougall, 413 U.S. 634, 646–649 (1973); De Canas v. Bica, 424 U.S. 351 (1976); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

which they may enter the United States, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers. It is not a power to lay down a special code of conduct for alien residents or to govern their private relations. [1302]

Yet Congress is empowered to assert a considerable degree of control over aliens after their admission to the country. By the Alien Registration Act of 1940, Congress provided that all aliens in the United States, fourteen years of age and over, should submit to registration and finger printing and willful failure to comply was made a criminal offense against the United States. [1303] This Act, taken in conjunction with other laws regulating immigration and naturalization, has constituted a comprehensive and uniform system for the regulation of all aliens. [1304]

An important benefit of this comprehensive regulation accruing to the alien is that it precludes state regulation that may well be more severe and burdensome. For example, in *Hines v. Davidowitz*, [1305] the Court voided a Pennsylvania law requiring the annual registration and fingerprinting of aliens but going beyond the subsequently-enacted federal law to require acquisition of an alien identification card that had to be carried at all times and to be exhibited to any police officer upon demand and to other licensing officers upon applications for such things as drivers' licenses. The Court did not squarely hold the State incapable of having such a law in the absence of federal law but appeared to lean in that direction. [1306] Another decision voided a Pennsylvania law limiting those eligible to welfare assistance to citizens and an Arizona law prescribing a fifteen-year durational residency period before an alien could be eligible for welfare assistance. [1307] Congress had pro-

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[1302] Purporting to enforce this distinction, the Court voided a statute, which, in prohibiting the importation of "any alien woman or girl for the purpose of prostitution," provided that whoever should keep for the purpose of prostitution "any alien woman or girl within three years after she shall have entered the United States" should be deemed guilty of a felony. Keller v. United States, 213 U.S. 138 (1909).

[1303] 54 Stat. 670, 8 U.S.C. §§ 1301–1306.

[1304] *See* Hines v. Davidowitz, 312 U.S. 52, 69–70 (1941).

[1305] 312 U.S. 52 (1941).

[1306] 312 U.S. at 68. *But see* De Canas v. Bica, 424 U.S. 351 (1976), in which the Court upheld a state law prohibiting an employer from hiring aliens not entitled to lawful residence in the United States. The Court wrote that States may enact legislation touching upon aliens coexistent with federal laws, under regular preemption standards, unless the nature of the regulated subject matter precludes the conclusion or unless Congress has unmistakably ordained the impermissibility of state law.

[1307] Graham v. Richardson, 403 U.S. 365 (1971). *See also* Sugarman v. Dougall, 413 U.S. 634 (1973); In re Griffiths, 413 U.S. 717 (1973); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

vided, Justice Blackmun wrote for a unanimous Court, that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry.[1308] Thus, in effect Congress had declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property and the States were disabled from denying aliens these benefits.[1309]

Deportation

Unlike the exclusion proceedings,[1310] deportation proceedings afford the alien a number of constitutional rights: a right against self-incrimination,[1311] protection against unreasonable searches and seizures,[1312] guarantees against *ex post facto* laws, bills of attainder, and cruel and unusual punishment,[1313] a right to bail,[1314] a right to procedural due process,[1315] a right to counsel,[1316] a right to notice of charges and hearing,[1317] as well as a right to cross-examine.[1318]

Notwithstanding these guarantees, the Supreme Court has upheld a number of statutory deportation measures as not unconstitutional. The Internal Security Act of 1950, in authorizing the Attorney General to hold in custody, without bail, aliens who are members of the Communist Party of the United States, pending determination as to their deportability, is not unconstitutional.[1319] Nor was it unconstitutional to deport under the Alien Registration

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[1308] 8 U.S.C. §§ 1182(a)(8), 1182(a)(15), 1251(a)(8).

[1309] *See* 42 U.S.C. § 1981, applied in Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 n.7 (1948).

[1310] *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950), where the Court noted that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

[1311] Kimm v. Rosenberg, 363 U.S. 405 (1960).

[1312] Abel v. United States, 362 U.S. 217, 229 (1960).

[1313] Marcello v. Bonds, 349 U.S. 302 (1955).

[1314] Carlson v. Landon, 342 U.S. 524, 540 (1952).

[1315] Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950). See discussion of aliens' due process rights under the Fifth Amendment, Aliens: Entry and Deportation.

[1316] 8 U.S.C. § 1252(b)(2).

[1317] 8 U.S.C. § 1252(b)(1).

[1318] 8 U.S.C. § 1252(b)(3).

[1319] Carlson v. Landon, 342 U.S. 524 (1952). In Reno v. Flores, 507 U.S. 292 (1993), the Court upheld an INS regulation providing for the ongoing detention of juveniles apprehended on suspicion of being deportable, unless parents, close relatives, or legal guardians were available to accept release, as against a substantive due process attack.

Act of 1940 [1320] a legally resident alien because of membership in the Communist Party, although such membership ended before the enactment of the Act. Such application of the Act did not make it *ex post facto*, being but an exercise of the power of the United States to terminate its hospitality *ad libitum*. [1321] And a statutory provision [1322] making it a felony for an alien against whom a specified order of deportation is outstanding "to willfully fail or refuse to make timely application for travel or other documents necessary to his departure" was not on its face void for "vagueness." [1323] An alien unlawfully in the country "has no constitutional right to assert selective enforcement as a defense against his deportation." [1324]

BANKRUPTCY

Persons Who May Be Released From Debt

In an early case on circuit, Justice Livingston suggested that inasmuch as the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject." [1325] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice to the extent of including bankers, brokers, factors and underwriters as well as traders. [1326] Asserting that the narrow scope of the English statutes was a mere matter of policy, which by no means entered into the nature of such laws, Justice Story defined bankruptcy legislation in the sense of the Constitution as a law making provisions for cases of persons failing to pay their debts. [1327]

This interpretation has been ratified by the Supreme Court. In *Hanover National Bank v. Moyses*, [1328] it held valid the Bankruptcy Act of 1898, which provided that persons other than traders might become bankrupts and that this might be done on voluntary petition. The Court has given tacit approval to the extension of the

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[1320] 54 Stat. 670. For existing statutory provisions as to deportation, *see* 8 U.S.C. § 1251 *et seq*.

[1321] Carlson v. Landon, 342 U.S. 524 (1952).

[1322] 8 U.S.C. § 1252(e).

[1323] United States v. Spector, 343 U.S. 169 (1952).

[1324] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).

[1325] Adams v. Storey, 1 Fed. Cas. 141, 142 (No. 66) (C.C.D.N.Y. 1817).

[1326] 2 Stat. 19 (1800).

[1327] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1113 (1833).

[1328] 186 U.S. 181 (1902).

bankruptcy laws to cover practically all classes of persons and corporations,[1329] including even municipal corporations[1330] and wage-earning individuals. The Bankruptcy Act has, in fact been amended to provide a wage-earners' extension plan to deal with the unique problems of debtors who derive their livelihood primarily from salaries or commissions. In furthering the implementation of this plan, the Supreme Court has held that a wage earner may make use of it, notwithstanding the fact he has been previously discharged in bankruptcy within the last six years.[1331]

Liberalization of Relief Granted and Expansion of the Rights of the Trustee

As the coverage of the bankruptcy laws has been expanded, the scope of the relief afforded to debtors has been correspondingly enlarged. The act of 1800, like its English antecedents, was designed primarily for the benefit of creditors. Beginning with the act of 1841, which opened the door to voluntary petitions, rehabilitation of the debtor has become an object of increasing concern to Congress. An adjudication in bankruptcy is no longer requisite to the exercise of bankruptcy jurisdiction. In 1867, the debtor for the first time was permitted, either before or after adjudication of bankruptcy, to propose terms of composition that would become binding upon acceptance by a designated majority of his creditors and confirmation by a bankruptcy court. This measure was held constitutional,[1332] as were later acts, which provided for the reorganization of corporations that are insolvent or unable to meet their debts as they mature,[1333] and for the composition and extension of debts in proceedings for the relief of individual farmer debtors.[1334]

Nor is the power of Congress limited to adjustment of the rights of creditors. The Supreme Court has also ruled that the rights of a purchaser at a judicial sale of the debtor's property are within reach of the bankruptcy power, and may be modified by a reasonable extension of the period for redemption from such sale.[1335] Moreover, the Court expanded the bankruptcy court's power over the property of the estate by affording the trustee af-

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[1329] Continental Bank v. Rock Island Ry., 294 U.S. 648, 670 (1935).

[1330] United States v. Bekins, 304 U.S. 27 (1938), distinguishing Ashton v. Cameron County Dist., 298 U.S. 513 (1936).

[1331] Perry v. Commerce Loan Co., 383 U.S. 392 (1966).

[1332] In re Reiman, 20 Fed. Cas. 490 (No. 11,673) (D.C.S.D.N.Y. 1874), cited with approval in Continental Bank v. Rock Island Ry., 294 U.S. 648, 672 (1935).

[1333] Continental Bank v. Rock Island Ry., 294 U.S. 648 (1935).

[1334] Wright v. Vinton Branch, 300 U.S. 440 (1937); Adair v. Bank of America Ass'n, 303 U.S. 350 (1938).

[1335] Wright v. Union Central Ins. Co., 304 U.S. 502 (1938).

firmative relief on counterclaim against a creditor filing a claim against the estate.[1336]

Underlying most Court decisions and statutes in this area is the desire to achieve equity and fairness in the distribution of the bankrupt's funds.[1337] *United States v. Speers*,[1338] codified by an amendment to the Bankruptcy Act,[1339] furthered this objective by strengthening the position of the trustee as regards the priority of a federal tax lien unrecorded at the time of bankruptcy.[1340] The Supreme Court has held, in other cases dealing with the priority of various creditors' claims, that claims arising from the tort of the receiver is an "actual and necessary" cost of administration,[1341] that benefits under a nonparticipating annuity plan are not wages and are therefore not given priority,[1342] and that when taxes are allowed against a bankrupt's estate, penalties due because of the trustee's failure to pay the taxes incurred while operating a bankrupt business are also allowable.[1343] The Court's attitude with regard to these and other developments is perhaps best summarized in the opinion in *Continental Bank v. Rock Island Ry.*,[1344] where Justice Sutherland wrote, on behalf of a unanimous court: "[T]hese acts, far-reaching though they may be, have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."[1345]

Constitutional Limitations on the Bankruptcy Power

In the exercise of its bankruptcy powers, Congress must not transgress the Fifth and Tenth Amendments. The Bankruptcy Act provides that oral testimony cannot be used in violation of the bankrupt's right against self-incrimination.[1346] Congress may not take from a creditor specific property previously acquired from a debtor, nor circumscribe the creditor's right to such an unreasonable extent as to deny him due process of law;[1347] this principle, however, is subject to the Supreme Court's finding that a bankruptcy court has summary jurisdiction for ordering the surrender

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[1336] Katchen v. Landy, 382 U.S. 323 (1966).
[1337] Bank of Marin v. England, 385 U.S. 99, 103 (1966).
[1338] 382 U.S. 266 (1965). *Cf.* United States v. Vermont, 337 U.S. 351 (1964).
[1339] Act of July 5, 1966, 80 Stat. 269, 11 U.S.C. § 501, repealed.
[1340] 382 U.S., 271–72.
[1341] Reading Co. v. Brown, 391 U.S. 471 (1968).
[1342] Joint Industrial Bd. v. United States, 391 U.S. 224 (1968).
[1343] Nicholas v. United States, 384 U.S. 678 (1966).
[1344] 294 U.S. 648 (1935).
[1345] 294 U.S. at 671.
[1346] 11 U.S.C. § 344.
[1347] Louisville Bank v. Radford, 295 U.S. 555, 589, 602 (1935).

of voidable preferences when the trustee successfully counterclaims to a claim filed by the creditor receiving such preferences.[1348]

Since Congress may not supersede the power of a State to determine how a corporation shall be formed, supervised, and dissolved, a corporation, which has been dissolved by a decree of a state court, may not file a petition for reorganization under the Bankruptcy Act.[1349] But Congress may impair the obligation of a contract and may extend the provisions of the bankruptcy laws to contracts already entered into at the time of their passage.[1350] Although it may not subject the fiscal affairs of a political subdivision of a State to the control of a federal bankruptcy court,[1351] Congress may empower such courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness where the State has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners.[1352] Congress may recognize the laws of the State relating to dower, exemption, the validity of mortgages, priorities of payment and similar matters, even though such recognition leads to different results from State to State;[1353] for although bankruptcy legislation must be uniform, the uniformity required is geographic, not personal.

The power of Congress to vest the adjudication of bankruptcy claims in entities not having the constitutional status of Article III federal courts is unsettled. At least, it may not give to non-Article III courts the authority to hear state law claims made subject to federal jurisdiction only because of their relevance to a bankruptcy proceeding.[1354]

Constitutional Status of State Insolvency Laws: Preemption

Prior to 1898, Congress exercised the power to establish "uniform laws on the subject of bankruptcy" only intermittently. The first national bankruptcy law was not enacted until 1800 and was repealed in 1803; the second was passed in 1841 and was repealed two years later; a third was enacted in 1867 and repealed in

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[1348] Katchen v. Landy, 382 U.S. 323, 327–340 (1966).

[1349] Chicago Title and Trust Co. v. Wilcox Bldg. Corp., 302 U.S. 120 (1937).

[1350] In re Klein, 42 U.S. (1 How.) 277 (1843); Hanover National Bank v. Moyses, 186 U.S. 181 (1902).

[1351] Ashton v. Cameron County Dist., 298 U.S. 513 (1936). *See also* United States v. Bekins, 304 U.S. 27 (1938).

[1352] United States v. Bekins, 304 U.S. 27 (1938).

[1353] Stellwagon v. Clum, 245 U.S. 605 (1918); Hanover National Bank v. Moyses, 186 U.S. 181, 190 (1902).

[1354] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). *And see* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (Seventh Amendment right to jury trial in bankruptcy cases).

1878.[1355] Thus, during the first eighty-nine years under the Constitution, a national bankruptcy law was in existence only sixteen years altogether. Consequently, the most important issue of interpretation that arose during that period concerned the effect of the clause on state law.

The Supreme Court ruled at an early date that in the absence of congressional action the States may enact insolvency laws, since it is not the mere existence of the power but rather its exercise that is incompatible with the exercise of the same power by the States.[1356] Later cases settled further that the enactment of a national bankruptcy law does not invalidate state laws in conflict therewith but serves only to relegate them to a state of suspended animation with the result that upon repeal of the national statute they again come into operation without re-enactment.[1357]

A State is, of course, without power to enforce any law governing bankruptcies which impairs the obligation of contracts,[1358] extends to persons or property outside its jurisdiction,[1359] or conflicts with the national bankruptcy laws.[1360] Giving effect to the policy of the federal statute, the Court has held that a state statute regulating this distribution of property of an insolvent was suspended by that law,[1361] and that a state court was without power to proceed with pending foreclosure proceedings after a farmer-debtor had filed a petition in federal bankruptcy court for a composition or extension of time to pay his debts.[1362] A state court injunction ordering a defendant to clean up a waste-disposal site was held to be a "liability on a claim" subject to discharge under the bankruptcy law, after the State had appointed a receiver to take charge of the defendant's property and comply with the injunc-

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[1355] Hanover National Bank v. Moyses, 186 U.S. 181, 184 (1902).

[1356] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827).

[1357] Tua v. Carriere, 117 U.S. 201 (1886); Butler v. Goreley, 146 U.S. 303, 314 (1892).

[1358] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

[1359] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827); Denny v. Bennett, 128 U.S. 489, 498 (1888); Brown v. Smart, 145 U.S. 454 (1892).

[1360] In re Watts and Sachs, 190 U.S. 1, 27 (1903); International Shoe Co. v. Pinkus, 278 U.S. 261, 264 (1929).

[1361] International Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929).

[1362] Kalb v. Feurerstein, 308 U.S. 433 (1940).

tion.[1363] A state law governing fraudulent transfers was found to be compatible with the federal law.[1364]

Substantial disagreement has marked the actions of the Justices in one area, however, resulting in three five-to-four decisions first upholding and then voiding state laws providing that a discharge in bankruptcy was not to relieve a judgment arising out of an automobile accident upon pain of suffering suspension of his driver's license.[1365] The state statutes were all similar enactments of the Uniform Motor Vehicle Safety Responsibility Act, which authorizes the suspension of the license of any driver who fails to satisfy a judgment against himself growing out of a traffic accident; a section of the law specifically provides that a discharge in bankruptcy will not relieve the debtor of the obligation to pay and the consequence of license suspension for failure to pay. In the first two decisions, the Court majorities decided that the object of the state law was not to see that such judgments were paid but was rather a device to protect the public against irresponsible driving.[1366] The last case rejected this view and held that the Act's sole emphasis was one of providing leverage for the collection of damages from drivers and as such was in fact intended to and did frustrate the purpose of the federal bankruptcy law, the giving of a fresh start unhampered by debt.[1367]

If a State desires to participate in the assets of a bankruptcy, it must submit to the appropriate requirements of the bankruptcy court with respect to the filing of claims by a designated date. It cannot assert a claim for taxes by filing a demand at a later date.[1368]

[1363] Ohio v. Kovacs, 469 U.S. 274 (1985). *Compare* Kelly v. Robinson, 479 U.S. 36 (1986) (restitution obligations imposed as conditions of probation in state criminal actions are nondischargeable in proceedings under chapter 7), *with* Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552 (1990) (restitution obligations imposed as condition of probation in state criminal actions are dischargeable in proceedings under chapter 13).

[1364] Stellwagon v. Clum, 245 U.S. 605, 615 (1918).

[1365] Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Public Safety, 369 U.S. 153 (1962); Perez v. Campbell, 402 U.S. 637 (1971).

[1366] Reitz v. Mealey, 314 U.S. 33, 37 (1941); Kesler v. Department of Public Safety, 369 U.S. 153, 169–174 (1962).

[1367] Perez v. Campbell, 402 U.S. 637, 644–648, 651–654 (1971). The dissenters, Justice Blackmun for himself and Chief Justice Burger and Justices Harlan and Stewart, argued, in line with the Reitz and Kesler majorities, that the provision at issue was merely an attempt to assure driving competence and care on the part of its citizens and had only tangential effect upon bankruptcy.

[1368] New York v. Irving Trust Co., 288 U.S. 329 (1933).

Clauses 5 and 6. The Congress shall have Power *** To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

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

FISCAL AND MONETARY POWERS OF CONGRESS

Coinage, Weights, and Measures

The power "to coin money" and "regulate the value thereof" has been broadly construed to authorize regulation of every phase of the subject of currency. Congress may charter banks and endow them with the right to issue circulating notes,[1369] and it may restrain the circulation of notes not issued under its own authority.[1370] To this end it may impose a prohibitive tax upon the circulation of the notes of state banks[1371] or of municipal corporations.[1372] It may require the surrender of gold coin and of gold certificates in exchange for other currency not redeemable in gold. A plaintiff who sought payment for the gold coin and certificates thus surrendered in an amount measured by the higher market value of gold was denied recovery on the ground that he had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency.[1373] Inasmuch as "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power,"[1374] the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts,[1375] and, many years later, to abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed.[1376] The power to coin money also imports authority to maintain such coinage as a medium of ex-

[1369] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[1370] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).
[1371] 75 U.S. at 548.
[1372] National Bank v. United States, 101 U.S. 1 (1880).
[1373] Nortz v. United States, 249 U.S. 317 (1935).
[1374] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 549 (1871); Juilliard v. Greenman, 110 U.S. 421, 449 (1884).
[1375] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).
[1376] Norman v. Baltimore & O. R.R., 294 U.S. 240 (1935).

change at home, and to forbid its diversion to other uses by defacement, melting or exportation. [1377]

Punishment of Counterfeiting

In its affirmative aspect, this clause has been given a narrow interpretation; it has been held not to cover the circulation of counterfeit coin or the possession of equipment susceptible of use for making counterfeit coin. [1378] At the same time, the Supreme Court has rebuffed attempts to read into this provision a limitation upon either the power of the States or upon the powers of Congress under the preceding clause. It has ruled that a State may punish the issuance of forged coins. [1379] On the ground that the power of Congress to coin money imports "the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation," [1380] it has sustained federal statutes penalizing the importation or circulation of counterfeit coin, [1381] or the willing and conscious possession of dies in the likeness of those used for making coins of the United States. [1382] In short, the above clause is entirely superfluous. Congress would have had the power it purports to confer under the necessary and proper clause; and the same is the case with the other enumerated crimes it is authorized to punish. The enumeration was unnecessary and is not exclusive. [1383]

Borrowing Power Versus Fiscal Power

Usually the aggregate of the fiscal and monetary powers of the National Government—to lay and collect taxes, to borrow money and to coin money and regulate the value thereof—have reinforced each other, and, cemented by the necessary and proper clause, have provided a secure foundation for acts of Congress chartering banks and other financial institutions, [1384] or making its treasury notes legal tender in the payment of antecedent debts. [1385] But in 1935, the opposite situation arose—one in which the power to regulate the value of money collided with the obligation incurred in the exercise of the power to borrow money. By a vote of eight-to-one

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[1377] Ling Su Fan v. United States, 218 U.S. 302 (1910).
[1378] United States v. Marigold, 50 U.S. (9 How.), 560, 568 (1850).
[1379] Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).
[1380] United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850).
[1381] Id.
[1382] Baender v. Barnett, 255 U.S. 224 (1921).
[1383] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 536 (1871).
[1384] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737, 861 (1824); Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U.S. 29, 33 (1875); Smith v. Kansas City Title Co., 255 U.S. 180, 208 (1921).
[1385] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 540–547 (1871).

the Supreme Court held that the obligation assumed by the exercise of the latter was paramount, and could not be repudiated to effectuate the monetary policies of Congress.[1386] In a concurring opinion, Justice Stone declined to join with the majority in suggesting that "the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds."[1387] However, with a view to inducing purchase of savings bonds, the sale of which is essential to successful management of the national debt, Congress is competent to authorize issuance of regulations creating a right of survivorship in such bonds registered in co-ownership form, and such regulations preempt provisions of state law prohibiting married couples from utilizing the survivorship privilege whenever bonds are paid out of community property.[1388]

Clause 7. The Congress shall have Power *** To establish Post Offices and post roads.

POSTAL POWER

"Establish"

The great question raised in the early days with reference to the postal clause concerned the meaning to be given to the word "establish"—did it confer upon Congress the power to construct post offices and post roads, or only the power to designate from existing places and routes those that should serve as post offices and post roads? As late as 1855, Justice McLean stated that this power "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither under the commerce power nor the power to establish post roads could Congress construct a bridge over a navigable water.[1389] A decade earlier, however, the Court, without passing upon the validity of the original construction of the Cumberland Road, held that being "charged . . . with the transportation of the

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[1386] Perry v. United States, 294 U.S. 330, 353 (1935).
[1387] 294 U.S. at 361.
[1388] Free v. Bland, 369 U.S. 663 (1962).
[1389] United States v. Railroad Bridge Co., 27 Fed. Cas. 686 (No. 16,114) (C.C.N.D. Ill. 1855).

mails," Congress could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the road lying in the State.[1390] The debate on the question was terminated in 1876 by the decision in *Kohl v. United States*,[1391] sustaining a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

Power To Protect the Mails

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the mails.[1392] And not only are the mails under the protection of the National Government, they are in contemplation of law its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a state toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.[1393] Half a century later it was availed of as one of the grounds on which the national executive was conceded the right to enter the national courts and demand an injunction against the authors of any wide-spread disorder interfering with interstate commerce and the transmission of the mails.[1394]

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern States through the mails, President Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection." In the Senate, John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.[1395] On this point his reasoning would appear to be vindicated

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[1390] Searight v. Stokes, 44 U.S. (3 How.) 151, 166 (1845).

[1391] 91 U.S. 367 (1876).

[1392] Ex parte Jackson, 96 U.S. 727, 732 (1878). *See* United States Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114 (1981), in which the Court sustained the constitutionality of a law making it unlawful for persons to use, without payment of a fee (postage), a letterbox which has been designated an "authorized depository" of the mail by the Postal Service.

[1393] Searight v. Stokes, 44 U.S. (3 How.) 151, 169 (1845).

[1394] In re Debs, 158 U.S. 564, 599 (1895).

[1395] Cong. Globe, 24th Cong., 1st Sess., 3, 10, 298 (1835).

by such decisions as those denying the right of the States to prevent the importation of alcoholic beverages from other States.[1396]

Power To Prevent Harmful Use of the Postal Facilities

In 1872, Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of *Ex parte Jackson*,[1397] the Court sustained the exclusion of circulars relating to lotteries on the general ground that "the right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[1398] The leading fraud order case, decided in 1904, held to the same effect.[1399] Pointing out that it is "an indispensable adjunct to a civil government," to supply postal facilities, the Court restated its premise that the "legislative body in thus establishing a postal service may annex such conditions ... as it chooses."[1400]

Later cases first qualified these sweeping assertions and then overturned them, holding Government operation of the mails to be subject to constitutional limitations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness, and circulation and that all paid advertisements in the publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications.[1401] Chief Justice White warned that the Court by no means intended to imply that it endorsed the Government's "broad contentions concerning ... the classification of the mails, or by the way of condition ..."[1402] Again, when the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper he had found to have published material in contravention of the Espionage Act of 1917, the claim of absolute power in Congress to withhold the privilege was sedulously avoided.[1403]

[1396] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890).

[1397] 96 U.S. 727 (1878).

[1398] 96 U.S. at 732.

[1399] Public Clearing House v. Coyne, 194 U.S. 497 (1904), followed in Donaldson v. Read Magazine, 333 U.S. 178 (1948).

[1400] 194 U.S. at 506.

[1401] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

[1402] 229 U.S. at 316.

[1403] United States ex rel. Milwaukee Publishing 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.

A unanimous Court transformed these reservations into a holding in *Lamont v. Postmaster General*,[1404] 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.[1405] The statute violated the First Amendment because it inhibited the right of persons to receive any information which they wished to receive.[1406]

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.[1407] But, as in other areas, postal censorship systems must contain procedural guarantees sufficient to ensure prompt resolution of disputes about the character of allegedly objectionable material consistently with the First Amendment.[1408]

Exclusive Power as an Adjunct to Other Powers

In the cases just reviewed, it was attempted to close the mails to communication which were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935.[1409] To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies that failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treat-

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[1404] 381 U.S. 301 (1965).

[1405] 381 U.S. at 305, quoting Justice Holmes in United States ex rel. Milwaukee Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (dissenting opinion): "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. . . ." *And see* Blount v. Rizzi, 400 U.S. 410, 416 (1971) (quoting same language). But for a different perspective on the meaning and application of the 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. Notice, too, that 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).

[1406] Lamont v. Postmaster General, 381 U.S. 301, 306–307 (1965). *And see* id. at 308 (concurring opinion). Note that this was the first federal statute ever voided as in conflict with the First Amendment.

[1407] Rowan v. Post Office Department, 397 U.S. 728 (1970).

[1408] Blount v. Rizzi, 400 U.S. 410 (1971).

[1409] 49 Stat. 803, 812, 813, 15 U.S.C. §§ 79d, 79e.

ed this provision as a penalty. While it held this statute constitutional because the regulations whose infractions were thus penalized were themselves valid,[1410] it declared that "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province. . . ."[1411]

State Regulations Affecting the Mails

In determining the extent to which state laws may impinge upon persons or corporations whose services are utilized by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court has approved regulations having a trivial or remote relation to the operation of the postal service, while disallowing those constituting a serious impediment to it. Thus, a state statute, which granted to one company an exclusive right to operate a telegraph business in the State, was found to be incompatible with a federal law, which, in granting to any telegraph company the right to construct its lines upon post roads, was interpreted as a prohibition of state monopolies in a field Congress was entitled to regulate in the exercise of its combined power over commerce and post roads.[1412]

An Illinois statute which, as construed by the state courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station, also was held to be an unconstitutional interference with the power of Congress under this clause.[1413] But a Minnesota statute requiring intrastate trains to stop at county seats was found to be unobjectionable.[1414]

Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries,[1415] 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,[1416] have been held not to conflict with national legislation or policy in this field. Despite the interference *pro tanto* with the performance of a federal function, a State may arrest a postal employee charged with murder while he is engaged in carrying out his official duties,[1417] but it

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[1410] Electric Bond Co. v. SEC, 303 U.S. 419 (1938).
[1411] 303 U.S. at 442.
[1412] Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878).
[1413] Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896).
[1414] Gladson v. Minnesota, 166 U.S. 427 (1897).
[1415] Price v. Pennsylvania R.R., 113 U.S. 218 (1895); Martin v. Pittsburgh & Lake Erie R.R., 203 U.S. 284 (1906).
[1416] Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).
[1417] United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869).

cannot punish a person for operating a mail truck over its highways without procuring a driver's license from state authorities. [1418]

Clause 8. The Congress shall have Power *** To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

COPYRIGHTS AND PATENTS

Scope of the Power

This clause is the foundation upon which the national patent and copyright laws rest, although it uses neither of those terms. So far as patents are concerned, modern legislation harks back to the Statute of Monopolies of 1624, whereby Parliament endowed inventors with the sole right to their inventions for fourteen years. [1419] Copyright law, in turn, traces back to the English Statute of 1710, which secured to authors of books the sole right of publishing them for designated periods. [1420] Congress was not vested by this clause, however, with anything akin to the royal prerogative in the creation and bestowal of monopolistic privileges. [1421] Its power is limited with regard both to subject matter and to the purpose and duration of the rights granted. Only the writings and discoveries of authors and inventors may be protected, and then only to the end of promoting science and the useful arts. [1422] The concept of originality is central to copyright, and it is a constitutional requirement Congress may not exceed. [1423] While Congress may grant exclusive rights only for a limited period, it may extend the term upon the

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[1418] Johnson v. Maryland, 254 U.S. 51 (1920).

[1419] Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 17, 18 (1829).

[1420] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 656, 658 (1834).

[1421] *Cf.* Graham v. John Deere Co., 383 U.S. 1, 5, 9 (1966).

[1422] Kendall v. Winsor, 62 U.S. (21 How.) 322, 328 (1859); A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950).

[1423] Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991) (publisher of telephone directory, consisting of white pages and yellow pages, not entitled to copyright in white pages, which are only compilations). "To qualify for copyright protection, a work must be original to the author.... Originality, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses some minimal degree of creativity.... To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice." Id. at 345. First clearly articulated in The Trade Mark Cases, 100 U.S. 82, 94 (1879), and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–60 (1884), the requirement is expressed in nearly every copyright opinion, but its forceful iteration in *Feist* was noteworthy, because originality is a statutory requirement as well, 17 U.S.C. § 102(a), and it was unnecessary to discuss the concept in constitutional terms.

expiration of the period originally specified, and in so doing may protect the rights of purchasers and assignees.[1424] The copyright and patent laws do not have, of their own force, any extraterritorial operation.[1425]

Patentable Discoveries

The protection traditionally afforded by acts of Congress under this clause has been limited to new and useful inventions,[1426] and while a patentable invention is a mental achievement,[1427] for an idea to be patentable it must have first taken physical form.[1428] Despite the fact that the Constitution uses the term "discovery" rather than "invention," a patent may not be issued for the discovery of a hitherto unknown phenomenon of nature. "If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end."[1429] As for the mental processes which have been traditionally required, the Court has held in the past that an invention must display "more ingenuity . . . than the work of a mechanic skilled in the art;"[1430] and while combination patents have been at times sustained,[1431] the accumulation of old devices is patentable "only when the whole in some way exceeds the sum of its parts."[1432] Though "inventive ge-

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[1424] Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).

[1425] Brown v. Duchesne, 60 U.S. (19 How.) 183, 195 (1857). It is, however, the ultimate objective of many nations, including the United States, to develop a system of patent issuance and enforcement which transcends national boundaries; it has been recommended, therefore, that United States policy should be to harmonize its patent system with that of foreign countries so long as such measures do not diminish the quality of the United States patent standards. President's Commission on the Patent System, To Promote the Progress of Useful Arts, Report to the Senate Judiciary Committee, S. Doc. No. 5, 90th Cong., 1st sess. (1967), recommendation XXXV. Effectuation of this goal was begun with the United States agreement to the Berne Convention (the Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886), and Congress' conditional implementation of the Convention through legislation. The Berne Convention Implementation Act of 1988, P. L. 100–568, 102 Stat. 2853, 17 U.S.C. § 101 and notes.

[1426] Seymour v. Osborne, 78 U.S. (11 Wall.) 516, 549 (1871). *Cf.* Collar Company v. Van Dusen, 90 U.S. (23 Wall.) 530, 563 (1875); Reckendorfer v. Faber, 92 U.S. 347, 356 (1876).

[1427] Smith v. Nichols, 89 U.S. (21 Wall.) 112, 118 (1875).

[1428] Rubber-Tip Pencil Co. v. Howard, 87 U.S. (20 Wall.) 498, 507 (1874); Clark Thread Co. v. Willimantic Linen Co., 140 U.S. 481, 489 (1891).

[1429] Funk Bros. Seed Co. v. Kalo Co., 333 U.S. 127, 130 (1948). *Cf.* Dow Co. v. Halliburton Co., 324 U.S. 320 (1945); Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 89 (1941).

[1430] Sinclair Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945); Marconi Wireless Co. v. United States, 320 U.S. 1 (1943).

[1431] Keystone Mfg. Co. v. Adams, 151 U.S. 139 (1894); Diamond Rubber Co. v. Consol. Tire Co., 220 U.S. 428 (1911).

[1432] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950). An interesting concurring opinion was filed by Justice Douglas for himself and Justice

nius" and slightly varying language have been appearing in judicial decisions for almost a century,[1433] "novelty" and "utility" has been the primary statutory test since the Patent Act of 1793.[1434] With Congress' enactment of the Patent Act of 1952, however, § 103 of the Act required that an innovation be of a "nonobvious" nature, that is, it must not be an improvement that would be obvious to a person having ordinary skill in the pertinent art.[1435] This alteration of the standard of patentability was perceived by some as overruling previous Supreme Court cases requiring perhaps a higher standard for obtaining a patent,[1436] but the Court itself interpreted the provision as codifying its earlier holding in *Hotchkiss v. Greenwood*,[1437] in *Graham v. John Deere Co.*[1438] The Court in this

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Black: "It is not enough," says Justice Douglas, "that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." Id. at 154–155. He then quotes the following from an opinion of Justice Bradley's given 70 years ago:

"It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith. (Atlantic Works v. Brady, 107 U.S. 192, 200 (1882))." at 155.

The opinion concludes: "The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices: [listing instances]." Id. at 156-58.

[1433] "Inventive genius"—Justice Hunt in Reckendorfer v. Faber, 92 U.S. 347, 357 (1875); "Genius or invention"—Chief Justice Fuller in Smith v. Whitman Saddle Co., 148 U.S. 674, 681 (1893); "Intuitive genius"—Justice Brown in Potts v. Creager, 155 U.S. 597, 607 (1895); "Inventive genius"—Justice Stone in Concrete Appliances Co. v. Gomery, 269 U.S. 177, 185 (1925); "Inventive genius"—Justice Roberts in Mantle Lamp Co. v. Aluminum Co., 301 U.S. 544, 546 (1937); "the flash of creative genius, not merely the skill of the calling"—Justice Douglas in Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 91 (1941).

[1434] Act of February 21, 1793, ch. 11, 1 Stat. 318. *See* Graham v. John Deere Co., 383 U.S. 1, 3–4, 10 (1966).

[1435] 35 U.S.C. § 103.

[1436] *E.g.*, A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Jungerson v. Ostby & Barton Co., 335 U.S. 560 (1949); and Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941).

[1437] 52 U.S. (11 How.) 248 (1850).

[1438] 383 U.S. 1 (1966).

case said: "Innovation, *advancement*, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of ... useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored."[1439] Congressional requirements on patentability, then, are conditions and tests that must fall within the constitutional standard. Underlying the constitutional tests and congressional conditions for patentability is the balancing of two interests—the interest of the public in being protected against monopolies and in having ready access to and use of new items versus the interest of the country, as a whole, in encouraging invention by rewarding creative persons for their innovations. By declaring a constitutional standard of patentability, however, the Court, rather than Congress, will be doing the ultimate weighing. As for the clarity of the patentability standard, the three-fold test of utility, novelty and advancement seems to have been made less clear by the Supreme Court's recent rejuvenation of "invention" as a standard of patentability.[1440]

Procedure in Issuing Patents

The standard of patentability is a constitutional standard, and the question of the validity of a patent is a question of law.[1441] Congress may authorize the issuance of a patent for an invention by a special, as well as by general, law, provided the question as to whether the patentees device is in truth an invention is left open to investigation under the general law.[1442] The function of the Commissioner of Patents in issuing letters patent is deemed to be quasi-judicial in character. Hence an act granting a right of appeal from the Commission to the Court of Appeals for the District of Columbia is not unconstitutional as conferring executive power upon

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[1439] 383 U.S. at 6 (first emphasis added, second emphasis by Court). For a thorough discussion, *see* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146–152 (1989).

[1440] Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969). "The question of invention must turn on whether the combination supplied the key requirement." Id. at 60. But the Court also appeared to apply the test of nonobviousness in the same decision: "We conclude that the combination was reasonably obvious to one with ordinary skill in the art." Id. *See also* McClain v. Ortmayer, 141 U.S. 419, 427 (1891), where, speaking of the use of "invention" as a standard of patentability the Court said: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not."

[1441] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Mahn v. Harwood, 112 U.S. 354, 358 (1884). In Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996), the Court held that the interpretation of terms in a patent claim is a matter of law reserved entirely for the court. The Seventh Amendment does not require that such issues be tried to a jury.

[1442] Evans v. Eaton, 16 U.S. (3 Wheat.) 454, 512 (1818).

a judicial body.[1443] The primary responsibility, however, for weeding out unpatentable devices rests in the Patent Office.[1444] The present system of "de novo" hearings before the Court of Appeals allows the applicant to present new evidence which the Patent Office has not heard,[1445] thus making somewhat amorphous the central responsibility.

Nature and Scope of the Right Secured

The leading case bearing on the nature of the rights which Congress is authorized to *secure* is that of *Wheaton v. Peters*. Wheaton charged Peters with having infringed his copyright on the twelve volumes of "Wheaton's Reports," wherein are reported the decisions of the United States Supreme Court for the years from 1816 to 1827 inclusive. Peters' defense turned on the proposition that inasmuch as Wheaton had not complied with all of the requirements of the act of Congress, his alleged copyright was void. Wheaton, while denying this assertion of fact, further contended that the statute was only intended to *secure* him in his pre-existent rights at common law. These at least, he claimed, the Court should protect. A divided Court held in favor of Peters on the legal question. It denied, in the first place, that there was any principle of the common law that protected an author in the sole right to continue to publish a work once published. It denied, in the second place, that there is any principle of law, common or otherwise, which pervades the Union except such as are embodied in the Constitution and the acts of Congress. Nor, in the third place, it held, did the word "securing" in the Constitution recognize the alleged common law principle Wheaton invoked. The exclusive right which Congress is authorized to *secure* to authors and inventors owes its existence solely to the acts of Congress securing it,[1446] from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress, in its unhampered consultation of the public interest, sees fit to impose.[1447]

[1443] United States v. Duell, 172 U.S. 576, 586–589 (1899). *See also* Butterworth v. United States ex rel. Hoe, 112 U.S. 50 (1884).

[1444] Graham v. John Deere Co., 383 U.S. 1, 18 (1966).

[1445] In Jennings v. Brenner, 255 F. Supp. 410, 412 (D.D.C. 1966), District Judge Holtzoff suggested that a system of remand be adopted.

[1446] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 660 (1834); Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[1447] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 662 (1834); Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815). A major limitation of copyright law is that "fair use" of a copyrighted work is not an infringement. Fair use can involve such things as citation for the use of criticism and reproduction for classroom purposes, but it may not

The Court's "reluctance to expand [copyright] protection without explicit legislative guidance" controlled its decision in *Sony Corp. v. Universal City Studios*,[1448] in which it held that the manufacture and sale of video tape (or cassette) recorders for home use do not constitute "contributory" infringement of the copyright in television programs. Copyright protection, the Court reiterated, is "wholly statutory," and courts should be "circumspect" in extending protections to new technology. The Court refused to hold that contributory infringement could occur simply through the supplying of the devices with which someone else could infringe, especially in view of the fact that VCRs are capable of substantial noninfringing "fair use," e.g., time shifting of television viewing.

In giving to authors the exclusive right to dramatize any of their works, Congress did not exceed its powers under this clause. Even as applied to pantomine dramatization by means of silent motion pictures, the act was sustained against the objection that it extended the copyright to ideas rather than to the words in which they were clothed.[1449] But the copyright of the description of an art in a book was held not to lay a foundation for an exclusive claim to the art itself. The latter can be protected, if at all, only by letters patent.[1450] Since copyright is a species of property distinct from the ownership of the equipment used in making copies of the matter copyrighted, the sale of a copperplate under execution did not pass any right to print and publish the map which the copperplate was designed to produce.[1451] A patent right may, however, be subjected, by bill in equity, to payment of a judgment debt of the patentee.[1452]

Power of Congress Over Patents and Copyrights

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government

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supersede the use of the original work. *See* Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (an unauthorized 300 to 400 word excerpt, published as a news "scoop" of the authorized prepublication excerpt of former President Ford's memoirs and substantially affecting the potential market for the authorized version, was not a fair use within the meaning of § 107 of the Copyright Act. 17 U.S.C. § 107). For fair use in the context of a song parody, *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[1448] 464 U.S. 417, 431 (1984).

[1449] Kalem Co. v. Harper Bros., 222 U.S. 55 (1911). For other problems arising because of technological and electronic advancement *see, e.g.*, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

[1450] Baker v. Selden, 101 U.S. 99, 105 (1880).

[1451] Stevens v. Gladding, 58 U.S. (17 How.) 447 (1855).

[1452] Ager v. Murray, 105 U.S. 126 (1882).

without just compensation.[1453] Congress may, however, modify rights under an existing patent, provided vested property rights are not thereby impaired,[1454] but it does not follow that it may authorize an inventor to recall rights that he has granted to others or reinvest in him rights of property that he had previously conveyed for a valuable and fair consideration.[1455] Furthermore, the rights the present statutes confer are subject to the antitrust laws, though it can hardly be said that the cases in which the Court has endeavored to draw the line between the rights claimable by patentees and the kind of monopolistic privileges which are forbidden by those acts exhibit entire consistency in their holdings.[1456]

State Power Affecting Patents and Copyrights

Displacement of state police or taxing powers by federal patent or copyright has been a source of considerable dispute. Ordinarily, rights secured to inventors must be enjoyed in subordination to the general authority of the States over all property within their limits. A state statute requiring the condemnation of illuminating oils inflammable at less than 130 degrees Fahrenheit was held not to interfere with any right secured by the patent laws, although the oil for which the patent was issued could not be made to comply with state specifications.[1457] In the absence of federal legislation, a State may prescribe reasonable regulations for the transfer of patent rights, so as to protect its citizens from fraud. Hence, a requirement of state law that the words "given for a patent right" appear on the face of notes given in payment for such right is not unconstitutional.[1458] Royalties received from patents or copyrights are subject to a nondiscriminatory state income tax, a holding to the contrary being overruled.[1459]

[1453] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* United States v. Burns, 79 U.S. (12 Wall.) 246, 252 (1871); Cammeyer v. Newton, 94 U.S. 225, 234 (1877); Hollister v. Benedict Manufacturing Co., 113 U.S. 59, 67 (1885); United States v. Palmer, 128 U.S. 262, 271 (1888); Belknap v. Schild, 161 U.S. 10, 16 (1896).

[1454] McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843).

[1455] Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 553 (1852).

[1456] *See* Motion Picture Co. v. Universal Film Co., 243 U.S. 502 (1917); Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. New Wrinkle, Inc., 342 U.S. 371 (1952), where the Justices divided 6 to 3 as to the significance for the case of certain leading precedents; and Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

[1457] Patterson v. Kentucky, 97 U.S. 501 (1879).

[1458] Allen v. Riley, 203 U.S. 347 (1906); John Woods & Sons v. Carl, 203 U.S. 358 (1906); Ozan Lumber Co. v. Union County Bank, 207 U.S. 251 (1907).

[1459] Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), overruling Long v. Rockwood, 277 U.S. 142 (1928).

State power to protect things not patented or copyrighted under federal law has been buffeted under changing Court doctrinal views. In two major cases, the Court held that a State could not utilize unfair competition laws to prevent or punish the copying of products not entitled to a patent. Emphasizing the necessity for a uniform national policy and adverting to the monopolistic effects of the state protection, the Court inferred that because Congress had not extended the patent laws to the material at issue, federal policy was to promote free access when the materials were thus in the public domain.[1460] But, in *Goldstein v. California*,[1461] the Court distinguished the two prior cases and held that the determination whether a state "tape piracy" statute conflicted with the federal copyright statute depended upon the existence of a specific congressional intent to forbid state protection of the "writing" there involved. Its consideration of the statute and of its legislative history convinced the Court that Congress in protecting certain "writings" and in not protecting others bespoke no intention that federally unprotected materials should enjoy no state protection, only that Congress "has left the area unattended."[1462] Similar analysis was used to sustain the application of a state trade secret law to protect a chemical process, that was patentable but not patented, from utilization by a commercial rival, which had obtained the process from former employees of the company, all of whom had signed agreements not to reveal the process. The Court determined that protection of the process by state law was not incompatible with the federal patent policy of encouraging invention and public use of patented inventions, inasmuch as the trade secret law serves other interests not similarly served by the patent law and where it protects matter clearly patentable it is not likely to deter applications for patents.[1463]

[1460] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[1461] 412 U.S. 546 (1973). Informing the decisions were different judicial attitudes with respect to the preclusion of the States from acting in fields covered by the patent and copyright clauses, whether Congress had or had not acted. The latter case recognized permissible state interests, id. at 552–560, whereas the former intimated that congressional power was exclusive. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228–31 (1964).

[1462] In the 1976 revision of the copyright law, Congress broadly preempted, with narrow exceptions, all state laws bearing on material subject to copyright. 17 U.S.C. § 301. The legislative history makes clear Congress' intention to overturn Goldstein and "to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law." H. Rep. No. 94–1476, 94th Congress, 2d sess. (1976), 130. The statute preserves state tape piracy and similar laws as to sound recordings fixed before February 15, 1972, until February 15, 2047.

[1463] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). *See also* Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979).

Returning to the *Sears* and *Compco* emphasis, the Court unanimously, in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, [1464] reasserted that "efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions." [1465] At the same time, however, the Court attempted to harmonize *Goldstein*, *Kewanee*, and other decisions: there is room for state regulation of the use of unpatented designs if those regulations are "necessary to promote goals outside the contemplation of the federal patent scheme." [1466] What States are forbidden to do is to "offer *patent-like protection* to intellectual creations which would otherwise remain unprotected as a matter of federal law." [1467] A state law "aimed directly at preventing the exploitation of the [unpatented] design" is invalid as impinging on an area of pervasive federal regulation. [1468]

Trade-Marks and Advertisements

In the famous *Trade-Mark Cases*, [1469] decided in 1879, the Supreme Court held void acts of Congress, which, in apparent reliance upon this clause, extended the protection of the law to trademarks registered in the Patent Office. "The ordinary trade mark," said Justice Miller for the Court, "has no necessary relation to invention or discovery;" nor is it to be classified "under the head of writings of authors." It does not "depend upon novelty, invention, discovery, or any work of the brain." [1470] Not many years later the Court, again speaking through Justice Miller, ruled that a photograph may be constitutionally copyrighted, [1471] while still more recently a circus poster was held to be entitled to the same protection. In answer to the objection of the circuit court that a lithograph which "has no other use than that of a mere advertisement . . . (would not be within) the meaning of the Constitution," Justice Holmes summoned forth the shades of Velasquez, Whistler, Rembrandt, Ruskin, Degas, and others in support of the proposition that it is not for the courts to attempt to judge the worth of pic-

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[1464] 489 U.S. 141 (1989).

[1465] 489 U.S. at 156.

[1466] 489 U.S. at 166. As examples of state regulation that might be permissible, the Court referred to unfair competition, trademark, trade dress, and trade secrets laws. Perhaps by way of distinguishing *Sears* and *Compco*, both of which invalidated use of unfair competition laws, the Court suggested that prevention of "consumer confusion" is a permissible state goal that can be served in some instances by application of such laws. Id. at 154.

[1467] 489 U.S. at 156 (emphasis supplied).

[1468] 489 U.S. at 158.

[1469] 100 U.S. 82 (1879).

[1470] 100 U.S. at 94.

[1471] Burrow-Giles Lithographic Co. v. Saroney, 111 U.S. 53 (1884).

torial illustrations outside the narrowest and most obvious limits.[1472]

Clause 9. The Congress shall have Power *** To constitute Tribunals inferior to the supreme Court; (see Article III).

IN GENERAL

See discussion "The Power of Congress to Control the Federal Courts" under Article III, § 2, cl. 2, infra.

Clause 10. The Congress shall have Power *** To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

PIRACIES, FELONIES, AND OFFENSES AGAINST THE LAW OF NATIONS

Origin of the Clause

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ."[1473] 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.[1474] 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.[1475] 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."[1476] In the debate on the

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[1472] Bleisten v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[1473] 1 J. KENT, COMMENTARIES ON AMERICAN LAW 1 (1826).

[1474] 19 JOURNALS OF THE CONTINENTAL CONGRESS 315, 361 (1912); 20 id. at 762; 21 id. at 1136–37, 1158.

[1475] Article IX.

[1476] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 168, 182 (Rev. ed. 1937).

floor of the Convention, the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies, and offenses against the law of nations.[1477]

Definition of Offenses

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case Congress must undertake to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations" was held to be an appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law.[1478] Similarly, in *Ex parte Quirin*,[1479] the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions . . .," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."[1480] Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus, the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds, and other securities of foreign governments.[1481]

[1477] Id. at 316.

[1478] 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).

[1479] 317 U.S. 1, 27 (1942).

[1480] 317 U.S. at 28.

[1481] United States v. Arjona, 120 U.S. 479, 487, 488 (1887).

Extraterritorial Reach of the Power

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932 [1482] that the general grant of admiralty and maritime jurisdiction by Article III, § 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision "cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the National Government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the States and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters." [1483] Within the meaning of this section, an offense is committed on the high seas even where the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country. [1484]

Clauses 11, 12, 13, and 14. The Congress shall have power *** ;

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

[1482] United States v. Flores, 3 F. Supp. 134 (E.D. Pa. 1932).
[1483] United States v. Flores, 289 U.S. 137, 149–150 (1933).
[1484] United States v. Furlong, 18 U.S. (5 Wheat.) 184, 200 (1820).

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

To provide and maintain a Navy.

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

THE WAR POWER

Source and Scope

Three Theories.—Three different views regarding the source of the war power found expression in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. Writing in *The Federalist*,[1485] Hamilton elaborated the theory that the war power is an aggregate of the particular powers granted by Article I, § 8. Not many years later, in 1795, the argument was advanced that the war power of the National Government is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.[1486] Chief Justice Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it. In *McCulloch v. Maryland*,[1487] he listed the power "to declare and conduct a war"[1488] as one of the "enumerated powers" from which the authority to charter the Bank of the United States was deduced. During the era of the Civil War, the two latter theories were both given countenance by the Supreme Court. Speaking for four Justices in *Ex parte Milligan*, Chief Justice Chase described the power to declare war as "necessarily" extending "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns."[1489] In another case, adopting the terminology used by Lincoln in his Message to Congress on July 4, 1861,[1490] the Court referred to "the war power" as a single unified power.[1491]

An Inherent Power.—Thereafter, we find the phrase, "the war power," being used by both Chief Justice White[1492] and Chief

[1485] THE FEDERALIST, No. 23 (J. Cooke ed. 1937), 146–51.
[1486] Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795).
[1487] 17 U.S. (4 Wheat.) 316 (1819).
[1488] 17 U.S. at 407. (Emphasis supplied.)
[1489] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (dissenting opinion); *see also* Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871); and United States v. MacIntosh, 283 U.S. 605, 622 (1931).
[1490] CONG. GLOBE, 37th Congress, 1st Sess., App. 1 (1861).
[1491] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 86 (1875).
[1492] Northern Pac. Ry. v. North Dakota ex rel. Langer, 250 U.S. 135, 149 (1919).

Justice Hughes,[1493] the former declaring the power to be "complete and undivided."[1494] Not until 1936, however, did the Court explain the logical basis for imputing such an inherent power to the Federal Government. In *United States v. Curtiss-Wright Corp.*,[1495] the reasons for this conclusion were stated by Justice Sutherland as follows: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. . . . It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality."[1496]

A Complexus of Granted Powers.—In *Lichter v. United States*,[1497] on the other hand, the Court speaks of the "war powers" of Congress. Upholding the Renegotiation Act, it declared that: "In view of this power 'To raise and support Armies, . . . and the power granted in the same Article of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers', . . . the only question remaining is whether the Renegotiation Act was a law 'necessary and proper for carrying into Execution' the war powers of Congress and especially its power to support armies."[1498] In a footnote, it listed the Preamble, the necessary and proper clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander-in-Chief of the Army and Navy, as being "among the many other provisions implementing

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[1493] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[1494] Northern Pac. Ry. v. North Dakota ex rel. Langer, 250 U.S. 135, 149 (1919).

[1495] 299 U.S. 304 (1936).

[1496] 299 U.S. at 316, 318. On the controversy respecting Curtiss-Wright, *see* The Curtiss-Wright Case, infra.

[1497] 334 U.S. 742 (1948).

[1498] 334 U.S. at 757–58.

the Congress and the President with powers to meet the varied demands of war. . . ." [1499]

Declaration of War

In the early draft of the Constitution presented to the Convention by its Committee of Detail, Congress was empowered "to make war." [1500] Although there were solitary suggestions that the power should better be vested in the President alone, [1501] in the Senate alone, [1502] or in the President and the Senate, [1503] the sentiment of the Convention, as best we can determine from the limited notes of the proceedings, was that the potentially momentous consequences of initiating armed hostilities should be called up only by the concurrence of the President and both Houses of Congress. [1504] In contrast to the English system, the Framers did not want the wealth and blood of the Nation committed by the decision of a single individual; [1505] in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of executive efficiency nor to entrust the matter solely to a branch so close to popular passions. [1506]

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to

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[1499] 334 U.S. at 755 n.3.

[1500] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 313 (rev. ed. 1937).

[1501] Mr. Butler favored "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Id. at 318.

[1502] Mr. Pinkney thought the House was too numerous for such deliberations but that the Senate would be more capable of a proper resolution and more acquainted with foreign affairs. Additionally, with the States equally represented in the Senate, the interests of all would be safeguarded. Id.

[1503] Hamilton's plan provided that the President was "to make war or peace, with the advice of the senate . . ." 1 id. at 300.

[1504] 2 id., 318–319. In THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 465, 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." (Emphasis in original). *And see* id. at No. 26, 164–171. *Cf.* C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES ch. V (1921).

[1505] THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 464–465, 470. During the Convention, Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (rev. ed. 1937).

[1506] The Articles of Confederation vested powers with regard to foreign relations in the Congress.

"declare war." [1507] Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to insure that the President was empowered to repel sudden attacks [1508] without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President. [1509]

An early controversy revolved about the issue of the President's powers and the necessity of congressional action when hostilities are initiated against us rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States, and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Jefferson sent a squadron of frigates to the Mediterranean to protect our ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war. [1510] Hamilton espoused a different interpretation, contending that the Constitution vested in Congress the power to initiate war but that when another nation made war upon the United States we were already in a state of war and no declaration by Congress was needed. [1511] 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 . . ." [1512] But no formal declaration of

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[1507] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318–319 (rev. ed. 1937).

[1508] 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.

[1509] Connecticut originally voted against the amendment to substitute "declare" for "make" but "on the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed. . . ." Id. at 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 Marshall: "The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry."); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

[1510] MESSAGES AND PAPERS OF THE PRESIDENTS 326, 327 (J. Richardson ed., 1896).

[1511] 7 WORKS OF ALEXANDER HAMILTON 746–747 (J. Hamilton ed., 1851).

[1512] 2 Stat. 129, 130 (1802) (emphasis supplied).

war was passed, Congress apparently accepting Hamilton's view.[1513]

Sixty years later, the Supreme Court sustained the blockade of the Southern ports instituted by Lincoln in April 1861 at a time when Congress was not in session.[1514] Congress had subsequently ratified Lincoln's action,[1515] so that it was unnecessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization, but the Court nonetheless approved, five-to-four, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact. "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."[1516] The minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the enforcement of order against insurgency, Congress alone could stamp an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.[1517]

The view of the majority was proclaimed by a unanimous Court a few years later when it became necessary to ascertain the exact dates on which the war began and ended. The Court, the Chief Justice said, must "refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second."[1518]

These cases settled the issue whether a state of war could exist without formal declaration by Congress. When hostile action is taken against the Nation, or against its citizens or commerce, the appropriate response by order of the President may be resort to force. But the issue so much a source of controversy in the era of the Cold War and so divisive politically in the context of United States involvement in the Vietnam War has been whether the

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[1513] Of course, Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[1514] The Prize Cases, 67 U.S. (2 Bl.) 635 (1863).

[1515] 12 Stat. 326 (1861).

[1516] The Prize Cases, 67 U.S. (2 Bl.) 635, 669 (1863).

[1517] 67 U.S. at 682.

[1518] The Protector, 79 U.S. (12 Wall.) 700, 702 (1872).

President is empowered to commit troops abroad to further national interests in the absence of a declaration of war or specific congressional authorization short of such a declaration.[1519] The Supreme Court studiously refused to consider the issue in any of the forms in which it was presented,[1520] and the lower courts generally refused, on "political question" grounds, to adjudicate the matter.[1521] In the absence of judicial elucidation, the Congress and the President have been required to accommodate themselves in the controversy to accept from each other less than each has been willing to accept but more than either has been willing to grant.[1522]

THE POWER TO RAISE AND MAINTAIN ARMED FORCES

Purpose of Specific Grants

The clauses of the Constitution, which give Congress authority to raise and support armies, and so forth, were not inserted to

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[1519] 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, P.L. 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. P.L. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548.

[1520] 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); Holtzman v. Schlesinger, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court simply denied certiorari in all cases on its discretionary docket.

[1521] *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 (C.A.D.C. 1967), *cert. denied*, 389 U.S. 945 (1968); Mora v. McNamara, 387 F.2d 862 (D.C., 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, the courts were no more receptive to suits, many by Members of Congress, seeking to obtain a declaration of the President's powers. The political question doctrine as well as certain discretionary authorities were relied on. *See, e.g.*, Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982) (military aid to El Salvador), *affd.* 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), *affd.* 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).

[1522] For further discussion, *see* section on President's commander-in-chief powers.

endow the national government rather than the States with the power to do these things but to designate the department of the Federal Government which would exercise the powers. As we have noted above, the English king was endowed with the power not only to initiate war but the power to raise and maintain armies and navies.[1523] Aware historically that these powers had been utilized to the detriment of the liberties and well-being of Englishmen and aware that in the English Declaration of Rights of 1688 it was insisted that standing armies could not be maintained without the consent of Parliament, the Framers vested these basic powers in Congress.[1524]

Time Limit on Appropriations for the Army

Prompted by the fear of standing armies to which Story alluded, the framers inserted the limitation that "no appropriation of money to that use shall be for a longer term than two years." In 1904, the question arose whether this provision would be violated if the Government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments are likely to continue for more than two years. Solicitor-General Hoyt ruled that such a contract would be lawful; that the appropriations limited by the Constitution "are those only which are to raise and support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense. . . ."[1525] Relying on this earlier opinion, Attorney General Clark ruled in 1948 that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended."[1526]

Conscription

The constitutions adopted during the Revolutionary War by at least nine of the States sanctioned compulsory military service.[1527] Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be en-

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[1523] W. BLACKSTONE, COMMENTARIES 263 (St. G. Tucker ed., 1803).

[1524] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1187 (1833).

[1525] 25 Ops. Atty. Gen. 105, 108 (1904).

[1526] 40 Ops. Atty. Gen. 555 (1948).

[1527] Selective Draft Law Cases, 245 U.S. 366, 380 (1918); Cox v. Wood, 247 U.S. 3 (1918).

acted.[1528] In 1863, a compulsory draft law was adopted and put into operation without being challenged in the federal courts.[1529] Not so the Selective Service Act of 1917.[1530] This measure was attacked on the grounds that it tended to deprive the States of the right to "a well-regulated militia," that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby.[1531]

Before the United States entered the first World War, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the following words: "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[1532] Accordingly, in the *Selective Draft Law Cases*,[1533] it dismissed the objection under that amendment as a contention that was "refuted by its mere statement."[1534]

Although the Supreme Court has so far formally declined to pass on the question of the "peacetime" draft,[1535] its opinions leave no doubt of the constitutional validity of the act. In *United States v. O'Brien*,[1536] upholding a statute prohibiting the destruction of

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[1528] 245 U.S. at 385.

[1529] 245 U.S. at 386–88. The measure was upheld by a state court. Kneedler v. Lane, 45 Pa. St. 238 (1863).

[1530] Act of May 18, 1917, ch. 15, 40 Stat. 76.

[1531] Selective Draft Law Cases, 245 U.S. 366, 381, 382 (1918).

[1532] Butler v. Perry, 240 U.S. 328, 333 (1916).

[1533] 245 U.S. 366 (1918).

[1534] 245 U.S. at 390.

[1535] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription has been precluded as of July 1, 1973, P.L. 92–129, 85 Stat. 353, 50 U.S.C. App. § 467(c), and registration was discontinued in 1975. Pres. Proc. No. 4360, 3 C.F.R. 462, 50 U.S.C. App. § 453 note. Registration, but not conscription, was reactivated in the wake of the invasion of Afghanistan. P.L. 96–282, 94 Stat. 552 (1980).

[1536] 391 U.S. 367 (1968).

selective service registrants' certificate of registration, the Court, speaking through Chief Justice Warren, thought "[t]he power of Congress to classify and conscript manpower for military service is 'beyond question.'" [1537] In noting Congress' "broad constitutional power" to raise and regulate armies and navies, [1538] the Court has specifically observed that the conscription act was passed "pursuant to" the grant of authority to Congress in clauses 12–14. [1539]

Care of the Armed Forces

Scope of the congressional and executive authority to prescribe the rules for the governance of the military is broad and subject to great deference by the judiciary. The Court recognizes "that the military is, by necessity, a specialized society separate from civilian society," that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than it is when prescribing rules for [civilian society]." [1540] Denying that Congress or military authorities are free to disregard the Constitution when acting in this area, [1541] the Court nonetheless operates with "a healthy deference to legislative and executive judgments" with respect to military affairs, [1542] 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." [1543]

In reliance upon this deference to congressional judgment with respect to the roles of the sexes in combat and the necessities of military mobilization, coupled with express congressional consideration of the precise questions, the Court sustained as constitutional the legislative judgment to provide only for registration of males

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[1537] 391 U.S. at 377, quoting Lichter v. United States, 334 U.S. 742, 756 (1948).

[1538] Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

[1539] Rostker v. Goldberg, 453 U.S. 57, 59 (1981). *See* id. at 64–65. *And see* 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).

[1540] Parker v. Levy, 417 U.S. 733, 743–752 (1974). *See also* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Schlesinger v. Councilman, 420 U.S. 738, 746–748 (1975); Greer v. Spock, 424 U.S. 828, 837–838 (1976); Middendorf v. Henry, 425 U.S. 25, 45–46 (1976); Brown v. Glines, 444 U.S. 348, 353–358 (1980); Rostker v. Goldberg, 453 U.S. 57, 64–68 (1981).

[1541] Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[1542] 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).

[1543] 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).

for possible future conscription.[1544] Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court upheld the validity of military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature and the distribution of literature without prior approval of post headquarters, with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base.[1545] 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.[1546] 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.[1547] 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.[1548]

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall be received, the compensation he shall be allowed, and the service to which he shall be assigned. This power may be exerted to supersede parents' control of minor sons who are needed for military service. Where the statute requiring the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of

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[1544] 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).

[1545] Greer v. Spock, 424 U.S. 828 (1976), limiting Flower v. United States, 407 U.S. 197 (1972).

[1546] Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034, which protects a serviceman's right to communicate with a Member of Congress, but which the Court interpreted narrowly.

[1547] Parker v. Levy, 417 U.S. 733 (1974).

[1548] Chappell v. Wallace, 462 U.S. 296 (1983) (enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations could not bring constitutional tort suits); United States v. Stanley, 483 U.S. 669 (1987) (officer who had been an unwitting, unconsenting subject of an Army experiment to test the effects of LSD on human subjects could not bring a constitutional tort for damages). These considerations are also the basis of the Court's construction of the Federal Tort Claims Act so that it does not reach injuries arising out of or in the course of military activity. Feres v. United States, 340 U.S. 135 (1950). In United States v. Johnson, 481 U.S. 681 (1987), four Justices urged reconsideration of *Feres*, but that has not occurred.

his mother was not binding on the Government.[1549] Since the possession of government insurance payable to the person of his choice is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of state law, and may exempt the proceeds from the claims of creditors.[1550] Likewise, Congress may bar a State from taxing the tangible, personal property of a soldier, assigned for duty therein, but domiciled elsewhere.[1551] 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.[1552]

Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents

Under its power to make rules for the government and regulation of the armed forces, Congress has set up a system of criminal law binding on all servicemen, with its own substantive laws, its own courts and procedures, and its own appeals procedure.[1553] The drafters of these congressional enactments conceived of a military justice system with application to all servicemen wherever they are, to reservists while on inactive duty training, and to certain civilians in special relationships to the military. In recent years, all these conceptions have been restricted.

Servicemen.—Although there had been extensive disagreement about the practice of court-martial trial of servicemen for nonmilitary offenses,[1554] the matter never was raised in substantial degree until the Cold War period when the United States found

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[1549] United States v. Williams, 302 U.S. 46 (1937). *See also* In re Grimley, 137 U.S. 147, 153 (1890); In re Morrissey, 137 U.S. 157 (1890).

[1550] 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).

[1551] 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).

[1552] McKinley v. United States, 249 U.S. 397 (1919).

[1553] 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* Loving v. United States, 517 U.S. 748 (1996) (in context of the death penalty under the UCMJ).

[1554] *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 (Justice Harlan dissenting). *See* Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

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*,[1555] the Court held that court-martial jurisdiction was lacking to try servicemen charged with a crime that was not "service connected." The Court attempted to assay no definition of "service connection," but among the factors it noted were that the crime in question was committed against a civilian in peacetime in the United States off-base while the serviceman was lawfully off duty.[1556] *O'Callahan* was overruled in *Solorio v. United States*,[1557] the Court holding that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[1558] Chief Justice Rehnquist's opinion for the Court insisted that *O'Callahan* had been based on erroneous readings of English and American history, and that "the service connection approach . . . has proved confusing and difficult for military courts to apply."[1559]

With regard to trials before courts-martial, it is not clear what provisions of the Bill of Rights and other constitutional guarantees do apply. The Fifth Amendment expressly excepts "[c]ases arising in the land and naval forces" from its grand jury provision, and there is an implication that these cases are also excepted from the Sixth Amendment.[1560] The double jeopardy provision of the Fifth Amendment appears to be applicable.[1561] The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those expressly or by implication inapplicable to the military.[1562] The Uniform Code of Military Justice, supplemented by the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures, so that many

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[1555] 395 U.S. 258 (1969).

[1556] 395 U.S. at 273–74. *See also* Relford v. Commandant, 401 U.S. 355 (1971); Gosa v. Mayden, 413 U.S. 665 (1973).

[1557] 483 U.S. 435 (1987).

[1558] 483 U.S. at 450–51.

[1559] 483 U.S. at 448. Although the Court of Military Appeals had affirmed Solorio's military-court conviction on the basis that the service-connection test had been met, the Court elected to reconsider and overrule O'Callahan altogether.

[1560] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123, 138–139 (1866); Ex parte Quirin, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in Middendorf v. Henry, 425 U.S. 25 (1976).

[1561] *See* Wade v. Hunter, 336 U.S. 684 (1949). *Cf.* Grafton v. United States, 206 U.S. 333 (1907).

[1562] 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).

such issues are unlikely to arise absolutely necessitating constitutional analysis.[1563] However, the Code leaves intact much of the criticized traditional structure of courts-martial, including the pervasive possibilities of command influence,[1564] and the Court of Military Appeals is limited on the scope of its review,[1565] thus creating areas in which constitutional challenges are likely.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society.[1566] This difference has resulted in a military Code regulating aspects of the conduct of members of the military that in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards.[1567] Neither did application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, inasmuch as the speech was unprotected, and, even while it might reach protected speech the officer here was unable to raise that issue.[1568]

Military courts are not Article III courts but agencies established pursuant to Article I.[1569] It was established in the last century that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review.[1570] Until August 1, 1984, the Supreme Court had no jurisdiction to review by writ of *certiorari* the proceedings of a military commission, but Congress has now conferred appellate jurisdiction of decisions of the Court of Military Appeals.[1571] Prior to this time, civil court review of court-martial decisions was possible

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[1563] The UCMJ guarantees counsel, protection from self-incrimination and double jeopardy, and warnings of rights prior to interrogation, to name a few.

[1564] *Cf.* O'Callahan v. Parker, 395 U.S. 258, 263–264 (1969).

[1565] 10 U.S.C. § 867.

[1566] Parker v. Levy, 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."

[1567] 417 U.S. at 756.

[1568] 417 U.S. at 757-61.

[1569] 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.

[1570] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

[1571] Military Justice Act of 1983, P.L. 98–209, 97 Stat. 1393, 28 U.S.C. § 1259.

through *habeas corpus* jurisdiction,[1572] an avenue that continues to exist, but the Court severely limited the scope of such review, restricting it to the issue whether the court-martial has jurisdiction over the person tried and the offense charged.[1573] In *Burns v. Wilson*,[1574] however, at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on *habeas corpus* could review claims of denials of due process rights to which the military had not given full and fair consideration. Since *Burns*, the Court has thrown little light on the range of issues cognizable by a federal court in such litigation[1575] and the lower federal courts have divided several ways.[1576]

Civilians and Dependents.—In recent years, the Court rejected the view of the drafters of the Code of Military Justice with regard to the persons Congress may constitutionally reach under its clause 14 powers. Thus, it held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but must be charged in federal court, if at all.[1577] After first leaning the other way,[1578] the Court on rehearing found lacking court-martial jurisdiction, at least in peacetime, to try civilian dependents of service personnel for capital crimes committed outside the United States.[1579] Subsequently, the Court extended its ruling to civilian dependents overseas charged with noncapital crimes[1580] and to ci-

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[1572] *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).

[1573] 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).

[1574] 346 U.S. 137 (1953).

[1575] *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).

[1576] *E.g.*, Calley v. Callaway, 519 F. 2d 184, 194–203 (5th Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 911 (1976).

[1577] United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). *See also* Lee v. Madigan, 358 U.S. 228 (1959).

[1578] Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956)

[1579] Reid v. Covert, 354 U.S. 1 (1957) (voiding court-martial convictions of two women for murdering their soldier husbands stationed in Japan). Chief Justice Warren and Justices Black, Douglas, and Brennan were of the opinion Congress' power under clause 14 could not reach civilians. Justices Frankfurter and Harlan concurred, limited to capital cases. Justices Clark and Burton dissented.

[1580] Kinsella v. United States ex rel. Singleton, 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

vilian employees of the military charged with either capital or noncapital crimes. [1581]

WAR LEGISLATION

War Powers in Peacetime

To some indeterminate extent, the power to wage war embraces the power to prepare for it and the power to deal with the problems of adjustment following its cessation. Justice Story emphasized that "[i]t is important also to consider, that the surest means of avoiding war is to be prepared for it in peace.... How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? ... It will be in vain to oppose constitutional barriers to the impulse of self-preservation." [1582] Authoritative judicial recognition of the power is found in *Ashwander v. Tennessee Valley Authority*, [1583] in which the power of the Federal Government to construct and operate a dam and power plant, pursuant to the National Defense Act of June 3, 1916, [1584] was sustained. The Court noted that the assurance of an abundant supply of electrical energy and of nitrates, which would be produced at the site, "constitute national defense assets" and the project was justifiable under the war powers. [1585]

Perhaps the most significant example of legislation adopted pursuant to the war powers when no actual "shooting war" was in progress, with the object of strengthening national defense, was the Atomic Energy Act of 1946, establishing a body to oversee and further the research into and development of atomic energy for both military and civil purposes. [1586] Congress has also authorized a vast amount of highway construction, pursuant to its conception of their "primary importance to the national defense," [1587] and the first extensive program of federal financial assistance in the field of education was the National Defense Education Act. [1588] The post-World

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noncapital crimes. Justices Harlan and Frankfurter dissented on the ground that in capital cases greater constitutional protection, available in civil courts, was required.

[1581] Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

[1582] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1180 (1833).

[1583] 297 U.S. 288 (1936).

[1584] 39 Stat. 166 (1916).

[1585] 297 U.S. at 327–328.

[1586] 60 Stat. 755 (1946), 42 U.S.C. § 1801 et seq.

[1587] 108(a), 70 Stat. 374, 378 (1956), 23 U.S.C. § 101(b), naming the Interstate System the "National System of Interstate and Defense Highways."

[1588] 72 Stat. 1580 (1958), as amended, codified to various sections of Titles 20 and 42.

War II years, though nominally peacetime, constituted the era of the Cold War and the occasions for several armed conflicts, notably in Korea and Indochina, in which the Congress enacted much legislation designed to strengthen national security, including an apparently permanent draft,[1589] authorization of extensive space exploration,[1590] authorization for wage and price controls,[1591] and continued extension of the Renegotiation Act to recapture excess profits on defense contracts.[1592] Additionally, the period saw extensive regulation of matter affecting individual rights, such as loyalty-security programs,[1593] passport controls,[1594] and limitations on members of the Communist Party and associated organizations,[1595] all of which are dealt with in other sections.

A particular province of such legislation is that designed to effect a transition from war to peace. The war power "is not limited to victories in the field.... It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."[1596] This principle was given a much broader application after the First World War in *Hamilton v. Kentucky Distilleries Co.*,[1597] where the War Time Prohibition Act[1598] adopted after the signing of the Armistice was upheld as an appropriate measure for increasing war efficiency. The Court was unable to conclude that the war emergency had passed with the cessation of hostilities.[1599] But in 1924, it held that a rent control law for the District of Columbia, which

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[1589] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription has been precluded as of July 1, 1973, P. L. 92–129, 85 Stat. 353, 50 U. S. C. App. 467(c), although registration for possible conscription is in effect. P. L. 96–282, 94 Stat. 552 (1980).

[1590] National Aeronautics and Space Act of 1958, 72 Stat. 426, as amended, codified in various sections of Titles 5, 18, and 50.

[1591] Title II of the Defense Production Act Amendments of 1970, 84 Stat. 799, as amended, provided temporary authority for wage and price controls, a power which the President subsequently exercised. E.O. 11615, 36 Fed Reg. 15727 (August 16, 1971). Subsequent legislation expanded the President's authority. 85 Stat. 743, 12 U.S.C. § 1904 note.

[1592] Renogtiation Act of 1951, 65 Stat. 7, as amended, 50 U.S.C. App. § 1211 et seq.

[1593] *E.g.*, Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Peters v. Hobby, 349 U.S. 331 (1955).

[1594] Zemel v. Rusk, 381 U.S. 1 (1965); United States v. Laub, 385 U.S. 475 (1967).

[1595] United States v. Robel, 389 U.S. 258 (1967); United States v. Brown, 381 U.S. 437 (1965).

[1596] Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1871) (sustaining a congressional deduction from a statute of limitations the period during which the Civil War prevented the bringing of an action). *See also* Mayfield v. Richards, 115 U.S. 137 (1885).

[1597] 251 U.S. 146 (1919). *See also* Ruppert v. Caffey, 251 U.S. 264 (1920).

[1598] Act of November 21, 1918, 40 Stat. 1046.

[1599] 251 U.S. at 163.

had been previously upheld,[1600] had ceased to operate because the emergency which justified it had come to an end.[1601]

A similar issue was presented after World War II, and the Court held that the authority of Congress to regulate rents by virtue of the war power did not end with the presidential proclamation terminating hostilities on December 31, 1946.[1602] However, the Court cautioned that "[w]e recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision."[1603]

In the same year, the Court sustained by only a five-to-four vote the Government's contention that the power which Congress had conferred upon the President to deport enemy aliens in times of a declared war was not exhausted when the shooting stopped.[1604] "It is not for us to question," said Justice Frankfurter for the Court, "a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilites [sic] do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come."[1605]

Delegation of Legislative Power in Wartime

The Court has insisted that in times of war as in times of peace "the respective branches of the Government keep within the power assigned to each,"[1606] thus raising the issue of permissible delegation, inasmuch as during a war Congress has been prone to delegate many more powers to the President than at other times.[1607] But the number of cases actually discussing the matter is few.[1608] Two theories have been advanced at times when the del-

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[1600] Block v. Hirsh, 256 U.S. 135 (1921).

[1601] Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

[1602] Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948). *See also* Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947).

[1603] 333 U.S. at 143–44.

[1604] Ludecke v. Watkins, 335 U.S. 160 (1948).

[1605] 335 U.S. at 170.

[1606] Lichter v. United States, 334 U.S. 742, 779 (1948).

[1607] For an extensive consideration of this subject in the context of the President's redelegation of it, *see* N. GRUNDSTEIN, PRESIDENTIAL DELEGATION OF AUTHORITY IN WARTIME (1961).

[1608] In the Selective Draft Law Cases, 245 U.S. 366, 389 (1918), the objection was dismissed without discussion. The issue was decided by reference to peacetime precedents in Yakus v. United States, 321 U.S. 414, 424 (1944).

egation doctrine carried more force than it has in recent years. First, it is suggested that inasmuch as the war power is inherent in the Federal Government, and one shared by the legislative and executive branches, Congress does not really delegate legislative power when it authorizes the President to exercise the war power in a prescribed manner, a view which entirely overlooks the fact that the Constitution expressly vests the war power as a legislative power in Congress. Second, it is suggested that Congress' power to delegate in wartime is limited as in other situations but that the existence of a state of war is a factor weighing in favor of the validity of the delegation.

The first theory was fully stated by Justice Bradley in *Hamilton v. Dillin*,[1609] upholding a levy imposed by the Secretary of the Treasury pursuant to an act of Congress. To the argument that the levy was a tax the fixing of which Congress could not delegate, Justice Bradley noted that the power exercised "does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government. . . ."[1610]

Both theories found expression in different passages of Chief Justice Stone's opinion in *Hirabayashi v. United States*,[1611] upholding executive imposition of a curfew on Japanese-Americans pursuant to legislative delegation. On the one hand, he spoke to Congress and the Executive, "acting in cooperation," to impose the curfew,[1612] while on the other hand, he noted that a delegation in which Congress has determined the policy and the rule of conduct, leaving to the Executive the carrying-out of the policy, is permissible delegation.[1613]

A similar ambiguity is found in *Lichter v. United States*,[1614] upholding the Renegotiation Act, but taken as a whole the Court there espoused the second theory. "The power [of delegation] is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to method to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. . . . Thus, while the constitutional structure and controls of our Government are our guides

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[1609] 88 U.S. (21 Wall.) 73 (1875).

[1610] 88 U.S. at 96–97. *Cf.* United States v. Chemical Foundation, 272 U.S. 1 (1926).

[1611] 320 U.S. 81 (1943).

[1612] 320 U.S. at 91–92, 104.

[1613] 320 U.S. at 104.

[1614] 334 U.S. 742 (1948).

equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind."[1615] The Court then examined the exigencies of war and concluded that the delegation was valid.[1616]

CONSTITUTIONAL RIGHTS IN WARTIME

Constitution and the Advance of the Flag

Theater of Military Operations.—Military law to the exclusion of constitutional limitations otherwise applicable is the rule in the areas in which military operations are taking place. This view was assumed by all members of the Court in *Ex parte Milligan*,[1617] in which the trial by a military commission of a civilian charged with disloyalty in a part of the country remote from the theater of military operations was held invalid. Although unanimous in the result, the Court divided five-to-four on the ground of decision. The point of disagreement was over which department of the Government had authority to say with finality what regions lie within the theater of military operations. The majority claimed this function for the courts and asserted that an area in which the civil courts were open and functioning does not;[1618] the minority argued that the question was for Congress' determination.[1619] The entire Court rejected the Government's contention that the President's determination was conclusive in the absence of restraining legislation.[1620]

Similarly, in *Duncan v. Kahanamoku*,[1621] the Court declared that the authority granted by Congress to the territorial governor of Hawaii to declare marital law under certain circumstances, which he exercised in the aftermath of the attack on Pearl Harbor, did not warrant the supplanting of civil courts with military tribunals and the trial of civilians for civilian crimes in these military tribunals at a time when no obstacle stood in the way of the operation of the civil courts, except, of course, the governor's order.

Enemy Country.—It has seemed reasonably clear that the Constitution does not follow the advancing troops into conquered territory. Persons in such territory have been held entirely beyond the reach of constitutional limitations and subject to the laws of war as interpreted and applied by the Congress and the Presi-

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[1615] 334 U.S. at 778–79, 782.
[1616] 334 U.S. at 778–83.
[1617] 71 U.S. (4 Wall.) 2 (1866).
[1618] 71 U.S. at 127.
[1619] 71 U.S. at 132, 138.
[1620] 71 U.S. at 121, 139-42.
[1621] 327 U.S. 304 (1946).

dent.[1622] "What is the law which governs an army invading an enemy's country?" the Court asked in *Dow v. Johnson*.[1623] "It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

These conclusions follow not only from the usual necessities of war but as well from the Court's doctrine that the Constitution is not automatically applicable in all territories acquired by the United States, the question turning upon whether Congress has made the area "incorporated" or "unincorporated" territory.[1624] But in *Reid v. Covert*,[1625] Justice Black in a plurality opinion of the Court asserted that wherever the United States acts it must do so only "in accordance with all the limitations imposed by the Constitution. . . . [C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as at home."[1626] The case, however, involved the trial of a United States citizen abroad and the language quoted was not subscribed to by a majority of the Court; thus, it must be regarded as a questionable rejection of the previous line of cases.[1627]

Enemy Property.—In *Brown v. United States*,[1628] Chief Justice Marshall dealt definitively with the legal position of enemy property during wartime. He held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the United States, but the right of Congress by further action to subject such property to confiscation was asserted in the most positive terms. As an exercise of the war power, such confiscation was held not subject to the restrictions of the Fifth and Sixth Amendments. Since such confiscation is unrelated to the personal guilt of the owner, it is immaterial

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[1622] New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387 (1874); Santiago v. Nogueras, 214 U.S. 260 (1909); Madsen v. Kinsella, 343 U.S. 341 (1952).

[1623] 100 U.S. 158, 170 (1880).

[1624] De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904).

[1625] 354 U.S. 1 (1957).

[1626] 354 U.S. at 6, 7.

[1627] For a comprehensive treatment, preceding *Reid v. Covert*, of the matter in the context of the post-War war crimes trials, *see* Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

[1628] 12 U.S. (8 Cr.) 110 (1814). *See also* Conrad v. Waples, 96 U.S. 279 (1878).

whether the property belongs to an alien, a neutral, or even to a citizen. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within the reach of his power, whether within his territory or outside it, impairs his ability to resist the confiscating government while at the same time it furnishes to that government means for carrying on the war.[1629]

Prizes of War.—The power of Congress with respect to prizes is plenary; no one can have any interest in prizes captured except by permission of Congress.[1630] Nevertheless, since international law is a part of our law, the Court will administer it so long as it has not been modified by treaty or by legislative or executive action. Thus, during the Civil War, the Court found that the Confiscation Act of 1861, and the Supplementary Act of 1863, which, in authorizing the condemnation of vessels, made provision for the protection of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize. It 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.[1631] Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held, over the vigorous dissent of three of its members, that the rule of international law exempting unarmed fishing vessels from capture was applicable in the absence of any treaty provision, or other public act of the Government in relation to the subject.[1632]

The Constitution at Home in Wartime

Personal Liberty.—"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false;

[1629] Miller v. United States, 78 U.S. (11 Wall.) 268 (1871); Steehr v. Wallace, 255 U.S. 239 (1921); Central Trust Co. v. Garvan, 254 U.S. 554 (1921); United States v. Chemical Foundation, 272 U.S. 1 (1926); Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); Cities Service Co. v. McGrath, 342 U.S. 330 (1952); Handelsbureau La Mola v. Kennedy, 370 U.S. 940 (1962); *cf.* Honda v. Clark, 386 U.S. 484 (1967).

[1630] The Siren, 80 U.S. (13 Wall.) 389 (1871).

[1631] The Hampton, 72 U.S. (5 Wall.) 372, 376 (1867).

[1632] The Paquete Habana, 175 U.S. 677, 700, 711 (1900).

for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." [1633]

Ex parte Milligan, from which these words are quoted, is justly deemed one of the great cases undergirding civil liberty in this country in times of war or other great crisis, holding that except in areas in which armed hostilities have made enforcement of civil law impossible constitutional rights may not be suspended and civilians subjected to the vagaries of military justice. Yet, the words were uttered after the cessation of hostilities, and the Justices themselves recognized that with the end of the shooting there arose the greater likelihood that constitutional rights could be and would be observed and that the Court would require the observance. [1634] This pattern recurs with each critical period.

That the power of Congress to punish seditious utterances in wartime is limited by the First Amendment was assumed by the Court in a series of cases, [1635] in which it nonetheless affirmed conviction for violations of the Espionage Act of 1917. [1636] The Court also upheld a state law making it an offense for persons to advocate that citizens of the State should refuse to assist in prosecuting war against enemies of the United States. [1637] Justice Holmes matter-of-factly stated the essence of the pattern that we have mentioned. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." [1638] By far, the most dramatic restraint of personal liberty imposed during World War II was the detention and relocation of the Japanese residents of the Western States, including those who were native-born citizens of the United States. When various phases of this program were challenged, the Court held that in order to prevent espionage and sabotage, the authorities could restrict the movement of

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[1633] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120–121 (1866).

[1634] "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which were happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment." Id. at 109 (emphasis by Court).

[1635] Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Sugarman v. United States, 249 U.S. 182 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[1636] 40 Stat. 217 (1917), as amended by 40 Stat. 553 (1918).

[1637] Gilbert v. Minnesota, 254 U.S. 325 (1920).

[1638] Schenck v. United States, 249 U.S. 47, 52 (1919).

these persons by a curfew order,[1639] even by a regulation excluding them from defined areas,[1640] but that a citizen of Japanese ancestry whose loyalty was conceded could not be detained in a relocation camp.[1641]

A mixed pattern emerges from an examination of the Cold War period. Legislation designed to regulate and punish the organizational activities of the Communist Party and its adherents was at first upheld[1642] and then in a series of cases was practically vitiated.[1643] Against a contention that Congress' war powers had been utilized to achieve the result, the Court struck down for the second time in history a congressional statute as an infringement of the First Amendment.[1644] It voided a law making it illegal for any member of a "communist-action organization" to work in a defense facility.[1645] The majority reasoned that the law overbroadly required a person to choose between his First Amendment-protected right of association and his right to hold a job, without attempting to distinguish between those persons who constituted a threat and those who did not.[1646]

On the other hand, in *New York Times Co. v. United States*,[1647] a majority of the Court agreed that in appropriate circumstances the First Amendment would not preclude a prior restraint of publication of information that might result in a sufficient degree of harm to the national interest, although a different majority concurred in denying the Government's request for an injunction in that case.[1648]

Enemy Aliens.—The Alien Enemy Act of 1798 authorized the President to deport any alien or to license him to reside within the

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[1639] Hirabayashi v. United States, 320 U.S. 81 (1943).

[1640] Korematsu v. United States, 323 U.S. 214 (1944).

[1641] Ex parte Endo, 323 U.S. 283 (1944).

[1642] *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); American Communications Association v. Douds, 339 U.S. 382 (1950).

[1643] *E.g.*, Yates v. United States, 354 U.S. 298 (1957); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965); United States v. Brown, 381 U.S. 437 (1965).

[1644] United States v. Robel, 389 U.S. 258 (1967); *cf.* Aptheker v. Secretary of State, 378 U.S. 500 (1964). *And see* Schneider v. Smith, 390 U.S. 17 (1968).

[1645] § 5(a)(1)(D) of the Subversive Control Act of 1950, 64 Stat 992, 50 U.S.C. § 784(a)(1)(D).

[1646] 389 U.S. at 264–66. Justices Harlan and White dissented, contending that the right of association should have been balanced against the public interest and finding the weight of the latter the greater. Id. at 282.

[1647] 403 U.S. 713 (1971).

[1648] The result in the case was reached by a six-to-three majority. The three dissenters, Chief Justice Burger, 403 U.S. at 748, Justice Harlan, id. at 752, and Justice Blackmun, id. at 759, would have granted an injunction in the case; Justices Stewart and White, id. at 727, 730, would not in that case but could conceive of cases in which they would.

United States at any place to be designated by the President.[1649] Though critical of the measure, many persons conceded its constitutionality on the theory that Congress' power to declare war carried with it the power to treat the citizens of a foreign power against which war has been declared as enemies entitled to summary justice.[1650] A similar statute was enacted during World War I[1651] and was held valid in *Ludecke v. Watkins*.[1652]

During World War II, the Court unanimously upheld the power of the President to order to trial before a military tribunal German saboteurs captured within this Country.[1653] Enemy combatants, said Chief Justice Stone, who without uniforms come secretly through the lines during time of war, for the purpose of committing hostile acts, are not entitled to the status of prisoners of war but are unlawful combatants punishable by military tribunals.

Eminent Domain.—An often-cited dictum uttered shortly after the Mexican War asserted the right of an owner to compensation for property destroyed to prevent its falling into the hands of the enemy, or for that taken for public use.[1654] In *United States v. Russell*, decided following the Civil War, a similar conclusion was based squarely on the Fifth Amendment, although the case did not necessarily involve the point. Finally, in *United States v. Pacific R.R.*,[1655] also a Civil War case, the Court held that the United States was not responsible for the injury or destruction of private property by military operations, but added that it did not have in mind claims for property of loyal citizens taken for the use of the national forces. "In such cases," the Court said, "it has been the practice of the government to make compensation for the property taken.... although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clauses."[1656]

Meantime, however, in 1874, a committee of the House of Representatives, in an elaborate report on war claims growing out of the Civil War, had voiced the opinion that the Fifth Amendment embodies the distinction between a taking of property in the course of military operations or other urgent military necessity, and other takings for war purposes, and required compensation of owners in

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[1649] 1 Stat. 577 (1798).
[1650] 6 WRITING OF JAMES MADISON 360–361 (G. Hunt ed., 1904).
[1651] 40 Stat. 531 (1918), 50 U.S.C. § 21.
[1652] 335 U.S. 160 (1948).
[1653] Ex parte Quirin, 317 U.S. 1 (1942).
[1654] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852).
[1655] 120 U.S. 227 (1887).
[1656] 120 U.S. at 239.

the latter class of cases.[1657] In determining what constitutes just compensation for property requisitioned for war purposes during World War II, the Court has assumed that the Fifth Amendment is applicable to such takings.[1658] But as to property seized and destroyed to prevent its use by the enemy, it has relied on the principle enunciated in *United States v. Pacific R.R.* as justification for the conclusion that owners thereof are not entitled to compensation.[1659]

Rent and Price Controls.—Even at a time when the Court was utilizing substantive due process to void economic regulations, it generally sustained such regulations in wartime. Thus, shortly following the end of World War I, it sustained, by a narrow margin, a rent control law for the District of Columbia, which not only limited permissible rent increases but also permitted existing tenants to continue in occupancy provided they paid rent and observed other stipulated conditions.[1660] Justice Holmes for the majority conceded in effect that in the absence of a war emergency the legislation might transcend constitutional limitations,[1661] but noted that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation."[1662]

During World War II and thereafter, economic controls were uniformly sustained.[1663] An apartment house owner who complained that he was not allowed a "fair return" on the property was dismissed with the observation that "a nation which can demand the lives of its men and women in the waging of . . . war is under no constitutional necessity of providing a system of price control . . . which will assure each landlord a 'fair return' on his property."[1664] The Court also held that rental ceilings could be established with-

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[1657] H.R. Rep. No. 262, 43d Cong., 1st Sess. (1874), 39–40.

[1658] United States v. Commodities Trading Corp., 339 U.S. 121 (1950); United States v. Toronto Nav. Co., 338 U.S. 396 (1949); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Cors, 337 U.S. 325 (1949); United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[1659] United States v. Caltex, Inc., 344 U.S. 149, 154 (1952). Justices Douglas and Black dissented.

[1660] Block v. Hirsh, 256 U.S. 135 (1921).

[1661] But *quaere* in the light of Nebbia v. New York, 291 U.S. 502 (1934), Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n, 313 U.S. 236 (1941), and their progeny.

[1662] Block v. Hirsh, 256 U.S. 135, 156 (1921).

[1663] Yakus v. United States, 321 U.S. 414 (1944); Bowles v. Willingham, 321 U.S. 503 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947); Lichter v. United States, 334 U.S. 742 (1948).

[1664] Bowles v. Willingham, 321 U.S. 503, 519 (1944).

out a prior hearing when the exigencies of national security precluded the delay which would ensue.[1665]

But in another World War I case, the Court struck down a statute which penalized the making of "any unjust or unreasonable rate or charge in handling ... any necessaries"[1666] as repugnant to the Fifth and Sixth Amendments in that it was so vague and indefinite that it denied due process and failed to give adequate notice of what acts would violate it.[1667]

Clause 15. The Congress shall have Power *** To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Clause 16. The Congress shall have Power *** To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

THE MILITIA CLAUSES

Calling Out the Militia

The States as well as Congress may prescribe penalties for failure to obey the President's call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1668] The Federal Government may call out the militia in case of civil war; its authority to suppress rebellion is found in the power to suppress insurrection and to carry on war.[1669] The act of February 28, 1795,[1670] which delegated to the President the power to call out the militia, was held constitutional.[1671] A militiaman who refused to obey such a call was not

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[1665] 321 U.S. at 521. The Court stressed, however, that Congress had provided for judicial review after the regulations and orders were made effective.

[1666] Act of October 22, 1919, 2, 41 Stat. 297.

[1667] United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[1668] Moore v. Houston, 3 S. & R. (Pa.) 169 (1817), affirmed, Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

[1669] Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871).

[1670] 1 Stat. 424 (1795), 10 U.S.C. § 332.

[1671] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32 (1827).

"employed in the service of the United States so as to be subject to the article of war," but was liable to be tried for disobedience of the act of 1795.[1672]

Regulation of the Militia

The power of Congress over the militia "being unlimited, except in the two particulars of officering and training them ... it may be exercised to any extent that may be deemed necessary by Congress.... The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government ..."[1673] Under the National Defense Act of 1916,[1674] the militia, which hitherto had been an almost purely state institution, was brought under the control of the National Government. The term "militia of the United States" was defined to comprehend "all able-bodied male citizens of the United States and all other able-bodied males who have ... declared their intention to become citizens of the United States," between the ages of eighteen and forty-five. The act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," limited the appointment of officers to those who "shall have successfully passed such tests as to ... physical, moral and professional fitness as the President shall prescribe," and authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and National Guard Reserve," who thereupon should "stand discharged from the militia."[1675]

The militia clauses do not constrain Congress in raising and supporting a national army. The Court has approved the system of "dual enlistment," under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National

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[1672] Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[1673] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820). Organizing and providing for the militia being constitutionally committed to Congress and statutorily shared 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. 233 (1974).

[1674] 39 Stat. 166, 197, 198, 200, 202, 211 (1916), codified in sections of Titles 10 & 32. *See* Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

[1675] Military and civilian personnel of the National Guard are state, rather than federal, employees and the Federal Government is thus not liable under the Tort Claims Act for their negligence. Maryland v. United States, 381 U.S. 41 (1965).

Guard of the United States, and, when called to active duty in the federal service, are relieved of their status in the state militia. Consequently, the restrictions in the first militia clause have no application to the federalized National Guard; there is no constitutional requirement that state governors hold a veto power over federal duty training conducted outside the United States or that a national emergency be declared before such training may take place. [1676]

Clause 17. Congress shall have power *** To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

SEAT OF THE GOVERNMENT

The Convention was moved to provide for the creation of a site in which to locate the Capital of the Nation, completely removed from the control of any State, because of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, physically threatened and verbally abused the members, and caused the Congress to flee the City when neither municipal nor state authorities would take action to protect the members. [1677] Thus, Madison noted that "[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it.... Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputa-

[1676] Perpich v. Department of Defense, 496 U.S. 434 (1990).

[1677] 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).

tion of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." [1678]

The actual site was selected by compromise, Northerners accepting the Southern-favored site on the Potomac in return for Southern support for a Northern aspiration, assumption of Revolutionary War debts by the National Government. [1679] Maryland and Virginia both authorized the cession of territory [1680] and Congress accepted. [1681] Congress divided the District into two counties, Washington and Alexandria, and provided that the local laws of the two States should continue in effect. [1682] It also established a circuit court and provided for the appointment of judicial and law enforcement officials. [1683]

There seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District. [1684] Madison in *The Federalist* did assume that the inhabitants "will have had their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed them. . . ." [1685] Although there was some dispute about the constitutional propriety of permitting local residents a measure of "home rule," to use the recent term, [1686] almost from the first there

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[1678] THE FEDERALIST, No. 43 (J. Cooke ed. 1961), 288–289. *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1213, 1214 (1833).

[1679] W. TINDALL, THE ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 5–30 (1903).

[1680] Maryland Laws 1798, ch. 2, p. 46; 13 Laws of Virginia 43 (Hening 1789).

[1681] Act of July 16, 1790, 1 Stat. 130. In 1846, Congress authorized a referendum in Alexandria County on the question of retroceding that portion to Virginia. The voters approved and the area again became part of Virginia. Laws of Virginia 1845–46, ch. 64, p. 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 40 years later and the Court held that the passage of time precluded the raising of the question. Phillips v. Payne, 92 U.S. 130 (1875).

[1682] Act of February 27, 1801, 2, 2 Stat. 103. The declaration of the continuing effect of state law meant that law in the District was frozen as of the date of cession, unless Congress should change it, which it seldom did. For some of the problems, *see* Tayloe v. Thompson, 30 U.S. (5 Pet.) 358 (1831); Ex parte Watkins, 32 U.S. (7 Pet.) 568 (1833); Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838); Van Ness v. United States Bank, 38 U.S. (13 Pet.) 17 (1839); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

[1683] Act of March 3, 1801, 1, 2 Stat. 115.

[1684] The objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1215, 1216 (1833).

[1685] THE FEDERALIST, No. 43 (J. Cooke ed. 1961), 289.

[1686] Such a contention was cited and rebutted in 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1218 (1833).

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 [1687] and replaced with a presidentially appointed Commission in 1878. [1688] The Commission lasted until 1967 when it was replaced by an appointed Mayor-Commissioner and an appointed city council. [1689] In recent years, Congress provided for a limited form of self-government in the District, with the major offices filled by election. [1690] District residents vote for President and Vice President [1691] and elect a nonvoting delegate to Congress. [1692] An effort by constitutional amendment to confer voting representation in the House and Senate failed of ratification. [1693]

Constitutionally, it appears that Congress is neither required to provide for a locally elected government [1694] nor precluded from delegating its powers over the District to an elective local government. [1695] 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. [1696]

Chief Justice Marshall for the Court held in *Hepburn v. Ellzey* [1697] that the District of Columbia was not a State within the meaning of the diversity jurisdiction clause of Article III. This

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[1687] 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).

[1688] Act of June 11, 1878, 20 Stat. 103.

[1689] Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11699, reprinted as appendix to District of Columbia Code, Title I.

[1690] District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93–198, 87 Stat. 774.

[1691] Twenty-third Amendment.

[1692] P.L. 91–405, 84 Stat. 848, D.C. Code, § 1–291.

[1693] H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978, but only 16 States had ratified before the expiration after seven years of the proposal.

[1694] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820); Heald v. District of Columbia, 259 U.S. 114 (1922).

[1695] 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.

[1696] 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).

[1697] 6 U.S. (2 Cr.) 445 (1805); *see also* Sere v. Pitot, 10 U.S. (6 Cr.) 332 (1810); New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816). The District was held to be a State within the terms of a treaty. Geofroy v. Riggs, 133 U.S. 258 (1890).

view, adhered to for nearly a century and a half,[1698] was overturned by the Court in 1949, 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.[1699] The decision was by a five to four division, but the five in the majority disagreed among themselves on the reasons. Three thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia pursuant to this clause without regard to Article III.[1700] Two others thought that *Hepburn v. Ellzey* had been erroneously decided and would have overruled it.[1701] 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[1702] and of presentment by a grand jury.[1703] 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.[1704]

Congress possesses over the District of Columbia the blended powers of a local and national legislature.[1705] 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.[1706] And when legislating for the District Con-

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[1698] Barney v. City of Baltimore, 73 U.S. (6 Wall.) 280 (1868); Hooe v. Jamieson, 166 U.S. 395 (1897); Hooe v. Werner, 166 U.S. 399 (1897).

[1699] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

[1700] 337 U.S. at 588–600 (Justices Jackson, Black and Burton).

[1701] 337 U.S. at 604 (Justices Rutledge and Murphy). The dissents were by Chief Justice Vinson, id. at 626, joined by Justice Douglas, and by Justice Frankfurter, id. at 646, joined by Justice Reed.

[1702] Callan v. Wilson, 127 U.S. 540 (1888); Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

[1703] United States v. Moreland, 258 U.S. 433 (1922).

[1704] 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).

[1705] 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).

[1706] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91–358, 111, 84 Stat. 475, D.C. Code, § 11–101, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the

gress remains the legislature of the Union, so that it may give its enactments nationwide operation to the extent necessary to make them locally effective.[1707]

AUTHORITY OVER PLACES PURCHASED

"Places"

This clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government.[1708] It includes post offices,[1709] a hospital and a hotel located in a national park,[1710] and locks and dams for the improvement of navigation.[1711] But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control.[1712] Nevertheless, the Supreme Court has held that a State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a State, for purposes other than those enumerated in clause 17.[1713]

After exclusive jurisdiction over lands within a State has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory.[1714] Private property located thereon is not subject to taxation by the State,[1715] nor can state statutes enacted subsequent to the transfer have any operation therein.[1716] But the local laws in force at the date of cession that are protective of private rights continue in force until abro-

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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 Electric Co., 261 U.S. 428 (1923); Embry v. Palmer, 107 U.S. 3 (1883).

[1707] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[1708] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[1709] Battle v. United States, 209 U.S. 36 (1908).

[1710] Arlington Hotel v. Fant, 278 U.S. 439 (1929).

[1711] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[1712] Collins v. Yosemite Park Co., 304 U.S. 518, 530 (1938).

[1713] 304 U.S. at 528.

[1714] 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).

[1715] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).

[1716] 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, 296–297 (1958).

gated by Congress.[1717] Moreover, as long as there is no interference with the exclusive jurisdiction of the United States, an area subject thereto may be annexed by a municipality.[1718]

Duration of Federal Jurisdiction

A State may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes.[1719] 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.[1720] In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the State had ceded jurisdiction only over such portions of the area as were used for military purposes and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the Court to inquire into the actual uses to which any portion of the area was temporarily put.[1721] 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.[1722]

The question arose whether the United States retains jurisdiction over a place which was ceded to it unconditionally, after it has abandoned the use of the property for governmental purposes and entered into a contract for the sale thereof to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in such land, and the Supreme Court upheld its right to do so. The majority assumed that "the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power."[1723] In separate concurring opinions, Chief Justice Stone and Justice Frankfurter reserved judgment on the question of territorial jurisdiction.[1724]

[1717] Chicago, R. I. & P. Ry. v. McGlinn, 114 U.S. 542, 545 (1885); Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

[1718] Howard v. Commissioners, 344 U.S. 624 (1953). As Howard recognized, such areas of federal property do not cease to be part of the State in which they are located and the residents of the areas are for most purposes residents of the State. Thus, a State may not constitutionally exclude such residents from the privileges of suffrage if they are otherwise qualified. Evans v. Cornman, 398 U.S. 419 (1970).

[1719] Palmer v. Barrett, 162 U.S. 399 (1896).

[1720] United States v. Unzeuta, 281 U.S. 138 (1930).

[1721] Benson v. United States, 146 U.S. 325, 331 (1892).

[1722] Palmer v. Barrett, 162 U.S. 399 (1896).

[1723] S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946).

[1724] 327 U.S. at 570, 571.

Reservation of Jurisdiction by States

For more than a century the Supreme Court kept alive, by repeated dicta,[1725] the doubt expressed by Justice Story "whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void."[1726] But when the issue was squarely presented in 1937, the Court ruled that where the United States purchases property within a State with the consent of the latter, it is valid for the State to convey, and for the United States to accept, "concurrent jurisdiction" over such land, the State reserving to itself the right to execute process "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States."[1727] The holding logically renders the second half of clause 17 superfluous. In a companion case, the Court ruled further that even if a general state statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.[1728]

Clause 18. The Congress shall have Power *** To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

NECESSARY AND PROPER CLAUSE

Scope of Incidental Powers

That this clause is an enlargement, not a constriction, of the powers expressly granted to Congress, that it enables the lawmakers to select any means reasonably adapted to effectuate those powers, was established by Marshall's classic opinion in *McCulloch v. Maryland*.[1729] "Let the end be legitimate," he wrote, "let it be within the scope of the Constitution, and all means which are ap-

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[1725] 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).

[1726] United States v. Cornell, 25 Fed. Cas. 646, 649 (No. 14,867) (C.C.D.R.I. 1819).

[1727] James v. Dravo Contracting Co., 302 U.S. 134, 145 (1937).

[1728] Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937). *See also* Atkinson v. Tax Comm'n, 303 U.S. 20 (1938).

[1729] 17 U.S. (4 Wheat.) 316 (1819).

propriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." [1730] Moreover, the provision gives Congress a share in the responsibilities lodged in other departments, by virtue of its right to enact legislation necessary to carry into execution all powers vested in the National Government. Conversely, where necessary for the efficient execution of its own powers, Congress may delegate some measure of legislative power to other departments. [1731]

Operation of Clause

Practically every power of the National Government has been expanded in some degree by the coefficient clause. Under its authority Congress has adopted measures requisite to discharge the treaty obligations of the nation; [1732] it has organized the federal judicial system and has enacted a large body of law defining and punishing crimes. Effective control of the national economy has been made possible by the authority to regulate the internal commerce of a State to the extent necessary to protect and promote interstate commerce. [1733] The right of Congress to utilize all known and appropriate means for collecting the revenue, including the distraint of property for federal taxes, [1734] and its power to acquire property needed for the operation of the Government by the exercise of the power of eminent domain, [1735] have greatly extended the range of national power. But the widest application of the necessary and proper clause has occurred in the field of monetary and fiscal controls. Inasmuch as the various specific powers granted by Article I, § 8, do not add up to a general legislative power over such matters, the Court has relied heavily upon this clause in sustaining the comprehensive control which Congress has asserted over this subject. [1736]

[1730] 17 U.S. at 420. This decision had been clearly foreshadowed fourteen years earlier by Marshall's opinion in United States v. Fisher, 6 U.S. (2 Cr.) 358, 396 (1805). Upholding an act which gave priority to claims of the United States against the estate of a bankrupt, he wrote: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittance, by bills or otherwise, and to take those precautions which will render the transaction safe."

[1731] See "Delegation of Legislative Power," supra.

[1732] Neely v. Henkel, 180 U.S. 109, 121 (1901). *See also* Missouri v. Holland, 252 U.S. 416 (1920).

[1733] See discussion of "Necessary and Proper Clause" under the commerce power, supra.

[1734] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 281 (1856).

[1735] Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Fox, 94 U.S. 315, 320 (1877).

[1736] See "Fiscal and Monetary Powers of Congress," supra.

Definition of Punishment and Crimes

Although the only crimes which Congress is expressly authorized to punish are piracies, felonies on the high seas, offenses against the law of nations, treason and counterfeiting of the securities and current coin of the United States, its power to create, define,and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded.[1737] Illustrative of the offenses which have been punished under this power are the alteration of registered bonds,[1738] the bringing of counterfeit bonds into the country,[1739] conspiracy to injure prisoners in custody of a United States marshal,[1740] impersonation of a federal officer with intent to defraud,[1741] conspiracy to injure a citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States,[1742] the receipt by Government officials of contributions from Government employees for political purposes,[1743] advocating the overthrow of the Government by force.[1744] Part I of Title 18 of the United States Code comprises more than 500 sections defining penal offenses against the United States.[1745]

Chartering of Banks

As an appropriate means for executing "the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies . . . ," Congress may incorporate banks and kindred institutions.[1746] Moreover, it may confer upon them private powers, which, standing alone, have no relation to the functions of the Federal Government, if those privileges are essential to the effective operation of such

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[1737] United States v. Fox, 95 U.S. 670, 672 (1978); United States v. Hall, 98 U.S. 343, 357 (1879); United States v. Worrall, 2 U.S. (2 Dall.) 384, 394 (1798); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). That this power has been freely exercised is attested by the pages of the United States Code devoted to Title 18, entitled "Criminal Code and Criminal Procedure." In addition numerous regulatory measures in other titles prescribe criminal penalties.

[1738] Ex parte Carll, 106 U.S. 521 (1883).

[1739] United States v. Marigold, 50 U.S. (9 How.) 560, 567 (1850).

[1740] Logan v. United States, 144 U.S. 263 (1892).

[1741] United States v. Barnow, 239 U.S. 74 (1915).

[1742] Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Waddell, 112 U.S. 76 (1884); In re Quarles and Butler, 158 U.S. 532, 537 (1895); Motes v. United States, 178 U.S. 458 (1900); United States v. Mosley, 238 U.S. 383 (1915). *See also* Rakes v. United States, 212 U.S. 55 (1909).

[1743] Ex parte Curtis, 106 U.S. 371 (1882).

[1744] 18 U.S.C. § 2385.

[1745] *See* National Commission on Reform of Federal Criminal Laws, Final Report (Washington: 1970); National Commission on Reform of Federal Criminal Laws, Working Papers (Washington: 1970), 2 vols.

[1746] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

corporations.[1747] Where necessary to meet the competition of state banks, Congress may authorize national banks to perform fiduciary functions, even though, apart from the competitive situation, federal instrumentalities might not be permitted to engage in such business.[1748] The Court will not undertake to assess the relative importance of the public and private functions of a financial institution Congress has seen fit to create. It sustained the act setting up the Federal Farm Loan Banks to provide funds for mortgage loans on agricultural land against the contention that the right of the Secretary of the Treasury, which he had not exercised, to use these banks as depositories of public funds, was merely a pretext for chartering those banks for private purposes.[1749]

Currency Regulations

Reinforced by the necessary and proper clause, the powers "'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States and to coin money and regulate the value thereon . . . ,'"[1750] have been held to give Congress virtually complete control over money and currency. A prohibitive tax on the notes of state banks,[1751] the issuance of treasury notes impressed with the quality of legal tender in payment of private debts[1752] and the abrogation of clauses in private contracts, which called for payment in gold coin,[1753] were sustained as appropriate measures for carrying into effect some or all of the foregoing powers.

Power to Charter Corporations

In addition to the creation of banks, Congress has been held to have authority to charter a railroad corporation,[1754] or a corporation to construct an interstate bridge,[1755] as instrumentalities for promoting commerce among the States, and to create corpora-

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[1747] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 862 (1824). *See also* Pittman v. Home Owners' Corp., 308 U.S. 21 (1939).

[1748] First National Bank v. Follows ex rel. Union Trust Co., 244 U.S. 416 (1917); Missouri ex rel. Burnes National Bank v. Duncan, 265 U.S. 17 (1924).

[1749] Smith v. Kansas City Title Co., 255 U.S. 180 (1921).

[1750] Juilliard v. Greenman, 110 U.S. 421, 449 (1884).

[1751] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[1752] Juilliard v. Greenman, 110 U.S. 421 (1884). *See also* Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

[1753] Norman v. Baltimore & O. R.R., 294 U.S. 240, 303 (1935).

[1754] Pacific R.R. Removal Cases, 115 U.S. 1 (1885); California v. Pacific R.R., 127 U.S. 1, 39 (1888).

[1755] Luxton v. North River Bridge Co., 153 U.S. 525 (1894).

tions to manufacture aircraft[1756] or merchant vessels[1757] as incidental to the war power.

Courts and Judicial Proceedings

Inasmuch as the Constitution "delineated only the great outlines of the judicial power . . . , leaving the details to Congress, . . . [t]he distribution and appropriate exercise of the judicial power must . . . be made by laws passed by Congress. . . ."[1758] As a necessary and proper provision for the exercise of the jurisdiction conferred by Article III, § 2, Congress may direct the removal from a state to a federal court of a criminal prosecution against a federal officer for acts done under color of federal law,[1759] and may authorize the removal before trial of civil cases arising under the laws of the United States.[1760] It may prescribe the effect to be given to judicial proceedings of the federal courts[1761] and may make all laws necessary for carrying into execution the judgments of federal courts.[1762] When a territory is admitted as a State, Congress may designate the court to which the records of the territorial courts shall be transferred and may prescribe the mode for enforcement and review of judgments rendered by those courts.[1763] In the exercise of other powers conferred by the Constitution, apart from Article III, Congress may create legislative courts and "clothe them with functions deemed essential or helpful in carrying those powers into execution."[1764]

Special Acts Concerning Claims

The Necessary and Proper Clause enables Congress to pass special laws to require other departments of the Government to prosecute or adjudicate particular claims, whether asserted by the Government itself or by private persons. In 1924,[1765] Congress adopted a Joint Resolution directing the President to cause suit to be instituted for the cancellation of certain oil leases alleged to have been obtained from the Government by fraud and to prosecute such other actions and proceedings, civil and criminal, as were warranted by the facts. This resolution also authorized the appoint-

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[1756] Clallam County v. United States, 263 U.S. 341 (1923).
[1757] Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549 (1922).
[1758] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).
[1759] Tennessee v. Davis, 100 U.S. 257, 263 (1880).
[1760] Railway Company v. Whitton, 80 U.S. (13 Wall.) 270, 287 (1872).
[1761] Embry v. Palmer, 107 U.S. 3 (1883).
[1762] Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53 (1825).
[1763] Express Co. v. Kountze Bros., 75 U.S. (8 Wall.) 342, 350 (1869).
[1764] Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929). *But see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
[1765] 43 Stat. 5 (1924). *See* Sinclair v. United States, 279 U.S. 263 (1929).

ment of special counsel to have charge of such litigation. Private acts providing for a review of an order for compensation under the Longshoreman's and Harbor Workers' Compensation Act,[1766] or conferring jurisdiction upon the Court of Claims, after it had denied recovery, to hear and determine certain claims of a contractor against the Government, have been held constitutional.[1767]

Maritime Law

Congress may implement the admiralty and maritime jurisdiction conferred upon the federal courts by revising and amending the maritime law that existed at the time the Constitution was adopted, but in so doing, it cannot go beyond the reach of that jurisdiction.[1768] This power cannot be delegated to the States; hence, acts of Congress that purported to make state workmen's compensation laws applicable to maritime cases were held unconstitutional.[1769]

SECTION 9. Clause 1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

IN GENERAL

The above clause, which sanctioned the importation of slaves by the States for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters, Art. IV, § 1, cl. 3, was held by Chief Justice Taney in *Scott v. Sandford*,[1770] to show conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution. Today this ruling is interesting only as an historical curiosity.

[1766] Paramino Co. v. Marshall, 309 U.S. 370 (1940).

[1767] Pope v. United States, 323 U.S. 1 (1944).

[1768] Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934).

[1769] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924).

[1770] 60 U.S. (19 How.) 393, 411 (1857).

Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

IN GENERAL

This clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the Constitution was written [1771] and stranger in the context of the role the right has come to play in the Supreme Court's efforts to constitutionalize federal and state criminal procedure. [1772]

Only the Federal Government and not the States, it has been held obliquely, is limited by the clause. [1773] The issue that has always excited critical attention is the authority in which the clause places the power to determine whether the circumstances warrant suspension of the privilege of the Writ. [1774] The clause itself does not specify, and while most of the clauses of § 9 are directed at Congress not all of them are. [1775] At the Convention, the first proposal of a suspending authority expressly vested "in the legislature" the suspending power, [1776] but the author of this proposal did not retain this language when the matter was taken up, [1777] the present language then being adopted. [1778] Nevertheless, Congress' power to suspend was assumed in early commentary [1779] and stated in dictum by the Court. [1780] President Lincoln suspended the privi-

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[1771] R. WALKER, THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY (1961).

[1772] Infra discussion under Article III, "Habeas Corpus: Scope of Writ".

[1773] Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917).

[1774] 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 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 213 (Luther Martin ed., 1937); Ex parte Merryman, 17 Fed. 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 M. FARRAND, 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.

[1775] *Cf.* Clauses 7, 8.

[1776] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 341 (rev. ed. 1937).

[1777] Id. at 438.

[1778] Id.

[1779] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1336 (1833).

[1780] Ex parte Bollman, 8 U.S. (4 Cr.) 75, 101 (1807).

lege on his own motion in the early Civil War period,[1781] but this met with such opposition[1782] that he sought and received congressional authorization.[1783] Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.[1784]

When suspension operates, what is suspended? In *Ex parte Milligan*,[1785] 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.[1786] Interpreting IIRIRA so as to avoid what it viewed as a serious constitutional problem, the Court in another case held that Congress had not evidenced clear intent to eliminate federal court habeas corpus jurisdiction to determine whether the Attorney General retained discretionary authority to waive deportation for a limited category of resident aliens who had entered guilty pleas before IIRIRA repealed the waiver authority.[1787] "[At] the absolute minimum," the Court reasoned, "the Suspension Clause protects the writ as it existed in 1789." "At its historical core, the writ of

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[1781] *Cf.* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118–139 (rev. ed. 1951).

[1782] Including a finding by Chief Justice Taney on circuit that the President's action was invalid. Ex parte Merryman, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

[1783] Act of March 3, 1863, 1, 12 Stat. 755. *See* Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. WIS. HISTORY BULL. 213 (1907).

[1784] 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* infra discussion under Article III, The Theory of Plenary Congressional Control.

[1785] 71 U.S. (4 Wall.) 2, 130–131 (1866).

[1786] Felker v. Turpin, 518 U.S. 651, 664 (1996).

[1787] INS v. St. Cyr, 533 U.S. 289 (2001).

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." [1788]

Clause 3. No Bill of Attainder or ex post facto Law shall be passed.

Bills of Attainder

"Bills of attainder . . . are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. . . . In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions." [1789] The phrase "bill of attainder," as used in this clause and in clause 1 of § 10, applies to bills of pains and penalties as well as to the traditional bills of attainder. [1790]

The prohibition embodied in this clause is not to be strictly and narrowly construed in the context of traditional forms but is to be interpreted in accordance with the designs of the framers so as to preclude trial by legislature, a violation of the separation of powers concept. [1791] The clause thus prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." [1792] That the Court has applied the clause dynamically is revealed by a consideration of the three cases in which acts of Congress have been struck down

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[1788] 533 U.S. at 301.

[1789] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1338 (1833).

[1790] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); *cf.* United States v. Brown, 381 U.S. 437, 441–442, (1965).

[1791] United States v. Brown, 381 U.S. 437, 442–446 (1965). Four dissenting Justices, however, denied that any separation of powers concept underlay the clause. Id. at 472–73.

[1792] United States v. Lovett, 328 U.S. 303, 315 (1946).

as violating it.[1793] In *Ex parte Garland*,[1794] the Court struck down a statute that required attorneys to take an oath that they had taken no part in the Confederate rebellion against the United States before they could practice in federal courts. The statute, and a state constitutional amendment requiring a similar oath of persons before they could practice certain professions,[1795] were struck down as legislative acts inflicting punishment on a specific group the members of which had taken part in the rebellion and therefore could not truthfully take the oath. The clause then lay unused until 1946 when the Court utilized it to strike down a rider to an appropriations bill forbidding the use of money appropriated therein to pay the salaries of three named persons whom the House of Representatives wished discharged because they were deemed to be "subversive."[1796]

Then, in *United States v. Brown*,[1797] a sharply divided Court held void as a bill of attainder a statute making it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. Congress could, Chief Justice Warren wrote for the majority, under its commerce power, protect the economy from harm by enacting a prohibition generally applicable to any person who commits certain acts or possesses certain characteristics making him likely in Congress' view to initiate political strikes or other harmful deeds and leaving it to the courts to determine whether a particular person committed the specified acts or possessed the specified characteristics. It was impermissible, however, for Congress to designate a class of persons—members of the Communist Party—as being forbidden to hold union office.[1798] The dissenters viewed the statute as merely expressing in shorthand the characteristics of those persons who were likely to utilize union responsibilities to accomplish harmful acts; Congress could validly conclude that all members of the Communist Party possessed those characteristics.[1799] The majority's decision in *Brown* cast in doubt

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[1793] For a rejection of the Court's approach and a plea to adhere to the traditional concept, *see* id. at 318 (Justice Frankfurter concurring).

[1794] 71 U.S. (4 Wall.) 333 (1867).

[1795] Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

[1796] United States v. Lovett, 328 U.S. 303 (1946).

[1797] 381 U.S. 437 (1965).

[1798] The Court of Appeals had voided the statute as an infringement of First Amendment expression and association rights, but the Court majority did not choose to utilize this ground. 334 F. 2d 488 (9th Cir. 1964). However, in United States v. Robel, 389 U.S. 258 (1967), a very similar statute making it unlawful for any member of a "Communist-action organization" to be employed in a defense facility was struck down on First Amendment grounds and the bill of attainder argument was ignored.

[1799] United States v. Brown, 381 U.S. 437, 462 (1965) (Justices White, Clark, Harlan, and Stewart dissenting).

certain statutes and certain statutory formulations that had been held not to constitute bills of attainder. For example, a predecessor of the statute struck down in *Brown*, which had conditioned a union's access to the NLRB upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party, had been upheld,[1800] and although Chief Justice Warren distinguished the previous case from *Brown* on the basis that the Court in the previous decision had found the statute to be preventive rather than punitive,[1801] he then proceeded to reject the contention that the punishment necessary for a bill of attainder had to be punitive or retributive rather than preventive,[1802] thus undermining the prior decision. Of much greater significance was the effect of the *Brown* decision on "conflict-of-interest" legislation typified by that upheld in *Board of Governors v. Agnew*.[1803] The statute there forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank.[1804] Chief Justice Warren distinguished the prior decision and the statute on three grounds from the statute then under consideration. First, the union statute inflicted its deprivation upon the members of a suspect political group in typical bill-of-attainder fashion, unlike the statute in *Agnew*. Second, in the *Agnew* statute, Congress did not express a judgment upon certain men or members of a particular group; it rather concluded that any man placed in the two positions would suffer a temptation any man might yield to. Third, Congress established in the *Agnew* statute an objective standard of conduct expressed in shorthand which precluded persons from holding the two positions.

Apparently withdrawing from the *Brown* analysis in upholding a statute providing for governmental custody of documents and recordings accumulated during the tenure of former President Nixon,[1805] the Court set out a rather different formula for deciding bill of attainder cases.[1806] The law specifically applied only to

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[1800] American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[1801] Douds, 339 U.S. at 413, 414, cited in United States v. Brown, 381 U.S. 437, 457–458 (1965).

[1802] Brown, 381 U.S. at 458–61.

[1803] 329 U.S. 441 (1947).

[1804] 12 U.S.C. § 78.

[1805] The Presidential Recordings and Materials Preservation Act, P.L. 93–526, 88 Stat. 1695 (1974), note following 44 U.S.C. § 2107. For an application of this statute, *see* Nixon v. Warner Communications, 435 U.S. 589 (1978).

[1806] Nixon v. Administrator of General Services, 433 U.S. 425, 468–484 (1977). Justice Stevens' concurrence is more specifically directed to the facts behind the statute than is the opinion of the Court, id. at 484, and Justice White, author of the dissent in *Brown*, merely noted he found the act nonpunitive. Id. at 487. Chief Justice Burger and Justice Rehnquist dissented. Id. at 504, 536–45. Adding to the

President Nixon and directed an executive agency to assume control over the materials and prepare regulations providing for ultimate public dissemination of at least some of them; the act assumed that it did not deprive the former President of property rights but authorized the award of just compensation if it should be judicially determined that there was a taking. First, the Court denied that the clause denies the power to Congress to burden some persons or groups while not so treating all other plausible individuals or groups; even the present law's specificity in referring to the former President by name and applying only to him did not condemn the act because he "constituted a legitimate class of one" on whom Congress could "fairly and rationally" focus.[1807] Second, even if the statute's specificity did bring it within the prohibition of the clause, the lodging of Mr. Nixon's materials with the GSA did not inflict punishment within the meaning of the clause. This analysis was a three-pronged one: 1) the law imposed no punishment traditionally judged to be prohibited by the clause; 2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and 3) the law had no legislative record evincing a congressional intent to punish.[1808] That is, the Court, looking "to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect," concluded that the statute served to further legitimate policies of preserving the availability of evidence for criminal trials and the functioning of the adversary legal system and in promoting the preservation of records of historical value, all in a way that did not and was not intended to punish the former President.

The clause protects individual persons and groups who are vulnerable to nonjudicial determinations of guilt and does not apply to a State; neither does a State have standing to invoke the clause for its citizens against the Federal Government.[1809]

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impression of a departure from *Brown* is the quotation in the opinion of the Court at several points of the *Brown* dissent, id. at 470 n.31, 471 n.34, while the dissent quoted and relied on the opinion of the Court in Brown. Id. at 538, 542.

[1807] 433 U.S. at 472. Justice Stevens carried the thought further, although in the process he severely limited the precedential value of the decision. Id. at 484.

[1808] 433 U.S. at 473–84.

[1809] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

Ex Post Facto Laws

Definition

Both federal and state governments are prohibited from enacting *ex post facto* laws,[1810] and the Court applies the same analysis whether the law in question is a federal or a state enactment. When these prohibitions were adopted as part of the original Constitution, many persons understood the term *ex post facto* laws to "embrace all retrospective laws, or laws governing or controlling past transactions, whether ... of a civil or a criminal nature."[1811] But in the early case of *Calder v. Bull*,[1812] the Supreme Court decided that the phrase, as used in the Constitution, was a term of art that applied only to penal and criminal statutes. But although it is inapplicable to retroactive legislation of any other kind,[1813] the constitutional prohibition may not be evaded by giving a civil form to a measure that is essentially criminal.[1814] Every law that makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution.[1815] A prosecution under a temporary statute which was extended before the date originally set for its expiration does not offend this provision even though it is instituted subsequent to the extension of the statute's duration for a violation committed prior thereto.[1816] Since this provision has no application to crimes committed outside the jurisdiction of the United States against the laws of a foreign country, it is immaterial in extradition proceedings whether the foreign law is *ex post facto* or not.[1817]

What Constitutes Punishment

The issue of whether a law is civil or punitive in nature is essentially the same for *ex post facto* and for double jeopardy analysis.[1818] "A court must ascertain whether the legislature intended the statute to establish civil proceedings. A court will reject the leg-

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[1810] The prohibition on state *ex post facto* legislation appears in Art. I, § 10, cl. 1.

[1811] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1339 (1833).

[1812] 3 U.S. (3 Dall.) 386, 393 (1798).

[1813] Bankers Trust Co. v. Blodgett, 260 U.S. 647, 652 (1923).

[1814] Burgess v. Salmon, 97 U.S. 381 (1878).

[1815] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); Ex parte Garland, 71 U.S. (4 Wall.) 333, 377 (1867); Burgess v. Salmon, 97 U.S. 381, 384 (1878).

[1816] United States v. Powers, 307 U.S. 214 (1939).

[1817] Neely v. Henkel, 180 U.S. 109, 123 (1901). *Cf.* In re Yamashita, 327 U.S. 1, 26 (1946) (dissenting opinion of Justice Murphy); Hirota v. MacArthur, 338 U.S. 197, 199 (1948) (concurring opinion of Justice Douglas).

[1818] Kansas v. Hendricks, 521 U.S. 346 (1997); Seling v. Young, 531 U.S. 250 (2001).

islature's manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention."[1819] A statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual.[1820]

A variety of federal laws have been challenged as *ex post facto*. A statute that prescribed as a qualification for practice before the federal courts an oath that the attorney had not participated in the Rebellion was found unconstitutional since it operated as a punishment for past acts.[1821] But a statute that denied to polygamists the right to vote in a territorial election was upheld even as applied to one who had not contracted a polygamous marriage and had not cohabited with more than one woman since the act was passed, because the law did not operate as an additional penalty for the offense of polygamy but merely defined it as a disqualification of a voter.[1822] A deportation law authorizing the Secretary of Labor to expel aliens for criminal acts committed before its passage is not *ex post facto* since deportation is not a punishment.[1823] For this reason, a statutory provision terminating payment of old-age benefits to an alien deported for Communist affiliation also is not *ex post facto*, for the denial of a non-contractual benefit to a deported alien is not a penalty but a regulation designed to relieve the Social Security System of administrative problems of supervision and enforcement likely to arise from disbursements to beneficiaries residing abroad.[1824] Likewise an act permitting the cancellation of naturalization certificates obtained by fraud prior to the passage of the law was held not to impose a punishment, but instead simply to deprive the alien of his ill-gotten privileges.[1825]

Change in Place or Mode of Trial

A change of the place of trial of an alleged offense after its commission is not an *ex post facto* law. If no place of trial was pro-

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[1819] Seling v. Young, 531 U.S. 250, 261 (2001) (interpreting Art. I, § 10).

[1820] Seling v. Young, 531 U.S. at 263 (2001).

[1821] Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867).

[1822] Murphy v. Ramsey, 114 U.S. 15 (1885).

[1823] Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Marcello v. Bonds, 349 U.S. 302 (1955). Justices Black and Douglas, reiterating in Lehman v. United States ex rel. Carson, 353 U.S. 685, 690–691 (1957), their dissent from the premise that the *ex post facto* clause is directed solely to penal legislation, disapproved a holding that an immigration law, enacted in 1952, 8 U.S.C. § 1251, which authorized deportation of an alien who, in 1945, had acquired a status of nondeportability under pre-existing law is valid. In their opinion, to banish, in 1957, an alien who had lived in the United States for almost 40 years, for an offense committed in 1936, and for which he already had served a term in prison, was to subject him to new punishment retrospectively imposed.

[1824] Flemming v. Nestor, 363 U.S. 603 (1960).

[1825] Johannessen v. United States, 225 U.S. 227 (1912).

vided when the offense was committed, Congress may designate the place of trial thereafter.[1826] A law which alters the rule of evidence to permit a person to be convicted upon less or different evidence than was required when the offense was committed is invalid,[1827] but a statute which simply enlarges the class of persons who may be competent to testify in criminal cases is not *ex post facto* as applied to a prosecution for a crime committed prior to its passage.[1828]

Clause 4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Direct Taxes

The Hylton Case

The crucial problem under clause 4 is to distinguish "direct" from other taxes. In its opinion in *Pollock v. Farmers' Loan & Trust Co.*, the Court declared: "It is apparent . . . that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it."[1829] Against this confident dictum may be set the following brief excerpt from *Madison's Notes on the Convention:* "Mr. King asked what was the precise meaning of *direct* taxation? No one answered."[1830] The first case to come before the Court on this issue was *Hylton v. United States*,[1831] which was decided early in 1796. Congress has levied, according to the rule of uniformity, a specific tax upon all carriages, for the conveyance of persons, which were to be kept by, or for any person, for his own use, or to be let out for hire, or for the conveying of passengers. In a fictitious statement of facts, it was stipulated that the carriages involved in the case were kept exclusively for the personal use of the owner and not for hire. The principal argument for the constitutionality of the measure was made by Hamilton, who treated it as an "excise tax,"[1832] while

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[1826] Cook v. United States, 138 U.S. 157, 183 (1891).

[1827] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

[1828] Hopt v. Utah, 110 U.S. 574, 589 (1884).

[1829] 157 U.S. 429, 573 (1895).

[1830] J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 435 (G. Hunt & J. Scott eds., Greenwood Press ed. 1970).

[1831] 3 U.S. (3 Dall.) 171 (1796).

[1832] THE WORKS OF ALEXANDER HAMILTON 845 (J. Hamilton ed., 1851). "If the meaning of the word excise is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an excise, and then must necessarily be uniform and liable to apportionment; consequently, not a direct tax."

Madison both on the floor of Congress and in correspondence attacked it as "direct" and so void, inasmuch as it was levied without apportionment.[1833] The Court, taking the position that the direct tax clause constituted in practical operation an exception to the general taxing powers of Congress, held that no tax ought to be classified as "direct" which could not be conveniently apportioned, and on this basis sustained the tax on carriages as one on their "use" and therefore an "excise." Moreover, each of the judges advanced the opinion that the direct tax clause should be restricted to capitation taxes and taxes on land, or that at most, it might cover a general tax on the aggregate or mass of things that generally pervade all the States, especially if an assessment should intervene, while Justice Paterson, who had been a member of the Federal Convention, testified to his recollection that the principal purpose of the provision had been to allay the fear of the Southern States lest their Negroes and land should be subjected to a specific tax.[1834]

From the Hylton to the Pollock Case

The result of the *Hylton* case was not challenged until after the Civil War. A number of the taxes imposed to meet the demands of that war were assailed during the postwar period as direct taxes, but without result. The Court sustained successively, as "excises" or "duties," a tax on an insurance company's receipts for premiums and assessments;[1835] a tax on the circulating notes of state banks,[1836] an inheritance tax on real estate,[1837] and finally a general tax on incomes.[1838] In the last case, the Court took pains to state that it regarded the term "direct taxes" as having acquired a definite and fixed meaning, to wit, capitation taxes, and taxes on land.[1839] Then, almost one hundred years after the *Hylton* case, the famous case of *Pollock v. Farmers' Loan & Trust Co.*[1840] arose under the Income Tax Act of 1894.[1841] Undertaking to correct "a century of error," the Court held, by a vote of five-to-four, that a tax on income from property was a direct tax within the meaning

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[1833] 4 ANNALS OF CONGRESS 730 (1794); 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14 (1865).

[1834] 3 U.S. (3 Dall.) 171, 177 (1796).

[1835] Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433 (1869).

[1836] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[1837] Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1875).

[1838] Springer v. United States, 102 U.S. 586 (1881).

[1839] 102 U.S. at 602.

[1840] 157 U.S. 429 (1895); 158 U.S. 601 (1895).

[1841] 28 Stat. 509, 553 (1894).

of the Constitution and hence void because not apportioned according to the census.

Restriction of the Pollock Decision

The *Pollock* decision encouraged taxpayers to challenge the right of Congress to levy by the rule of uniformity numerous taxes that had always been reckoned to be excises. But the Court evinced a strong reluctance to extend the doctrine to such exactions. Purporting to distinguish taxes levied "because of ownership" or "upon property as such" from those laid upon "privileges,"[1842] it sustained as "excises" a tax on sales on business exchanges,[1843] a succession tax which was construed to fall on the recipients of the property transmitted rather than on the estate of the decedent,[1844] and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer.[1845] Again, in *Thomas v. United States*,[1846] the validity of a stamp tax on sales of stock certificates was sustained on the basis of a definition of "duties, imposts and excises." These terms, according to the Chief Justice, "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."[1847] On the same day, it ruled, in *Spreckels Sugar Refining Co. v. McClain*,[1848] that an exaction, denominated a special excise tax, imposed on the business of refining sugar and measured by the gross receipts thereof, was in truth an excise and hence properly levied by the rule of uniformity. The lesson of *Flint v. Stone Tracy Co.*[1849] was the same. In the *Flint* case, what was in form an income tax was sustained as a tax on the privilege of doing business as a corporation, the value of the privilege being measured by the income, including income from investments. Similarly, in *Stanton v. Baltic Mining Co.*,[1850] a tax on the annual production of mines was held to be "independently of the effect of the operation of the Sixteenth Amendment . . . not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations."[1851]

[1842] Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Knowlton v. Moore, 178 U.S. 41, 80 (1900).
[1843] Nicol v. Ames, 173 U.S. 509 (1899).
[1844] Knowlton v. Moore, 178 U.S. 41 (1900).
[1845] Patton v. Brady, 184 U.S. 608 (1902).
[1846] 192 U.S. 363 (1904).
[1847] 192 U.S. at 370.
[1848] 192 U.S. 397 (1904).
[1849] 220 U.S. 107 (1911).
[1850] 240 U.S. 103 (1916).
[1851] 240 U.S. at 114.

A convincing demonstration of the extent to which the *Pollock* decision had been whittled down by the time the Sixteenth Amendment was adopted is found in *Billings v. United States*.[1852] In challenging an annual tax assessed for the year 1909 on the use of foreign built yachts—a levy not distinguishable in substance from the carriage tax involved in the *Hylton* case as construed by the Supreme Court—counsel did not even suggest that the tax should be classed as a direct tax. Instead, he based his argument that the exaction constituted a taking of property without due process of law upon the premise that it was an excise, and the Supreme Court disposed of the case upon the same assumption.

In 1921, the Court cast aside the distinction drawn in *Knowlton v. Moore* between the right to transmit property on the one hand and the privilege of receiving it on the other, and sustained an estate tax as an excise. "Upon this point," wrote Justice Holmes for a unanimous Court, "a page of history is worth a volume of logic."[1853] This proposition being established, the Court had no difficulty in deciding that the inclusion in the computation of the estate tax of property held as joint tenants,[1854] or as tenants by the entirety,[1855] or the entire value of community property owned by husband and wife,[1856] or the proceeds of insurance upon the life of the decedent,[1857] did not amount to direct taxation of such property. Similarly, it upheld a graduated tax on gifts as an excise, saying that it was "a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another."[1858] Justice Sutherland, speaking for himself and two associates, urged that "the right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it."[1859]

Miscellaneous

The power of Congress to levy direct taxes is not confined to the States represented in that body. Such a tax may be levied in proportion to population in the District of Columbia.[1860] A penalty imposed for nonpayment of a direct tax is not a part of the tax

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[1852] 232 U.S. 261 (1914).

[1853] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[1854] Phillips v. Dime Trust & S.D. Co., 284 U.S. 160 (1931).

[1855] Tyler v. United States, 281 U.S. 497 (1930).

[1856] Fernandez v. Wiener, 326 U.S. 340 (1945).

[1857] Chase Nat'l Bank v. United States, 278 U.S. 327 (1929); United States v. Manufacturers Nat'l Bank, 363 U.S. 194, 198–201 (1960).

[1858] Bromley v. McCaughn, 280 U.S. 124, 136 (1929). *See also* Helvering v. Bullard, 303 U.S. 297 (1938).

[1859] Bromley v. McCaughn, 280 U.S. 124, 140 (1929).

[1860] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820).

itself and hence is not subject to the rule of apportionment. Accordingly, the Supreme Court sustained the penalty of fifty percent, which Congress exacted for default in the payment of the direct tax on land in the aggregate amount of twenty million dollars that was levied and apportioned among the States during the Civil War.[1861]

Clause 5. No Tax or Duty shall be laid on Articles exported from any State.

Taxes on Exports

This prohibition applies only to the imposition of duties on goods by reason of exportation.[1862] The word "export" signifies goods exported to a foreign country, not to an unincorporated territory of the United States.[1863] A general tax laid on all property alike, including that intended for export, is not within the prohibition, if it is not levied on goods in course of exportation nor because of their intended exportation.[1864] Continuing its refusal to modify its export clause jurisprudence,[1865] the Court held unconstitutional the Harbor Maintenance Tax (HMT) under the export clause insofar as the tax was applied to goods loaded at United States ports for export. The HMT required shippers to pay a uniform charge on commercial cargo shipped through the Nation's ports. The clause, said the Court, "categorically bars Congress from imposing any tax on exports."[1866] However, the clause does not interdict a "user fee," that is, a charge that lacks the attributes of a generally applicable tax or duty and is designed to compensate for government supplied services, facilities, or benefits, and it was that defense to which the Government repaired once it failed to obtain a modification of the rules under the clause. But the HMT bore the indicia of a tax. It was titled as a tax, described as a tax in the law, and codified in the Internal Revenue Code. Aside from labels, however, courts must look to how things operate, and the HMT did not qualify as a user fee. It did not represent compensation for services rendered. The value of export cargo did not correspond reliably with the federal harbor services used or usable by the exporter. Instead, the extent and manner of port use depended on such factors as size and

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[1861] De Treville v. Smalls, 98 U.S. 517, 527 (1879).

[1862] Turpin v. Burgess, 117 U.S. 504, 507 (1886). *Cf.* Almy v. California, 65 U.S. (24 How.) 169, 174 (1861).

[1863] Dooley v. United States, 183 U.S. 151, 154 (1901).

[1864] Cornell v. Coyne, 192 U.S. 418, 428 (1904); Turpin v. Burgess, 117 U.S. 504, 507 (1886).

[1865] *See* United States v. IBM, 517 U.S. 843, 850–61 (1996).

[1866] United States v. United States Shoe Corp., 523 U.S. 360, 363 (1998).

tonnage of a vessel and the length of time it spent in port.[1867] The HMT was thus a tax, and therefore invalid. Where the sale to a commission merchant for a foreign consignee was consummated by delivery of the goods to an exporting carrier, the sale was held to be a step in the exportation and hence exempt from a general tax on sales of such commodity.[1868] The giving of a bond for exportation of distilled liquor was not the commencement of exportation so as to exempt from an excise tax spirits that were not exported pursuant to such bond.[1869] A tax on the income of a corporation derived from its export trade was not a tax on "articles exported" within the meaning of the Constitution.[1870]

In *United States v. IBM Corp.*,[1871] the Court declined the Government's argument that it should refine its export-tax-clause jurisprudence. Rather than read the clause as a bar on any tax that applies to a good in the export stream, the Government contended that the Court should bring this clause in line with the import-export clause[1872] and with dormant-commerce-clause doctrine. In that view, the Court should distinguish between discriminatory and nondiscriminatory taxes on exports. But the Court held that sufficient differences existed between the export clause and the other two clauses, so that its bar should continue to apply to any and all taxes on goods in the course of exportation.

Stamp Taxes

A stamp tax imposed on foreign bills of lading,[1873] charter parties,[1874] or marine insurance policies,[1875] was in effect a tax or duty upon exports, and so void; but an act requiring the stamping

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[1867] 523 U.S. at 367–69.

[1868] Spalding & Bros. v. Edwards, 262 U.S. 66 (1923).

[1869] Thompson v. United States, 142 U.S. 471 (1892).

[1870] Peck & Co. v. Lowe, 247 U.S. 165 (1918); National Paper Co. v. Bowers, 266 U.S. 373 (1924).

[1871] 517 U.S. 843 (1996).

[1872] Article I, § 10, cl. 2, applying to the States.

[1873] Fairbank v. United States, 181 U.S. 283 (1901).

[1874] United States v. Hvoslef, 237 U.S. 1 (1915).

[1875] Thames & Mersey Inc. v. United States, 237 U.S. 19 (1915). In United States v. IBM Corp., 517 U.S. 843 (1996), the Court adhered to *Thames & Mersey*, and held unconstitutional a federal excise tax upon insurance policies issued by foreign countries as applied to coverage for exported products. The Court admitted that one could question the earlier case's equating of a tax on the insurance of exported goods with a tax on the goods themselves, but it observed that the Government had chosen not to present that argument. Principles of *stare decisis* thus cautioned observance of the earlier case. Id. at 854–55. The dissenters argued that the issue had been presented and should be decided by overruling the earlier case. Id. at 863 (Justices Kennedy and Ginsburg dissenting).

of all packages of tobacco intended for export in order to prevent fraud was held not to be forbidden as a tax on exports.[1876]

Clause 6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

The "No Preference" Clause

The limitations imposed by this section were designed to prevent preferences as between ports because of their location in different States. They do not forbid such discriminations as between individual ports. Acting under the commerce clause, Congress may do many things that benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic.[1877] A rate order of the Interstate Commerce Commission which allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas.[1878] Although there were a few early intimations that this clause was applicable to the States as well as to Congress,[1879] the Supreme Court declared emphatically in 1886 that state legislation was unaffected by it.[1880] After more than a century, the Court confirmed, over the objection that this clause was offended, the power which the First Congress had exercised[1881] in sanctioning the continued supervision and regulation of pilots by the States.[1882]

[1876] Pace v. Burgess, 92 U.S. 372 (1876); Turpin v. Burgess, 117 U.S. 504, 505 (1886).

[1877] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 131 (1931); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856); South Carolina v. Georgia, 93 U.S. 4 (1876). In Williams v. United States, 255 U.S. 336 (1921) the argument that an act of Congress which prohibited interstate transportation of liquor into States whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this clause was rejected.

[1878] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 132 (1931).

[1879] Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 282, 414 (1849) (opinion of Justice Wayne); *cf.* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851).

[1880] 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).

[1881] 1 Stat. 53, 54, § 4 (1789).

[1882] Thompson v. Darden, 198 U.S. 310 (1905).

Clause 7. No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Appropriations

This clause is a limitation upon the power of the Executive Department and does not restrict Congress in appropriating moneys in the Treasury.[1883] That body may recognize and pay a claim of an equitable, moral, or honorary nature. When it directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.[1884] In making appropriations to pay claims arising out of the Civil War, Congress could, the Court held, lawfully provide that certain persons, i.e., those who had aided the Rebellion, should not be paid out of the funds made available by the general appropriation, but that such persons should seek relief from Congress.[1885] The Court has also recognized that Congress has a wide discretion with regard to the extent to which it shall prescribe details of expenditures for which it appropriates funds and has approved the frequent practice of making general appropriations of large amounts to be allotted and expended as directed by designated government agencies. Citing as an example the act of June 17, 1902,[1886] where all moneys received from the sale and disposal of public lands in a large number of States and territories were set aside as a special fund to be expended under the direction of the Secretary of the Interior upon such projects as he determined to be practicable and advisable for the reclamation of arid and semi-arid lands within those States and territories, the Court declared: "The constitutionality of this delegation of authority has never been seriously questioned."[1887]

Payment of Claims

No officer of the Federal Government is authorized to pay a debt due from the United States, whether reduced to judgment or not, without an appropriation for that purpose.[1888] Nor may a gov-

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[1883] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Knote v. United States, 95 U.S. 149, 154 (1877).

[1884] United States v. Price, 116 U.S. 43 (1885); United States v. Realty Company, 163 U.S. 427, 439 (1896); Allen v. Smith, 173 U.S. 389, 393 (1899).

[1885] Hart v. United States, 118 U.S. 62, 67 (1886).

[1886] 32 Stat. 388 (1902).

[1887] Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937).

[1888] Reeside v. Walker, 52 U.S. (11 How.) 272 (1851).

ernment employee, by erroneous advice to a claimant, bind the United States through equitable estoppel principles to pay a claim for which an appropriation has not been made.[1889]

After the Civil War, a number of controversies arose out of attempts by Congress to restrict the payment of the claims of persons who had aided the Rebellion but had thereafter received a pardon from the President. The Supreme Court held that Congress could not prescribe the evidentiary effect of a pardon in a proceeding in the Court of Claims for property confiscated during the Civil War,[1890] but that where the confiscated property had been sold and the proceeds paid into the Treasury, a pardon did not of its own force authorize the restoration of such proceeds.[1891] It was within the competence of Congress to declare that the amount due to persons thus pardoned should not be paid out of the Treasury and that no general appropriation should extend to their claims.[1892]

Clause 8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

IN GENERAL

In 1871 the Attorney General of the United States ruled that: "A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power . . . but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative," which is prohibited by this clause of the Constitution.[1893]

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

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[1889] OPM v. Richmond, 496 U.S. 414 (1990).

[1890] United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

[1891] Knote v. United States, 95 U.S. 149, 154 (1877); Austin v. United States, 155 U.S. 417, 427 (1894).

[1892] Hart v. United States, 118 U.S. 62, 67 (1886).

[1893] 13 Ops. Atty. Gen. 538 (1871).

gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Treaties, Alliances, or Confederations

At the time of the Civil War, this clause was one of the provisions upon which the Court relied in holding that the Confederation formed by the seceding States could not be recognized as having any legal existence.[1894] Today, its practical significance lies in the limitations which it implies upon the power of the States to deal with matters having a bearing upon international relations. In the early case of *Holmes v. Jennison*,[1895] Chief Justice Taney invoked it as a reason for holding that a State had no power to deliver up a fugitive from justice to a foreign State. More recently, the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, since the oil under the three mile marginal belt along the California coast might well become the subject of international dispute and since the ocean, including this three mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area.[1896] In *Skiriotes v. Florida*,[1897] the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Hughes declared; "When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances."[1898]

Bills of Credit

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals, and between the Government and individuals, for the ordi-

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[1894] Williams v. Bruffy, 96 U.S. 176, 183 (1878).
[1895] 39 U.S. (14 Pet.) 540 (1840).
[1896] United States v. California, 332 U.S. 19 (1947).
[1897] 313 U.S. 69 (1941).
[1898] 313 U.S. at 78–79.

nary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest bearing certificates, in denominations not exceeding ten dollars, which were issued by loan offices established by the State of Missouri and made receivable in payment of taxes or other moneys due to the State, and in payment of the fees and salaries of state officers, were held to be bills of credit whose issuance was banned by this section.[1899] The States are not forbidden, however, to issue coupons receivable for taxes,[1900] nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.[1901] Bills issued by state banks are not bills of credit;[1902] it is immaterial that the State is the sole stockholder of the bank,[1903] that the officers of the bank were elected by the state legislature,[1904] or that the capital of the bank was raised by the sale of state bonds.[1905]

Legal Tender

Relying on this clause, which applies only to the States and not to the Federal Government,[1906] the Supreme Court has held that where the marshal of a state court received state bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.[1907] Since, however, there is nothing in the Constitution prohibiting a bank depositor from consenting when he draws a check that payment may be made by draft, a state law providing that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts was held valid.[1908]

Bills of Attainder

Statutes passed after the Civil War with the intent and result of excluding persons who had aided the Confederacy from following certain callings, by the device of requiring them to take an oath

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[1899] Craig v. Missouri, 29 U.S. (4 Pet.) 410, 425 (1830); Byrne v. Missouri, 33 U.S. (8 Pet.) 40 (1834).

[1900] Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 269 (1885); Chaffin v. Taylor, 116 U.S. 567 (1886).

[1901] Houston & Texas Cent. R.R. v. Texas, 177 U.S. 66 (1900).

[1902] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[1903] Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15 (1851); Curran v. Arkansas, 56 U.S. (15 How.) 304, 317 (1854).

[1904] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[1905] Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851).

[1906] Juilliard v. Greenman, 110 U.S. 421, 446 (1884).

[1907] Gwin v. Breedlove, 43 U.S. (2 How.) 29, 38 (1844). *See also* Griffin v. Thompson, 43 U.S. (2 How.) 244 (1844).

[1908] Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 659 (1923).

that they had never given such aid, were held invalid as being bills of attainder, as well as *ex post facto* laws.[1909]

Other attempts to raise bill-of-attainder claims have been unsuccessful. A Court majority denied that a municipal ordinance that required all employees to execute oaths that they had never been affiliated with Communist or similar organizations, violated the clause, on the grounds that the ordinance merely provided standards of qualifications and eligibility for employment.[1910] A law that prohibited any person convicted of a felony and not subsequently pardoned from holding office in a waterfront union was not a bill of attainder because the "distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt" and the prohibition "embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction."[1911]

Ex Post Facto Laws

Scope of the Provision.—This clause, like the cognate restriction imposed on the Federal Government by § 9, relates only to penal and criminal legislation and not to civil laws that affect private rights adversely.[1912] There are three categories of *ex post facto* laws: those "which punish[ ] as a crime an act previously committed, which was innocent when done; which make[ ] more burdensome the punishment for a crime, after its commission; or which deprive[ ] one charged with crime of any defense available according to law at the time when the act was committed."[1913] The

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[1909] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1872); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1873).

[1910] Garner v. Board of Pub. Works, 341 U.S. 716, 722–723 (1951). *Cf.* Konigsberg v. State Bar of California, 366 U.S. 36, 47 n.9 (1961).

[1911] De Veau v. Braisted, 363 U.S. 144, 160 (1960). Presumably, United States v. Brown, 381 U.S. 437 (1965), does not qualify this decision.

[1912] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834); Baltimore and Susquehanna R.R. v. Nesbit, 51 U.S. (10 How.) 395, 401 (1850); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 463 (1855); Loche v. New Orleans, 71 U.S. (4 Wall.) 172 (1867); Orr v. Gilman, 183 U.S. 278, 285 (1902); Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911). In Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998) (concurring), Justice Thomas indicated a willingness to reconsider *Calder* to determine whether the clause should apply to civil legislation.

[1913] Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting Beazell v. Ohio, 269 U.S. 167, 169–170 (1925)). Alternatively, the Court described the reach of the clause as extending to laws that "alter the definition of crimes or increase the punishment for criminal acts." Id. at 43. Justice Chase's oft-cited formulation has a fourth category: "every law that aggravates a crime, or makes it greater than it was, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), *cited in, e.g.*, Carmell v. Texas, 529 U.S. 513, 522 (2000).

bar is directed only against legislative action and does not touch erroneous or inconsistent decisions by the courts.[1914]

The fact that a law is *ex post facto* and invalid as to crimes committed prior to its enactment does not affect its validity as to subsequent offenses.[1915] A statute that mitigates the rigor of the law in force at the time the crime was committed,[1916] or merely penalizes the continuance of conduct lawfully begun before its passage, is not *ex post facto*. Thus, measures penalizing the failure of a railroad to cut drains through existing embankments[1917] or making illegal the continued possession of intoxicating liquors which were lawfully acquired[1918] have been held valid.

Denial of Future Privileges to Past Offenders.—The right to practice a profession may be denied to one who was convicted of an offense before the statute was enacted if the offense reasonably may be regarded as a continuing disqualification for the profession. Without offending the Constitution, statutes barring a person from practicing medicine after conviction of a felony[1919] or excluding convicted felons from waterfront union offices unless pardoned or in receipt of a parole board's good conduct certificate,[1920] may be enforced against a person convicted before the measures were passed. But the test oath prescribed after the Civil War, whereby office holders, teachers, or preachers were required to swear that they had not participated in the Rebellion, was held invalid on the ground that it had no reasonable relation to fitness to perform official or professional duties, but rather was a punishment for past offenses.[1921] A similar oath required of suitors in the courts also was held void.[1922]

Changes in Punishment.—Statutes that changed an indeterminate sentence law to require a judge to impose the maximum sentence, whereas formerly he could impose a sentence between the

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[1914] Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913). However, an unforeseeable judicial enlargement of a criminal statute so as to encompass conduct not covered on the face of the statute operates like an *ex post facto* law if it is applied retroactively and violates due process in that event. Bouie v. City of Columbia, 378 U.S. 347 (1964). *See* Marks v. United States, 430 U.S. 188 (1977) (applying *Bouie* in context of § 9, cl. 3). *But see* Splawn v. California, 431 U.S. 595 (1977) (rejecting application of *Bouie*). The Court itself has not always adhered to this standard. *See* Ginzburg v. United States, 383 U.S. 463 (1966).

[1915] Jaehne v. New York, 128 U.S. 189, 194 (1888).

[1916] Rooney v. North Dakota, 196 U.S. 319, 325 (1905).

[1917] Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915).

[1918] Samuels v. McCurdy, 267 U.S. 188 (1925).

[1919] Hawker v. New York, 170 U.S. 189, 190 (1898). *See also* Reetz v. Michigan, 188 U.S. 505, 509 (1903); Lehmann v. State Board of Public Accountancy, 263 U.S. 394 (1923).

[1920] De Veau v. Braisted, 363 U.S. 144, 160 (1960).

[1921] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 316 (1867).

[1922] Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1873).

minimum and maximum,[1923] required criminals sentenced to death to be kept thereafter in solitary confinement,[1924] or allowed a warden to fix, within limits of one week, and keep secret the time of execution,[1925] were held to be *ex post facto* as applied to offenses committed prior to their enactment. Because it made more onerous the punishment for crimes committed before its enactment, a law, a law that altered sentencing guidelines to make it more likely the sentencing authority would impose on a defendant a more severe sentence than was previously likely and making it impossible for the defendant to challenge the sentence was *ex post facto* as to one who had committed the offense prior to the change.[1926] But laws providing heavier penalties for new crimes thereafter committed by habitual criminals,[1927] changing the punishment from hanging to electrocution, fixing the place therefor in the penitentiary, and permitting the presence of a greater number of invited witnesses,[1928] or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.[1929]

In *Dobbert v. Florida*,[1930] the Court may have formulated a new test for determining when a criminal statute *vis-a-vis* punishment is *ex post facto*. Defendant murdered two of his children; at the time of the commission of the offenses, Florida law provided the death penalty upon conviction for certain takings of life. Subsequent to the commission of the capital offenses, the Supreme Court held capital sentencing laws similar to Florida's unconstitutional, although convictions obtained under the statutes were not to be

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[1923] Lindsey v. Washington, 301 U.S. 397 (1937). But note the limitation of *Lindsey* in Dobbert v. Florida, 432 U.S. 282, 298–301 (1977).

[1924] Holden v. Minnesota, 137 U.S. 483, 491 (1890).

[1925] Medley, Petitioner, 134 U.S. 160, 171 (1890).

[1926] Miller v. Florida, 482 U.S. 423 (1987). *But see* California Dep't of Corrections v. Morales, 514 U.S. 499 (1995) (a law amending parole procedures to decrease frequency of parole-suitability hearings is not *ex post facto* as applied to prisoners who committed offenses before enactment). The opinion modifies previous opinions that had held impermissible some laws because they operated to the disadvantage of covered offenders. Henceforth, "the focus of *ex post facto* inquiry is . . . whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Id. at 506 n.3. *Accord*, Garner v. Jones, 529 U.S. 244 (2000) (evidence insufficient to determine whether change in frequency of parole hearings significantly increases the likelihood of prolonging incarceration). *But see* Lynce v. Mathis, 519 U.S. 433 (1997) (cancellation of release credits already earned and used, resulting in reincarceration, violates the Clause).

[1927] Gryger v. Burke, 334 U.S. 728 (1948); McDonald v. Massachusetts, 180 U.S. 311 (1901); Graham v. West Virginia, 224 U.S. 616 (1912).

[1928] Malloy v. South Carolina, 237 U.S. 180 (1915).

[1929] Rooney v. North Dakota, 196 U.S. 319, 324 (1905).

[1930] 432 U.S. 282, 297–98 (1977). Justices Stevens, Brennan, and Marshall dissented. Id. at 304.

overturned,[1931] and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law, which was sustained. Dobbert was convicted and sentenced to death under the new law, which was enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether the old statute was constitutional or not, "it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder."[1932] Whether the "fair warning" standard is to have any prominent place in *ex post facto* jurisprudence may be an interesting question, but it is problematical whether the fact situation will occur often enough to make the principle applicable in very many cases.

Changes in Procedure.—An accused person does not have a right to be tried in all respects in accordance with the law in force when the crime charged was committed.[1933] Laws shifting the place of trial from one county to another,[1934] increasing the number of appellate judges and dividing the appellate court into divisions,[1935] granting a right of appeal to the State,[1936] changing the method of selecting and summoning jurors,[1937] making separate trials for persons jointly indicted a matter of discretion for the trial court rather than a matter of right,[1938] and allowing a comparison of handwriting experts[1939] have been sustained over the objection that they were *ex post facto*. It was said or suggested in a number of these cases, and two decisions were rendered precisely on the basis, that the mode of procedure might be changed only so long as the substantial rights of the accused were not curtailed.[1940] The

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[1931] Furman v. Georgia, 408 U.S. 238 (1972). The new law was sustained in Proffitt v. Florida, 428 U.S. 242 (1976).

[1932] 432 U.S. at 297.

[1933] Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

[1934] Gut v. Minnesota, 76 U.S. (9 Wall.) 35, 37 (1870).

[1935] Duncan v. Missouri, 152 U.S. 377 (1894).

[1936] Mallett v. North Carolina, 181 U.S. 589, 593 (1901).

[1937] Gibson v. Mississippi, 162 U.S. 565, 588 (1896).

[1938] Beazell v. Ohio, 269 U.S. 167 (1925).

[1939] Thompson v. Missouri, 171 U.S. 380, 381 (1898).

[1940] *E.g.*, Duncan v. Missouri, 152 U.S. 377, 382–383 (1894); Malloy v. South Carolina, 237 U.S. 180, 183 (1915); Beazell v. Ohio, 269 U.S. 167, 171 (1925). The two cases decided on the basis of the distinction were Thompson v. Utah, 170 U.S. 343 (1898) (application to felony trial for offense committed before enactment of change from 12–person jury to an eight-person jury void under clause), and Kring v. Missouri, 107 U.S. 221 (1883) (as applied to a case arising before change, a law abolishing a rule under which a guilty plea functioned as a acquittal of a more seri-

Court has now disavowed this position.[1941] All that the language of most of these cases meant was that a legislature might not evade the *ex post facto* clause by labeling changes as alteration of "procedure." If a change labeled "procedural" effects a substantive change in the definition of a crime or increases punishment or denies a defense, the clause is invoked; however, if a law changes the procedures by which a criminal case is adjudicated, the clause is not implicated, regardless of the increase in the burden on a defendant.[1942]

Changes in evidentiary rules that allow conviction on less evidence than was required at the time the crime was committed can also run afoul of the *ex post facto* clause. This principle was applied in the Court's invalidation of retroactive application of a Texas law that eliminated the requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses, and allowed conviction on the victim's testimony alone.[1943]

Obligation of Contracts

"Law" Defined.—The term comprises statutes, constitutional provisions,[1944] municipal ordinances,[1945] and administrative regulations having the force and operation of statutes.[1946] But are judicial decisions within the clause? The abstract principle of the separation of powers, at least until recently, forbade the idea that the courts "make" law and the word "pass" in the above clause seemed to confine it to the formal and acknowledged methods of exercise of the law-making function. Accordingly, the Court has frequently said that the clause does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights.[1947] Nev-

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ous offense, so that defendant could be tried on the more serious charge, a violation of the clause).

[1941] Collins v. Youngblood, 497 U.S. 37, 44–52 (1990). In so doing, the Court overruled Kring and Thompson v. Utah.

[1942] 497 U.S. at 44, 52. *Youngblood* upheld a Texas statute, as applied to a person committing an offense and tried before passage of the law, that authorized criminal courts to reform an improper verdict assessing a punishment not authorized by law, which had the effect of denying defendant a new trial to which he would have been previously entitled.

[1943] Carmell v. Texas, 529 U.S. 513 (2000).

[1944] Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856); Ohio & M. R.R. v. McClure, 77 U.S. (10 Wall.) 511 (1871); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885); Bier v. McGehee, 148 U.S. 137, 140 (1893).

[1945] New Orleans Water-Works Co. v. Rivers, 115 U.S. 674 (1885); City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898); City of Vicksburg v. Waterworks Co., 202 U.S. 453 (1906); Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914); Cuyahoga Power Co. v. City of Akron, 240 U.S. 462 (1916).

[1946] Id. *See also* Grand Trunk Ry. v. Indiana R.R. Comm'n, 221 U.S. 400 (1911); Appleby v. Delaney, 271 U.S. 403 (1926).

[1947] Central Land Co. v. Laidley, 159 U.S. 103 (1895). *See also* New Orleans Water-Works Co. v. Louisiana Sugar Co., 125 U.S. 18 (1888); Hanford v. Davies, 163

ertheless, there are important exceptions to this rule that are set forth below.

Status of Judicial Decisions.—While the highest state court usually has final authority in determining the construction as well as the validity of contracts entered into under the laws of the State, and the national courts will be bound by their decision of such matters, nevertheless, for reasons that are fairly obvious, this rule does not hold when the contract is one whose obligation is alleged to have been impaired by state law.[1948] Otherwise, the challenged state authority could be vindicated through the simple device of a modification or outright nullification by the state court of the contract rights in issue. Similarly, the highest state court usually has final authority in construing state statutes and determining their validity in relation to the state constitution. But this rule too has had to bend to some extent to the Supreme Court's interpretation of the obligation of contracts clause.[1949]

Suppose the following situation: (1) a municipality, acting under authority conferred by a state statute, has issued bonds in aid of a railway company; (2) the validity of this statute has been sustained by the highest state court; (3) later the state legislature passes an act to repeal certain taxes to meet the bonds; (4) it is sustained in doing so by a decision of the highest state court holding that the statute authorizing the bonds was unconstitutional *ab initio*. In such a case the Supreme Court would take an appeal from the state court and would reverse the latter's decision of unconstitutionality because of its effect in rendering operative the act to repeal the tax.[1950]

U.S. 273 (1896); Ross v. Oregon, 227 U.S. 150 (1913); Detroit United Ry. v. Michigan, 242 U.S. 238 (1916); Long Sault Development Co. v. Call, 242 U.S. 272 (1916); McCoy v. Union Elevated R. Co., 247 U.S. 354 (1918); Columbia G. & E. Ry. v. South Carolina, 261 U.S. 236 (1923); Tidal Oil Co. v. Flannagan, 263 U.S. 444 (1924).

[1948] Jefferson Branch Bank v. Skelly, 66 U.S. (1 Bl.) 436, 443 (1862); Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116, 145 (1863); Wright v. Nagle, 101 U.S. 791, 793 (1880); McGahey v. Virginia, 135 U.S. 662, 667 (1890); Scott v. McNeal, 154 U.S. 34, 35 (1894); Stearns v. Minnesota, 179 U.S. 223, 232–233 (1900); Coombes v. Getz, 285 U.S. 434, 441 (1932); Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168, 170 (1947).

[1949] McCullough v. Virginia, 172 U.S. 102 (1898); Houston & Texas Central Rd. Co. v. Texas, 177 U.S. 66, 76, 77 (1900); Hubert v. New Orleans, 215 U.S. 170, 175 (1909); Carondelet Canal Co. v. Louisiana, 233 U.S. 362, 376 (1914); Louisiana Ry. & Nav. Co. v. New Orleans, 235 U.S. 164, 171 (1914).

[1950] State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854), and Ohio Life Ins. and Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1854) are the leading cases. *See also* Jefferson Branch Bank v. Skelly, 66 U.S. (1 Bl.) 436 (1862); Louisiana v. Pilsbury, 105 U.S. 278 (1882); McGahey v. Virginia, 135 U.S. 662 (1890); Mobile & Ohio R.R. v. Tennessee, 153 U.S. 486 (1894); Bacon v. Texas, 163 U.S. 207 (1896); McCullough v. Virginia, 172 U.S. 102 (1898).

Suppose further, however, that the state court has reversed itself on the question of the constitutionality of the bonds in a suit by a creditor for payment without there having been an act of repeal. In this situation, the Supreme Court would still afford relief if the case is one between citizens of different States, which reaches it via a lower federal court.[1951] This is because in cases of this nature the Court formerly felt free to determine questions of fundamental justice for itself. Indeed, in such a case, the Court has apparently in the past regarded itself as free to pass upon the constitutionality of the state law authorizing the bonds even though there has been no prior decision by the highest state court sustaining them, the idea being that contracts entered into simply on the faith of the presumed constitutionality of a state statute are entitled to this protection.[1952]

In other words, in cases of which it has jurisdiction because of diversity of citizenship, the Court has held that the obligation of contracts is capable of impairment by subsequent judicial decisions no less than by subsequent statutes and that it is able to prevent such impairment. In cases, on the other hand, of which it obtains jurisdiction only on the constitutional ground and by appeal from a state court, it has always adhered in terms to the doctrine that the word "laws" as used in Article I, § 10, does not comprehend judicial decisions. Yet even in these cases, it will intervene to protect contracts entered into on the faith of existing decisions from an impairment that is the direct result of a reversal of such decisions, but there must be in the offing, as it were, a statute of some kind—one possibly many years older than the contract rights involved—on which to pin its decision.[1953]

In 1922, Congress, through an amendment to the Judicial Code, endeavored to extend the reviewing power of the Supreme Court to suits involving "... the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States...." This appeared to be an invitation to the Court to say frankly that the obligation of a contract can be impaired by a subsequent court decision. The Court, however, declined the invitation in an opinion by

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[1951] Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 206 (1865); Havemayer v. Iowa County, 70 U.S. (3 Wall.) 294 (1866); Thomson v. Lee County, 70 U.S. (3 Wall.) 327 (1866); The City v. Lamson, 76 U.S. (9 Wall.) 477 (1870); Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678 (1873); Taylor v. Ypsilanti, 105 U.S. 60 (1882); Anderson v. Santa Anna, 116 U.S. 356 (1886); Wilkes County v. Coler, 180 U.S. 506 (1901).

[1952] Great Southern Hotel Co. v. Jones, 193 U.S. 532, 548 (1904).

[1953] Sauer v. New York, 206 U.S. 536 (1907); Muhlker v. New York & Harlem R.R., 197 U.S. 544, 570 (1905).

Chief Justice Taft that reviewed many of the cases covered in the preceding paragraphs.

Dealing with *Gelpcke* and adherent decisions, Chief Justice Taft said: "These cases were not writs of error to the Supreme Court of a State. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. *Burgess v. Seligman*, 107 U.S. 20 (1883)."[1954] While doubtless this was an available explanation in 1924, the decision in 1938 in *Erie Railroad Co. v. Tompkins*,[1955] so cut down the power of the federal courts to decide diversity of citizenship cases according to their own notions of "general principles of common law" as to raise the question whether the Court will not be required eventually to put *Gelpcke* and its companions and descendants squarely on the obligation of contracts clause or else abandon them.

"Obligation" Defined.—A contract is analyzable into two elements: the agreement, which comes from the parties, and the obligation, which comes from the law and makes the agreement binding on the parties. The concept of obligation is an importation from the Civil Law and its appearance in the contracts clause is supposed to have been due to James Wilson, a graduate of Scottish universities and a Civilian. Actually, the term as used in the contracts clause has been rendered more or less superfluous by the doctrine that the law in force when a contract is made enters into and comprises a part of the contract itself.[1956] Hence, the Court sometimes recognizes the term in its decisions applying the clause, sometimes ignores it. In *Sturges v. Crowninshield*,[1957] Marshall defined "obligation of contract" as "the law which binds the parties to perform their agreement;" but a little later the same year he set

[1954] Tidal Oil Co. v. Flannagan, 263 U.S. 444, 450, 451–452 (1924).
[1955] 304 U.S. 64 (1938).
[1956] Walker v. Whitehead, 83 U.S. (16 Wall.) 314 (1873); Wood v. Lovett, 313 U.S. 362, 370 (1941).
[1957] 17 U.S. (4 Wheat.) 122, 197 (1819); *see also* Curran v. Arkansas, 56 U.S. (15 How.) 304 (1854).

forth the points presented for consideration in *Dartmouth College v. Woodward*,[1958] to be: "1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?"[1959] The word "obligation" undoubtedly does carry the implication that the Constitution was intended to protect only executory contracts—i.e., contracts still awaiting performance, but this implication was early rejected for a certain class of contracts, with immensely important result for the clause.

"Impair" Defined.—"The obligations of a contract," said Chief Justice Hughes for the Court in *Home Building & Loan Ass'n v. Blaisdell*,[1960] "are impaired by a law which renders them invalid, or releases or extinguishes them . . ., and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights."[1961] But he adds: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."[1962] In short, the law from which the obligation stems must be understood to include constitutional law and, moreover a "progressive" constitutional law.[1963]

Vested Rights Not Included.—The term "contracts" is used in the contracts clause in its popular sense of an agreement of minds. The clause therefore does not protect vested rights that are not referable to such an agreement between the State and an individual, such as the right of recovery under a judgment. The individual in question may have a case under the Fourteenth Amendment, but not one under Article I, § 10.[1964]

[1958] 17 U.S. (4 Wheat.) 518 (1819).

[1959] 17 U.S. at 627.

[1960] 290 U.S. 398 (1934).

[1961] 290 U.S. at 431.

[1962] 290 U.S. at 435. *And see* City of El Paso v. Simmons, 379 U.S. 497 (1965).

[1963] "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency." Justice Black, in Wood v. Lovett, 313 U.S. 362, 383 (1941).

[1964] Crane v. Hahlo, 258 U.S. 142, 145–146 (1922); Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 288 (1883); Morley v. Lake Shore Ry., 146 U.S. 162, 169 (1892). That the obligation of contracts clause did not protect vested rights merely as such was stated by the Court as early as Satterlee v. Matthewson,

Public Grants That Are Not "Contracts".—Not all grants by a State constitute "contracts" within the sense of Article I, § 10. In his *Dartmouth College* decision, Chief Justice Marshall conceded that "if the act of incorporation be a grant of political power, if it creates a civil institution, to be employed in the administration of the government . . . the subject is one in which the legislature of the State may act according to its own judgment," unrestrained by the Constitution [1965] —thereby drawing a line between "public" and "private" corporations that remained undisturbed for more than half a century. [1966]

It has been subsequently held many times that municipal corporations are mere instrumentalities of the State for the more convenient administration of local governments, whose powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the legislature. [1967] The same principle applies, moreover, to the property rights which the municipality derives either directly or indirectly from the State. This was first held as to the grant of a franchise to a municipality to operate a ferry and has since then been recognized as the universal rule. [1968] It was stated in a case decided in 1923 that the distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity, while it limited the legal liability of municipalities for the negligent acts or omissions of its officers or agents, did not, on the other hand, furnish ground for the application of constitutional restraints against the State in favor of its own municipalities. [1969] Thus, no contract rights were impaired by a statute relocating a county seat, even though the former location was by law to be "permanent" and the citizens of the community had donated land and furnished bonds for the erection of public buildings. [1970] Similarly, a statute changing the boundaries of a school district, giving to the new district

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27 U.S. (2 Pet.) 380, 413 (1829); and again in Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 539–540 (1837).

[1965] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819).

[1966] In Munn v. Illinois, 94 U.S. 113 (1877), a category of "business affected with a public interest" and whose property is "impressed with a public use" was recognized. A corporation engaged in such a business becomes a "quasi-public" corporation, and the power of the State to regulate it is larger than in the case of a purely private corporation. Inasmuch as most corporations receiving public franchises are of this character, the final result of *Munn* was to enlarge the police power of the State in the case of the most important beneficiaries of the *Dartmouth College* decision.

[1967] Meriwether v. Garrett, 102 U.S. 472 (1880); Covington v. Kentucky, 173 U.S. 231 (1899); Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[1968] East Hartford v. Hartford Bridge Co., 51 U.S. (10 How.) 511 (1851); Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[1969] City of Trenton v. New Jersey, 262 U.S. 182, 191 (1923).

[1970] Newton v. Commissioners, 100 U.S. 548 (1880).

the property within its limits that had belonged to the former district, and requiring the new district to assume the debts of the old district, did not impair the obligation of contracts.[1971] Nor was the contracts clause violated by state legislation authorizing state control over insolvent communities through a Municipal Finance Commission.[1972]

On the same ground of public agency, neither appointment nor election to public office creates a contract in the sense of Article I, § 10, whether as to tenure, or salary, or duties, all of which remain, so far as the Constitution of the United States is concerned, subject to legislative modification or outright repeal.[1973] Indeed, there can be no such thing in this country as property in office, although the common law sustained a different view sometimes reflected in early cases.[1974] When, however, services have once been rendered, there arises an implied contract that they shall be compensated at the rate in force at the time they were rendered.[1975] Also, an express contract between the State and an individual for the performance of specific services falls within the protection of the Constitution. Thus, a contract made by the governor pursuant to a statute authorizing the appointment of a commissioner to conduct, over a period of years, a geological, mineralogical, and agricultural survey of the State, for which a definite sum had been authorized, was held to have been impaired by repeal of the statute.[1976] But a resolution of a local board of education reducing teachers' salaries for the school year 1933–1934, pursuant to an act of the legislature authorizing such action, was held not to impair the contract of a teacher who, having served three years, was by earlier legislation exempt from having his salary reduced except for inefficiency or misconduct.[1977] Similarly, it was held that an Illinois statute that reduced the annuity payable to retired teachers under an earlier act did not violate the contracts clause, since it had not been the intention of the earlier act to propose a contract but only to put

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[1971] Michigan ex rel. Kies v. Lowrey, 199 U.S. 233 (1905).

[1972] Faitoute Co. v. City of Asbury Park, 316 U.S. 502 (1942).

[1973] Butler v. Pennsylvania, 51 U.S. (10 How.) 402 (1850); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Dodge v. Board of Education, 302 U.S. 74 (1937); Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928).

[1974] Butler v. Pennsylvania, 51 U.S. (10 How.) 420 (1850). *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803); Hoke v. Henderson, 154 N.C. (4 Dev.) 1 (1833). *See also* United States v. Fisher, 109 U.S. 143 (1883); United States v. Mitchell, 109 U.S. 146 (1883); Crenshaw v. United States, 134 U.S. 99 (1890).

[1975] Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928).

[1976] Hall v. Wisconsin, 103 U.S. 5 (1880). *Cf.* Higginbotham v. City of Baton Rouge, 306 U.S. 535 (1930).

[1977] Phelps v. Board of Education, 300 U.S. 319 (1937).

into effect a general policy.[1978] On the other hand, the right of one, who had become a "permanent teacher" under the Indiana Teachers Tenure Act of 1927, to continued employment was held to be contractual and to have been impaired by the repeal in 1933 of the earlier act.[1979]

Tax Exemptions: When Not "Contracts".—From a different point of view, the Court has sought to distinguish between grants of privileges, whether to individuals or to corporations, which are contracts and those which are mere revocable licenses, although on account of the doctrine of presumed consideration mentioned earlier, this has not always been easy to do. In pursuance of the precedent set in *New Jersey v. Wilson*,[1980] the legislature of a State "may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation, to which such property shall be subjected," and such an exemption is frequently a contract within the sense of the Constitution. Indeed this is always so when the immunity is conferred upon a corporation by the clear terms of its charter.[1981] When, on the other hand, an immunity of this sort springs from general law, its precise nature is more open to doubt, as a comparison of decisions will serve to illustrate.

In *State Bank of Ohio v. Knoop*,[1982] a closely divided Court held that a general banking law of Ohio, which provided that companies complying therewith and their stockholders should be exempt from all but certain taxes, was, as to a bank organized under it and its stockholders, a contract within the meaning of Article I, § 10. The provision was not, the Court said, "a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted."[1983] When, however, the State of Michigan pledged itself, by a general legislative act, not to tax any corporation, company, or individual undertaking to manufacture salt in the State from water there obtained by boring on property used for this purpose and, furthermore, to pay a bounty on the salt so manufactured, it was held not to have engaged itself within the constitutional sense. "General encouragements,"

[1978] Dodge v. Board of Education, 302 U.S. 74 (1937).

[1979] Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).

[1980] 11 U.S. (7 Cr.) 164 (1812).

[1981] The Delaware Railroad Tax, 85 U.S. (18 Wall.) 206, 225 (1874); Pacific R.R. v. Maguire, 87 U.S. (20 Wall.) 36, 43 (1874); Humphrey v. Pegues, 83 U.S. (16 Wall.) 244, 249 (1873); Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438 (1869).

[1982] 57 U.S. (16 How.) 369 (1854).

[1983] 57 U.S. at 382–83.

said the Court, "held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time."[1984] So far as exemption from taxation is concerned the difference between these two cases is obviously slight, but the later one is unquestionable authority for the proposition that legislative bounties are repealable at will.

Furthermore, exemptions from taxation have in certain cases been treated as gratuities repealable at will, even when conferred by specific legislative enactments. This would seem always to be the case when the beneficiaries were already in existence when the exemption was created and did nothing of a more positive nature to qualify for it than to continue in existence.[1985] Yet the cases are not always easy to explain in relation to each other, except in light of the fact that the Court's point of view has altered from time to time.[1986]

"Contracts" Include Public Contracts and Corporate Charters.—The question, which was settled very early, was whether the clause was intended to be applied solely in protection of private contracts or in the protection also of public grants, or, more broadly, in protection of public contracts, in short, those to which a State is a party.[1987] Support for the affirmative answer accorded this question could be derived from the following sources.

[1984] Salt Company v. East Saginaw, 80 U.S. (13 Wall.) 373, 379 (1872). *See also* Welch v. Cook, 97 U.S. 541 (1879); Grand Lodge v. New Orleans, 166 U.S. 143 (1897); Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903). *Cf.* Ettor v. Tacoma, 228 U.S. 148 (1913), in which it was held that the repeal of a statute providing for consequential damages caused by changes of grades of streets could not constitutionally affect an already accrued right to compensation.

[1985] *See* Rector of Christ Church v. County of Philadelphia, 65 U.S. (24 How.) 300, 302 (1861); Seton Hall College v. South Orange, 242 U.S. 100 (1916).

[1986] *Compare* the above cases *with* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 437 (1869); Illinois Cent, R.R. v. Decatur, 147 U.S. 190 (1893), with Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379 (1903).

[1987] According to Benjamin F. Wright, throughout the first century of government under the Constitution "the contract clause had been considered in almost forty per cent of all cases involving the validity of State legislation," and of these the vast proportion involved legislative grants of one type or other, the most important category being charters of incorporation. However, the numerical prominence of such grants in the cases does not overrate their relative importance from the point of view of public interest. B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 95 (1938).

Madison explained the clause by allusion to what had occurred "in the internal administration of the States" in the years preceding the Constitutional Convention, in regard to private debts. Violations of contracts had become familiar in the form of depreciated paper made legal tender, of property substituted for money, of installment laws, and of the occlusions of the courts of justice. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 548 (rev. ed. 1937); THE FEDERALIST, No. 44 (J. Cooke ed. 1961), 301–302.

For one thing, the clause departed from the comparable provision in the Northwest Ordinance (1787) in two respects: first, in the presence of the word "obligation;" secondly, in the absence of the word "private." There is good reason for believing that James Wilson may have been responsible for both alterations, inasmuch as two years earlier he had denounced a current proposal to repeal the Bank of North America's Pennsylvania charter in the following words: "If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, every precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politicks, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction." [1988]

Furthermore, in its first important constitutional case, that of *Chisholm v. Georgia*, [1989] the Court ruled that its original jurisdiction extended to an action in assumpsit brought by a citizen of South Carolina against the State of Georgia. This construction of the federal judicial power was, to be sure, promptly repealed by the Eleventh Amendment, but without affecting the implication that the contracts protected by the Constitution included public contracts.

One important source of this diversity of opinion is to be found in that ever welling spring of constitutional doctrine in early days, the prevalence of natural law notions and the resulting vague significance of the term "law." In *Sturges v. Crowninshield*, Marshall defined the obligation of contracts as "the law which binds the parties to perform their undertaking." Whence, however, comes this law? If it comes from the State alone, which Marshall was later to deny even as to private contracts, [1990] then it is hardly possible to hold that the States' own contracts are covered by the clause, which manifestly does not create an obligation for contracts but only protects such obligation as already exists. But, if, on the other hand, the law furnishing the obligation of contracts comprises Natural Law and kindred principles, as well as law which springs from state authority, then, inasmuch as the State itself is presumably

[1988] 2 THE WORKS OF JAMES WILSON 834 (R. McCloskey ed., 1967).

[1989] 2 U.S. (2 Dall.) 419 (1793).

[1990] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 338 (1827).

bound by such principles, the State's own obligations, so far as harmonious with them, are covered by the clause.

Fletcher v. Peck [1991] has the double claim to fame that it was the first case in which the Supreme Court held a state enactment to be in conflict with the Constitution, and also the first case to hold that the contracts clause protected public grants. By an act passed on January 7, 1795, the Georgia Legislature directed the sale to four land companies of public lands comprising most of what are now the States of Alabama and Mississippi. As soon became known, the passage of the measure had been secured by open and wholesale bribery. So when a new legislature took over in the winter of 1795–1796, almost its first act was to revoke the sale made the previous year.

Meantime, however, the land companies had disposed of several millions of acres of their holdings to speculators and prospective settlers, and following the rescinding act some of these took counsel with Alexander Hamilton as to their rights. In an opinion which was undoubtedly known to the Court when it decided *Fletcher v. Peck*, Hamilton characterized the repeal as contravening "the first principles of natural justice and social policy," especially so far as it was made "to the prejudice ... of third persons ... innocent of the alleged fraud or corruption; ... moreover," he added, "the Constitution of the United States, article first, section tenth, declares that no State shall pass a law impairing the obligations of contract. This must be equivalent to saying no State shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a State or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so." [1992] In the debate to which the "Yazoo Land Frauds," as they were contemporaneously known, gave rise in Congress, Hamilton's views were quoted frequently.

[1991] 10 U.S. (6 Cr.) 87 (1810).

[1992] B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 22 (1938). Professor Wright dates Hamilton's pamphlet, 1796.

So far as it invoked the obligation of contracts clause, Marshall's opinion in *Fletcher v. Peck* performed two creative acts. He recognized that an obligatory contract was one still to be performed—in other words, was an executory contract, also that a grant of land was an executed contract—a conveyance. But, he asserted, every grant is attended by "an implied contract" on the part of the grantor not to claim again the thing granted. Thus, grants are brought within the category of contracts having continuing obligation and so within Article I, § 10. But the question still remained of the nature of this obligation. Marshall's answer to this can only be inferred from his statement at the end of his opinion. The State of Georgia, he says, "was restrained" from the passing of the rescinding act "either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States." [1993]

The protection thus thrown about land grants was presently extended, in the case of *New Jersey v. Wilson*, [1994] to a grant of immunity from taxation that the State of New Jersey had accorded certain Indian lands, and several years after that, in the *Dartmouth College* case, [1995] to the charter privileges of an eleemosynary corporation.

In *City of El Paso v. Simmons*, [1996] the Court held, over a vigorous dissent by Justice Black, that Texas had not violated this clause when it amended its laws governing the sale of public lands so as to restrict the previously unlimited right of a delinquent to reinstate himself upon forfeited land by a single payment of all past interest due.

Corporate Charters: Different Ways of Regarding.—There are three ways in which the charter of a corporation may be regarded. In the first place, it may be thought of simply as a license terminable at will by the State, like a liquor-seller's license or an auctioneer's license, but affording the incorporators, so long as it remains in force, the privileges and advantages of doing business in the form of a corporation. Nowadays, indeed, when corporate

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[1993] 10 U.S. (6 Cr.) 87, 139 (1810). Justice Johnson, in his concurring opinion, relied exclusively on general principles. "I do not hesitate to declare, that a State does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." Id. at 143.

[1994] 11 U.S. (7 Cr.) 164 (1812). The exemption from taxation which was involved in this case was held in 1886 to have lapsed through the acquiescence for sixty years by the owners of the lands in the imposition of taxes upon these. Given v. Wright, 117 U.S. 648 (1886).

[1995] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[1996] 379 U.S. 497 (1965). *See also* Thorpe v. Housing Authority, 393 U.S. 268, 278–279 (1969).

charters are usually issued to all legally qualified applicants by an administrative officer who acts under a general statute, this would probably seem to be the natural way of regarding them were it not for the *Dartmouth College* decision. But, in 1819 charters were granted directly by the state legislatures in the form of special acts and there were very few profit-taking corporations in the country. The later extension of the benefits of the *Dartmouth College* decision to corporations organized under general law took place without discussion.

Secondly, a corporate charter may be regarded as a franchise constituting a vested or property interest in the hands of the holders, and therefore as forfeitable only for abuse or in accordance with its own terms. This is the way in which some of the early state courts did regard them at the outset.[1997] It is also the way in which Blackstone regarded them in relation to the royal prerogative, although not in relation to the sovereignty of Parliament, and the same point of view found expression in Story's concurring opinion in *Dartmouth College v. Woodward*, as it did also in Webster's argument in that case.[1998]

The third view is the one formulated by Chief Justice Marshall in his controlling opinion in *Dartmouth College v. Woodward*.[1999] This is that the charter of Dartmouth College, a purely private institution, was the outcome and partial record of a contract between the donors of the college, on the one hand, and the British Crown, on the other, and the contract still continued in force between the State of New Hampshire, as the successor to the Crown and Government of Great Britain, and the trustees, as successors to the donors. The charter, in other words, was not simply a grant—rather it was the documentary record of a still existent agreement between still existent parties.[2000] Taking this view, which he developed with great ingenuity and persuasiveness, Marshall was able to appeal to the obligation of contracts clause directly, and without

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[1997] In 1806 Chief Justice Parsons of the Supreme Judicial Court of Massachusetts, without mentioning the contracts clause, declared that rights legally vested in a corporation cannot be "controlled of destroyed by a subsequent statute, unless a power [for that purpose] be reserved to the legislature in the act of incorporation," Wales v. Stetson, 2 Mass. 142 (1806). *See also* Stoughton v. Baker, 4 Mass. 521 (1808) to like effect; *cf.* Locke v. Dane, 9 Mass. 360 (1812), in which it is said that the purpose of the contracts clause was to provide against paper money and insolvent laws. Together these holdings add up to the conclusion that the reliance of the Massachusetts court was on "fundamental principles," rather than the contracts clause.

[1998] 17 U.S. (4 Wheat.) at 577–595 (Webster's argument); id. at 666 (Story's opinion). *See also* Story's opinion for the Court in Terrett v. Taylor, 13 U.S. (9 Cr.) 43 (1815).

[1999] 17 U.S. (4 Wheat.) 518 (1819).

[2000] 17 U.S. at 627.

further use of his fiction in *Fletcher v. Peck* of an executory contract accompanying the grant.

A difficulty still remained, however, in the requirement that a contract, before it can have obligation, must import consideration, that is to say, must be shown not to have been entirely gratuitous on either side. Moreover, the consideration, which induced the Crown to grant a charter to Dartmouth College, was not merely a speculative one. It consisted of the donations of the donors to the important public interest of education. Fortunately or unfortunately, in dealing with this phase of the case, Marshall used more sweeping terms than were needed. "The objects for which a corporation is created," he wrote, "are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant." In other words, the simple fact of the charter having been granted imports consideration from the point of view of the State.[2001] With this doctrine before it, the Court in *Providence Bank v. Billings*,[2002] and again in *Charles River Bridge v. Warren Bridge*,[2003] admitted without discussion of the point, the applicability of the *Dartmouth College* decision to purely business concerns.

Reservation of Right to Alter or Repeal Corporate Charters.—It is next in order to consider four principles or doctrines whereby the Court has itself broken down the force of the *Dartmouth College* decision in great measure in favor of state legislative power. By the logic of the *Dartmouth College* decision itself, the State may reserve in a corporate charter the right to "amend, alter, and repeal" the same, and such reservation becomes a part of the contract between the State and the incorporators, the obligation of which is accordingly not impaired by the exercise of the right.[2004] Later decisions recognize that the State may reserve the right to amend, alter, and repeal by general law, with the result of incorporating the reservation in all charters of subsequent date.[2005] There is, however, a difference between a reservation by a statute and one by constitutional provision. While the former may be re-

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[2001] 17 U.S. at 637; *see also* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 437 (1869).

[2002] 29 U.S. (4 Pet.) 514 (1830).

[2003] 36 U.S. (11 Pet.) 420 (1837).

[2004] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819) (Justice Story).

[2005] Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438 (1869); Pennsylvania College Cases, 80 U.S. (13 Wall.) 190, 213 (1872); Miller v. New York, 82 U.S. (15 Wall.) 478 (1873); Murray v. Charleston, 96 U.S. 432 (1878); Greenwood v. Freight Co., 105 U.S. 13 (1882); Chesapeake & Ohio Ry. v. Miller, 114 U.S. 176 (1885); Louisville Water Company v. Clark, 143 U.S. 1 (1892).

pealed as to a subsequent charter by the specific terms thereof, the latter may not.[2006]

Is the right reserved by a State to "amend" or "alter" a charter without restriction? When it is accompanied, as it generally is, by the right to "repeal," one would suppose that the answer to this question was self-evident. Nonetheless, there are a number of judicial dicta to the effect that this power is not without limit, that it must be exercised reasonably and in good faith, and that the alterations made must be consistent with the scope and object of the grant.[2007] Such utterances amount, apparently, to little more than an anchor to windward, for while some of the state courts have applied tests of this nature to the disallowance of legislation, it does not appear that the Supreme Court of the United States has ever done so.[2008]

Quite different is it with the distinction pointed out in the cases between the franchises and privileges that a corporation derives from its charter and the rights of property and contract that accrue to it in the course of its existence. Even the outright repeal of the former does not wipe out the latter or cause them to escheat to the State. The primary heirs of the defunct organization are its creditors, but whatever of value remains after their valid claims are met goes to the former shareholders.[2009] By the earlier weight of authority, on the other hand, persons who contract with companies whose charters are subject to legislative amendment or repeal do so at their own risk; any "such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter. . . ."[2010] But later holdings becloud this rule.[2011]

[2006] New Jersey v. Yard, 95 U.S. 104, 111 (1877).

[2007] *See* Holyoke Company v. Lyman, 82 U.S. (15 Wall.) 500, 520 (1873), *See also* Shields v. Ohio, 95 U.S. 319 (1877); Fair Haven R.R. v. New Haven, 203 U.S. 379 (1906); Berea College v. Kentucky, 211 U.S. 45 (1908). Also Lothrop v. Stedman, 15 Fed. Cas. 922 (No. 8519) (C.C.D. Conn. 1875) where the principles of natural justice are thought to set a limit to the power.

[2008] *See* in this connection the cases cited by Justice Sutherland in his opinion for the Court in Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1936).

[2009] Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853); Shields v. Ohio, 95 U.S. 319 (1877); Greenwood v. Freight Co., 105 U.S. 13 (1882); Adirondack Ry. v. New York, 176 U.S. 335 (1900); Stearns v. Minnesota, 179 U.S. 223 (1900); Chicago, M. & St. P. R.R. v. Wisconsin, 238 U.S. 491 (1915); Coombes v. Getz, 285 U.S. 434 (1932).

[2010] Pennsylvania College Cases, 80 U.S. (13 Wall.) 190, 218 (1872). *See also* Calder v. Michigan, 218 U.S. 591 (1910).

[2011] Lake Shore & Michigan Southern Ry. v. Smith, 173 U.S. 684, 690 (1899); Coombes v. Getz, 285 U.S. 434 (1932). Both these decisions cite Greenwood v. Freight Co., 105 U.S. 13, 17 (1882), but without apparent justification.

Corporation Subject to the Law and Police Power.—But suppose the State neglects to reserve the right to amend, alter, or repeal. Is it, then, without power to control its corporate creatures? By no means. Private corporations, like other private persons, are always presumed to be subject to the legislative power of the State, from which it follows that immunities conferred by charter are to be treated as exceptions to an otherwise controlling rule. This principle was recognized by Chief Justice Marshall in the case of *Providence Bank v. Billings*,[2012] in which he held that in the absence of express stipulation or reasonable implication to the contrary in its charter, the bank was subject to the taxing power of the State, notwithstanding that the power to tax is the power to destroy.

And of course the same principle is equally applicable to the exercise by the State of its police powers. Thus, in what was perhaps the leading case before the Civil War, the Supreme Court of Vermont held that the legislature of that State had the right, in furtherance of the public safety, to require chartered companies operating railways to fence in their tracks and provide cattle guards. In a matter of this nature, said the court, corporations are on a level with individuals engaged in the same business, unless, from their charter, they can prove the contrary.[2013] Since then the rule has been applied many times in justification of state regulation of railroads,[2014] and even of the application of a state prohibition law

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[2012] 29 U.S. (4 Pet.) 514 (1830).

[2013] Thorpe v. Rutland & Burlington R.R., 27 Vt. 140 (1854).

[2014] Thus a railroad may be required, at its own expense and irrespective of benefits to itself, to eliminate grade crossings in the interest of the public safety, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894), to make highway crossings reasonably safe and convenient for public use, Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918), to repair viaducts, Northern Pacific Railway v. Duluth, 208 U.S. 583 (1908), and to fence its right of way, Minneapolis & St. L. Ry. v. Emmons, 149 U.S. 364 (1893). Though a railroad company owns the right of way along a street, the city may require it to lay tracks to conform to the established grade; to fill in tracks at street intersections; and to remove tracks from a busy street intersection, when the attendant disadvantage and expense are small and the safety of the public appreciably enhanced Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919).

Likewise the State, in the public interest, may require a railroad to reestablish an abandoned station, even though the railroad commission had previously authorized its abandonment on condition that another station be established elsewhere, a condition which had been complied with. Railroad Co. v. Hamersley, 104 U.S. 1 (1881). It may impose upon a railroad liability for fire communicated by its locomotives, even though the State had previously authorized the company to use said type of locomotive power, St. Louis & S. F. Ry. v. Mathews, 165 U.S. 1, 5 (1897), and it may penalize the failure to cut drains through embankments so as to prevent flooding of adjacent lands. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915).

to a company that had been chartered expressly to manufacture beer.[2015]

Strict Construction of Charters, Tax Exemptions.—Long, however, before the cases last cited were decided, the principle that they illustrate had come to be powerfully reinforced by two others, the first of which is that all charter privileges and immunities are to be strictly construed as against the claims of the State, or as it is otherwise often phrased, "nothing passes by implication in a public grant."

The leading case was that of the *Charles River Bridge v. Warren Bridge*,[2016] which was decided shortly after Chief Justice Marshall's death by a substantially new Court. The question at issue was whether the charter of the complaining company, which authorized it to operate a toll bridge, stood in the way of the State's permitting another company of later date to operate a free bridge in the immediate vicinity. Inasmuch as the first company could point to no clause in its charter specifically vesting it with an exclusive right, the Court held the charter of the second company to be valid on the principle just stated. Justice Story, presented a vigorous dissent, in which he argued cogently, but unavailingly, that the monopoly claimed by the Charles River Bridge Company was fully as reasonable an implication from the terms of its charter and the circumstances surrounding its concession as perpetuity had been from the terms of the Dartmouth College charter and the ensuing transaction.

The Court was in fact making new law, because it was looking at things from a new point of view. This was the period when judicial recognition of the Police Power began to take on a doctrinal character. It was also the period when the railroad business was just beginning. Chief Justice Taney's opinion evinces the influence of both these developments. The power of the State to provide for its own internal happiness and prosperity was not, he asserted, to be pared away by mere legal intendments, nor was its ability to avail itself of the lights of modern science to be frustrated by obsolete interests such as those of the old turnpike companies, the charter privileges of which, he apprehended, might easily become a bar to the development of transportation along new lines.[2017]

[2015] Beer Co. v. Massachusetts, 97 U.S. 25 (1878). *See also* Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 345 (1909).

[2016] 36 U.S. (11 Pet.) 420 (1837).

[2017] 36 U.S. at 548–53.

The rule of strict construction has been reiterated by the Court many times. In the Court's opinion in *Blair v. City of Chicago*,[2018] decided nearly seventy years after the *Charles River Bridge* case, it said: "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privilege may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. . . . The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.'" [2019]

An excellent illustration of the operation of the rule in relation to tax exemptions was furnished by the derivative doctrine that an immunity of this character must be deemed as intended solely for the benefit of the corporation receiving it and hence, in the absence of express permission by the State, may not be passed on to a successor.[2020] Thus, where two companies, each exempt from taxation, were permitted by the legislature to consolidate, the new corporation was held to be subject to taxation.[2021] Again, a statute which granted a corporation all "the rights and privileges" of an earlier corporation was held not to confer the latter's "immunity" from taxation.[2022] Yet again, a legislative authorization of the transfer by one corporation to another of the former's "estate, property, right,

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[2018] 201 U.S. 400 (1906).

[2019] 201 U.S. at 471–72, citing The Binghamton Bridge, 70 U.S. (3 Wall.) 51, 75 (1866).

[2020] Memphis & L.R. R.R. v. Comm'rs, 112 U.S. 609, 617 (1884). *See also* Morgan v. Louisiana, 93 U.S. 217 (1876); Wilson v. Gaines, 103 U.S. 417 (1881); Louisville & Nashville R.R. v. Palmes, 109 U.S. 244, 251 (1883); Norfolk & Western R.R. v. Pendleton, 156 U.S. 667, 673 (1895); Picard v. East Tennessee, V. & G. R.R., 130 U.S. 637, 641 (1889).

[2021] Atlantic & Gulf R.R. v. Georgia, 98 U.S. 359, 365 (1879).

[2022] Phoenix F. & M. Ins. Co. v. Tennessee, 161 U.S. 174 (1896).

privileges, and franchises" was held not to clothe the later company with the earlier one's exemption from taxation.[2023]

Furthermore, an exemption from taxation is to be strictly construed even in the hands of one clearly entitled to it. So the exemption conferred by its charter on a railway company was held not to extend to branch roads constructed by it under a later statute.[2024] Also, a general exemption of the property of a corporation from taxation was held to refer only to the property actually employed in its business.[2025] Also, the charter exemption of the capital stock of a railroad from taxation "for ten years after completion of the said road" was held not to become operative until the completion of the road.[2026] So also the exemption of the campus and endowment fund of a college was held to leave other lands of the college, though a part of its endowment, subject to taxation.[2027] Provisions in a statute that bonds of the State and its political subdivisions were not to be taxed and should not be taxed were held not to exempt interest on them from taxation as income of the owners.[2028]

Strict Construction and the Police Power.—The police power, too, has frequently benefitted from the doctrine of strict construction, although this recourse is today seldom, if ever, necessary in this connection. Some of the more striking cases may be briefly summarized. The provision in the charter of a railway company permitting it to set reasonable charges still left the legislature free to determine what charges were reasonable.[2029] On the other hand, when a railway agreed to accept certain rates for a specified period, it thereby foreclosed the question of the reasonableness of such rates.[2030] The grant to a company of the right to supply a city with water for twenty-five years was held not to prevent a similar concession to another company by the same city.[2031] The promise by a city in the charter of a water company not to make a similar

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[2023] Rochester Ry. v. Rochester, 205 U.S. 236 (1907); followed in Wright v. Georgia R.R. & Banking Co., 216 U.S. 420 (1910); Rapid Transit Corp. v. New York, 303 U.S. 573 (1938). *Cf.* Tennessee v. Whitworth, 117 U.S. 139 (1886), the authority of which is respected in the preceding case.

[2024] Chicago, B. & K.C. R.R. v. Guffey, 120 U.S. 569 (1887).

[2025] Ford v. Delta and Pine Land Company, 164 U.S. 662 (1897).

[2026] Vicksburg, S. & P. R.R. v. Dennis, 116 U.S. 665 (1886).

[2027] Millsaps College v. City of Jackson, 275 U.S. 129 (1927).

[2028] Hale v. State Board, 302 U.S. 95 (1937).

[2029] Railroad Comm'n Cases (Stone v. Farmers' Loan & Trust Co.), 116 U.S. 307, 330 (1886), extended in Southern Pacific Co. v. Campbell, 230 U.S. 537 (1913) to cases in which the word "reasonable" does not appear to qualify the company's right to prescribe tolls. *See also* American Bridge Co. v. Railroad Comm'n, 307 U.S. 486 (1939).

[2030] Georgia Ry. v. Town of Decatur, 262 U.S. 432 (1923). *See also* Southern Iowa Elec. Co. v. City of Chariton, 255 U.S. 539 (1921).

[2031] City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 15 (1898).

grant to any other person or corporation was held not to prevent the city itself from engaging in the business.[2032] A municipal concession to a water company to run for thirty years, and accompanied by the provision that the "said company shall charge the following rates," was held not to prevent the city from reducing such rates.[2033] But more broadly, the grant to a municipality of the power to regulate the charges of public service companies was held not to bestow the right to contract away this power.[2034] Indeed, any claim by a private corporation that it received the rate-making power from a municipality must survive a two-fold challenge: first, as to the right of the municipality under its charter to make such a grant, secondly, as to whether it has actually done so, and in both respects an affirmative answer must be based on express words and not on implication.[2035]

Doctrine of Inalienability as Applied to Eminent Domain, Taxing, and Police Powers.—The second of the doctrines mentioned above, whereby the principle of the subordination of all persons, corporate and individual alike, to the legislative power of the State has been fortified, is the doctrine that certain of the State's powers are inalienable, and that any attempt by a State to alienate them, upon any consideration whatsoever, is *ipso facto* void and hence incapable to producing a "contract" within the meaning of Article I, § 10. One of the earliest cases to assert this principle occurred in New York in 1826. The corporation of the City of New York, having conveyed certain lands for the purposes of a church and cemetery together with a covenant for quiet enjoyment, later passed a by-law forbidding their use as a cemetery. In denying an action against the city for breach of covenant, the state court said the defendants "had no power as a party, [to the covenant] to make a contract which should control or embarrass their legislative powers and duties."[2036]

The Supreme Court first applied similar doctrine in 1848 in a case involving a grant of exclusive right to construct a bridge at a

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[2032] Skaneateles Water Co. v. Village of Skaneateles, 184 U.S. 354 (1902); Water Co. v. City of Knoxville, 200 U.S. 22 (1906); Madera Water Works v. City of Madera, 228 U.S. 454 (1913).

[2033] Rogers Park Water Co. v. Fergus, 180 U.S. 624 (1901).

[2034] Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908); Wyandotte Gas Co. v. Kansas, 231 U.S. 622 (1914).

[2035] *See also* Puget Sound Traction Co. v. Reynolds, 244 U.S. 574 (1917). "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed." Justice Black for the Court in Keefe v. Clark, 322 U.S. 393, 396–397 (1944).

[2036] Brick Presbyterian Church v. New York, 5 Cow. (N.Y.) 538, 540 (1826).

specified locality. Sustaining the right of the State of Vermont to make a new grant to a competing company, the Court held that the obligation of the earlier exclusive grant was sufficiently recognized in making just compensation for it; and that corporate franchises, like all other forms of property, are subject to the overruling power of eminent domain.[2037] This reasoning was reinforced by an appeal to the theory of state sovereignty, which was held to involve the corollary of the inalienability of all the principal powers of a State.

The subordination of all charter rights and privileges to the power of eminent domain has been maintained by the Court ever since; not even an explicit agreement by the State to forego the exercise of the power will avail against it.[2038] Conversely, the State may revoke an improvident grant of public property without recourse to the power of eminent domain, such a grant being inherently beyond the power of the State to make. So when the legislature of Illinois in 1869 devised to the Illinois Central Railroad Company, its successors and assigns, the State's right and title to nearly a thousand acres of submerged land under Lake Michigan along the harbor front of Chicago, and four years later sought to repeal the grant, the Court, a four-to-three decision, sustained an action by the State to recover the lands in question. Said Justice Field, speaking for the majority: "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. . . . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time."[2039]

On the other hand, repeated endeavors to subject tax exemptions to the doctrine of inalienability, though at times supported by powerful minorities on the Bench, have failed.[2040] As recently as January, 1952, the Court ruled that the Georgia Railway Company was entitled to seek an injunction in the federal courts against an attempt by Georgia's Revenue Commission to compel it to pay ad valorem taxes contrary to the terms of its special charter issued in

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[2037] West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848). *See also* Backus v. Lebanon, 11 N.H. 19 (1840); White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590 (1849); and Bonaparte v. Camden & A.R. Co., 3 Fed. Cas. 821 (No. 1617) (C.C.D.N.J. 1830).

[2038] Pennsylvania Hospital v. City of Philadelphia, 245 U.S. 20 (1917).

[2039] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453, 455 (1892).

[2040] *See especially* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869), and The Washington University v. Rouse, 75 U.S. (8 Wall.) 439 (1869).

1833. In answer to the argument that this was a suit contrary to the Eleventh Amendment, the Court declared that the immunity from federal jurisdiction created by the Amendment "does not extend to individuals who act as officers without constitutional authority." [2041]

The leading case involving the police power is *Stone v. Mississippi*. [2042] In 1867, the legislature of Mississippi chartered a company to which it expressly granted the power to conduct a lottery. Two years later, the State adopted a new Constitution which contained a provision forbidding lotteries, and a year later the legislature passed an act to put this provision into effect. In upholding this act and the constitutional provision on which it was based, the Court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights," and these agencies can neither give away nor sell their discretion. All that one can get by a charter permitting the business of conducting a lottery "is suspension of certain governmental rights in his favor, subject to withdrawal at will." [2043]

The Court shortly afterward applied the same reasoning in a case in which was challenged the right of Louisiana to invade the exclusive privilege of a corporation engaged in the slaughter of cattle in New Orleans by granting another company the right to engage in the same business. Although the State did not offer to compensate the older company for the lost monopoly, its action was sustained on the ground that it had been taken in the interest of the public health. [2044] When, however, the City of New Orleans, in reliance on this precedent, sought to repeal an exclusive franchise which it had granted a company for fifty years to supply gas to its inhabitants, the Court interposed its veto, explaining that in this instance neither the public health, the public morals, nor the public safety was involved. [2045]

Later decisions, nonetheless, apply the principle of inalienability broadly. To quote from one: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of over-

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[2041] Georgia R.R. v. Redwine, 342 U.S. 299, 305–306 (1952). The Court distinguished In re Ayers, 123 U.S. 443 (1887) on the ground that the action there was barred "as one in substance directed at the State merely to obtain specific performance of a contract with the State." 342 U.S. at 305.

[2042] 101 U.S. 814 (1880).

[2043] 101 U.S. at 820–21.

[2044] Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884).

[2045] New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885).

riding the power to the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise."[2046]

It would scarcely suffice today for a company to rely upon its charter privileges or upon special concessions from a State in resisting the application to it of measures alleged to have been enacted under the police power thereof; if this claim is sustained, the obligation of the contract clause will not avail, and if it is not, the due process of law clause of the Fourteenth Amendment will furnish a sufficient reliance. That is to say, the discrepancy that once existed between the Court's theory of an overriding police power in these two adjoining fields of constitutional law is today apparently at an end. Indeed, there is usually no sound reason why rights based on public grant should be regarded as more sacrosanct than rights that involve the same subject matter but are of different provenience.

Private Contracts.—The term "private contract" is, naturally, not all-inclusive. A judgment, though granted in favor of a creditor, is not a contract in the sense of the Constitution,[2047] nor is marriage.[2048] And whether a particular agreement is a valid contract is a question for the courts, and finally for the Supreme Court, when the protection of the contract clause is invoked.[2049]

The question of the nature and source of the obligation of a contract, which went by default in *Fletcher v. Peck* and the *Dartmouth College* case, with such vastly important consequences, had eventually to be met and answered by the Court in connection with

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[2046] Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 558 (1914). *See also* Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915); Pennsylvania Hospital v. Philadelphia, 245 U.S. 20 (1917); where the police power and eminent domain are treated on the same basis in respect of inalienability; Wabash R.R. v. Defiance, 167 U.S. 88, 97 (1897); Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908).

[2047] Morley v. Lake Shore Ry., 146 U.S. 162 (1892); New Orleans v. New Orleans Water-Works Co., 142 U.S. 79 (1891); Missouri & Ark. L. & M. Co. v. Sebastian County, 249 U.S. 170 (1919). *But cf.* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469, 549 (1833); and Garrison v. New York, 88 U.S. (21 Wall.) 196, 203 (1875), suggesting that a different view was earlier entertained in the case of judgments in actions of debt.

[2048] Maynard v. Hill, 125 U.S. 190 (1888); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819). *Cf.* Andrews v. Andrews, 188 U.S. 14 (1903). The question whether a wife's rights in the community property under the laws of California were of a contractual nature was raised but not determined in Moffit v. Kelly, 218 U.S. 400 (1910).

[2049] New Orleans v. N.O. Water Works Co., 142 U.S. 79 (1891); Zane v. Hamilton County, 189 U.S. 370, 381 (1903).

private contracts. The first case involving such a contract to reach the Supreme Court was *Sturges v. Crowninshield*,[2050] in which a debtor sought escape behind a state insolvency act of later date than his note. The act was held inoperative, but whether this was because of its retroactivity in this particular case or for the broader reason that it assumed to excuse debtors from their promises was not at the time made clear. As noted earlier, Chief Justice Marshall's definition on this occasion of the obligation of a contract as the law which binds the parties to perform their undertakings was not free from ambiguity, owing to the uncertain connotation of the term law.

These obscurities were finally cleared up for most cases in *Ogden v. Saunders*,[2051] in which the temporal relation of the statute and the contract involved was exactly reversed—the former antedating the latter. Marshall contended, but unsuccessfully, that the statute was void, inasmuch as it purported to release the debtor from that original, intrinsic obligation which always attaches under natural law to the acts of free agents. "When," he wrote, "we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contracts," and that they took their views on these subjects from those sources. He also posed the question of what would happen to the obligation of contracts clause if States might pass acts declaring that all contracts made subsequently thereto should be subject to legislative control.[2052]

For the first and only time, a majority of the Court abandoned the Chief Justice's leadership. Speaking by Justice Washington, it held that the obligation of private contracts is derived from the municipal law—state statutes and judicial decisions—and that the inhibition of Article I, § 10, is confined to legislative acts made after the contracts affected by them, subject to the following exception. By a curiously complicated line of reasoning, it was also held in the same case that when the creditor is a nonresident, then a State by an insolvency law may not alter the former's rights under a contract, albeit one of later date.

With the proposition established that the obligation of a private contract comes from the municipal law in existence when the contract is made, a further question presents itself, namely, what

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[2050] 17 U.S. (4 Wheat.) 122 (1819).
[2051] 25 U.S. (12 Wheat.) 213 (1827).
[2052] 25 U.S. at 353–54.

part of the municipal law is referred to? No doubt, the law which determines the validity of the contract itself is a part of such law. Also part of such law is the law which interprets the terms used in the contract, or which supplies certain terms when others are used, as for instance, constitutional provisions or statutes which determine what is "legal tender" for the payment of debts, or judicial decisions which construe the term "for value received" as used in a promissory note, and so on. In short, any law which at the time of the making of a contract goes to measure the rights and duties of the parties to it in relation to each other enters into its obligation.

Remedy a Part of the Private Obligation.—Suppose, however, that one of the parties to a contract fails to live up to his obligation as thus determined. The contract itself may now be regarded as at an end, but the injured party, nevertheless, has a new set of rights in its stead, those which are furnished him by the remedial law, including the law of procedure. In the case of a mortgage, he may foreclose; in the case of a promissory note, he may sue; and in certain cases, he may demand specific performance. Hence the further question arises, whether this remedial law is to be considered a part of the law supplying the obligation of contracts. Originally, the predominating opinion was negative, since as we have just seen, this law does not really come into operation until the contract has been broken. Yet it is obvious that the sanction which this law lends to contracts is extremely important—indeed, indispensable. In due course it became the accepted doctrine that that part of the law which supplies one party to a contract with a remedy if the other party does not live up to his agreement, as authoritatively interpreted, entered into the "obligation of contracts" in the constitutional sense of this term, and so might not be altered to the material weakening of existing contracts. In the Court's own words: "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable . . ." [2053]

This rule was first definitely announced in 1843 in the case of *Bronson v. Kinzie*. [2054] Here, an Illinois mortgage giving the mortgagee an unrestricted power of sale in case of the mortgagor's default was involved, along with a later act of the legislature that re-

[2053] United States ex rel. Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535, 552 (1867).

[2054] 42 U.S. (1 How.) 311 (1843).

quired mortgaged premises to be sold for not less than two-thirds of the appraised value and allowed the mortgagor a year after the sale to redeem them. It was held that the statute, in altering the preexisting remedies to such an extent, violated the constitutional prohibition and hence was void. The year following a like ruling was made in the case of *McCracken v. Hayward*,[2055] as to a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value.

But the rule illustrated by these cases does not signify that a State may make no changes in its remedial or procedural law that affect existing contracts. "Provided," the Court has said, "a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract, the Legislature may modify or change existing remedies or prescribe new modes of procedure."[2056] Thus, States are constantly remodelling their judicial systems and modes of practice unembarrassed by the obligation of contracts clause.[2057] The right of a State to abolish imprisonment for debt was early asserted.[2058] Again, the right of a State to shorten the time for the bringing of actions has been affirmed even as to existing causes of action, but with the proviso added that a reasonable time must be left for the bringing of such actions.[2059] On the other hand, a statute which withdrew the judicial power to enforce satisfaction of a certain class of judgments by mandamus was held invalid.[2060] In the words of the Court: "Every case must be determined upon its own circumstances;"[2061] and it later added: "In all such cases the question becomes . . . one of reasonableness, and of that the legislature is primarily the judge."[2062]

[2055] 43 U.S. (2 How.) 608 (1844).

[2056] Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1903); City & Lake R.R. v. New Orleans, 157 U.S. 219 (1895).

[2057] Antoni v. Greenhow, 107 U.S. 769 (1883).

[2058] The right was upheld in Mason v. Haile, 25 U.S. (12 Wheat.) 370 (1827), and again in Penniman's Case, 103 U.S. 714 (1881).

[2059] McGahey v. Virginia, 135 U.S. 662 (1890).

[2060] Louisiana v. New Orleans, 102 U.S. 203 (1880).

[2061] United States ex rel. Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535, 554 (1867).

[2062] Antoni v. Greenhow, 107 U.S. 769, 775 (1883). Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830); Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831); Crawford v. Branch Bank of Mobile, 48 U.S. (7 How.) 279 (1849); Curtis v. Whitney, 80 U.S. (13 Wall.) 68 (1872); Railroad Co. v. Hecht, 95 U.S. 168 (1877); Terry v. Anderson, 95 U.S. 628 (1877); Tennessee v. Sneed, 96 U.S. 69 (1877); South Carolina v. Gaillard, 101 U.S. 433 (1880); Louisiana v. New Orleans, 102 U.S. 203 (1880); Connecticut Mut. Life Ins. Co. v. Cushman, 108 U.S. 51 (1883); Vance v. Vance, 108 U.S. 514 (1883); Gilfillan v. Union Canal Co., 109 U.S. 401 (1883); Hill v. Merchant's Ins. Co., 134 U.S. 515 (1890); City & Lake R.R. v. New Orleans, 157 U.S. 219 (1895); Red River Valley Bank v. Craig, 181 U.S. 548 (1901); Wilson v. Standefer, 184 U.S. 399 (1902); Oshkosh Waterworks Co. v. Oshkosh, 187

There is one class of cases resulting from the doctrine that the law of remedy constitutes a part of the obligation of a contract to which a special word is due. This comprises cases in which the contracts involved were municipal bonds. While a city is from one point of view but an emanation from the government's sovereignty and an agent thereof, when it borrows money it is held to be acting in a corporate or private capacity and so to be suable on its contracts. Furthermore, as was held in the leading case of *United States ex rel. Von Hoffman v. Quincy*,[2063] "where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." In this case the Court issued a mandamus compelling the city officials to levy taxes for the satisfaction of a judgment on its bonds in accordance with the law as it stood when the bonds were issued.[2064] Nor may a State by dividing an indebted municipality among others enable it to escape its obligations. The debt follows the territory and the duty of assessing and collecting taxes to satisfy it devolves upon the succeeding corporations and their officers.[2065] But where a municipal organization has ceased practically to exist through the vacation of its offices, and the government's function is exercised once more by the State directly, the Court has thus far found itself powerless to frustrate a program of repudiation.[2066] However, there is no reason why the State should enact the role of *particeps criminis* in an attempt to relieve its municipalities of the obligation to meet their honest debts. Thus, in 1931, during the Great Depression, New Jersey created a Municipal Finance Commission with power to assume control over its insolvent municipalities. To the complaint of certain bondholders that this legislation impaired the contract obligations of their debtors,

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U.S. 437 (1903); Waggoner v. Flack, 188 U.S. 595 (1903); Bernheimer v. Converse, 206 U.S. 516 (1907); Henley v. Myers, 215 U.S. 373 (1910); Selig v. Hamilton, 234 U.S. 652 (1914); Security Bank v. California, 263 U.S. 282 (1923); United States Mortgage Co. v. Matthews, 293 U.S. 232 (1934); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

Compare the following cases, where changes in remedies were deemed to be of such character as to interfere with substantial rights: Wilmington & Weldon R.R. v. King, 91 U.S. 3 (1875); Memphis v. United States, 97 U.S. 293 (1878); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 269, 270, 298, 299 (1885); Effinger v. Kenney, 115 U.S. 566 (1885); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Bradley v. Lightcap, 195 U.S. 1 (1904); Bank of Minden v. Clement, 256 U.S. 126 (1921).

[2063] 71 U.S. (4 Wall.) 535, 554–555 (1867).

[2064] *See also* Nelson v. St. Martin's Parish, 111 U.S. 716 (1884).

[2065] Mobile v. Watson, 116 U.S. 289 (1886); Graham v. Folsom, 200 U.S. 248 (1906).

[2066] Heine v. Levee Commissioners, 86 U.S. (19 Wall.) 655 (1874). *Cf.*, Virginia v. West Virginia, 246 U.S. 565 (1918).

the Court, speaking by Justice Frankfurter, pointed out that the practical value of an unsecured claim against a city is "the effectiveness of the city's taxing power," which the legislation under review was designed to conserve. [2067]

Private Contracts and the Police Power.—The increasing subjection of public grants to the police power of the States has been previously pointed out. That purely private contracts should be in any stronger situation in this respect obviously would be anomalous in the extreme. In point of fact, the ability of private parties to curtail governmental authority by the easy device of contracting with one another is, with an exception to be noted, even less than that of the State to tie its own hands by contracting away its own powers. So, when it was contended in an early Pennsylvania case that an act prohibiting the issuance of notes by unincorporated banking associations was violative of the obligation of contracts clause because of its effect upon certain existing contracts of members of such association, the state Supreme Court answered: "But it is said, that the members had formed a contract between themselves, which would be dissolved by the stoppage of their business. And what then? Is that such a violation of contracts as is prohibited by the Constitution of the United States? Consider to what such a construction would lead. Let us suppose, that in one of the States there is no law against gaming, cock-fighting, horse-racing or public masquerades, and that companies should be formed for the purpose of carrying on these practices. . . ." Would the legislature then be powerless to prohibit them? The answer returned, of course, was no. [2068]

The prevailing doctrine was stated by the Supreme Court of the United States in the following words: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts pre-

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[2067] Faitoute Co. v. City of Asbury Park, 316 U.S. 502, 510 (1942). Alluding to the ineffectiveness of purely judicial remedies against defaulting municipalities, Justice Frankfurter says: "For there is no remedy when resort is had to 'devices and contrivances' to nullify the taxing power which can be carried out only through authorized officials." *See* Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 124 (1874). And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (*see* Raymond, State and Municipal Bonds, 342–343), and evasion of service by tax collectors, thus making impotent a court's mandate. Yost v. Dallas County, 236 U.S. 50, 57 (1915)." Id. at 511.

[2068] Myers v. Irwin, 2 S. & R. (Pa.), 367, 372 (1816); *see*, to the same effect, Lindenmuller v. The People, 33 Barb. (N.Y.) 548 (1861); Brown v. Penobscot Bank, 8 Mass. 445 (1812).

viously entered into between individuals may thereby be affected.... In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."[2069]

So, in an early case, we find a state recording act upheld as applying to deeds dated before the passage of the act.[2070] Later cases have brought the police power in its more customary phases into contact with private as well as with public contracts. Lottery tickets, valid when issued, were necessarily invalidated by legislation prohibiting the lottery business;[2071] contracts for the sale of beer, valid when entered into, were similarly nullified by a state prohibition law;[2072] and contracts of employment were modified by later laws regarding the liability of employers and workmen's compensation.[2073] Likewise, a contract between plaintiff and defendant did not prevent the State from making the latter a concession which rendered the contract worthless;[2074] nor did a contract as to rates between two railway companies prevent the State from imposing different rates;[2075] nor did a contract between a public utility company and a customer protect the rates agreed upon from being superseded by those fixed by the State.[2076] Similarly, a contract for the conveyance of water beyond the limits of a State did not prevent the State from prohibiting such conveyance.[2077]

But the most striking exertions of the police power touching private contracts, as well as other private interests within recent years, have been evoked by war and economic depression. Thus, in World War I, the State of New York enacted a statute which, declaring that a public emergency existed, forbade the enforcement of covenants for the surrender of the possession of premises on the expiration of leases, and wholly deprived for a period owners of dwellings, including apartment and tenement houses, within the City of New York and contiguous counties, of possessory remedies for the eviction from their premises of tenants in possession when the law took effect, providing the latter were able and willing to pay a reasonable rent. In answer to objections leveled against this legislation

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[2069] Manigault v. Springs, 199 U.S. 473, 480 (1905).

[2070] Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830). *See also* Phalen v. Virginia, 49 U.S. (8 How.) 163 (1850).

[2071] Stone v. Mississippi, 101 U.S. 814 (1880).

[2072] Beer Co. v. Massachusetts, 97 U.S. 25 (1878).

[2073] New York Cent. R.R. v. White, 243 U.S. 188 (1917). In this and the preceding two cases the legislative act involved did not except from its operation existing contracts.

[2074] Manigault v. Springs, 199 U.S. 473 (1905).

[2075] Portland Ry. v. Oregon R.R. Comm'n, 229 U.S. 397 (1913).

[2076] Midland Co. v. Kansas City Power Co., 300 U.S. 109 (1937).

[2077] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).

on the basis of the obligation of contracts clause, the Court said: "But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be." [2078] In a subsequent case, however, the Court added that, while the declaration by the legislature of a justifying emergency was entitled to great respect, it was not conclusive; a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change," and whether they have changed was always open to judicial inquiry. [2079]

Summing up the result of the cases above referred to, Chief Justice Hughes, speaking for the Court in *Home Building & Loan Ass'n v. Blaisdell*, [2080] remarked in 1934: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. . . . The principle of this development is . . . that the reservation of the reasonable exercise of the protective power of the States is read into all contracts . . ." [2081]

Evaluation of the Clause Today.—It should not be inferred that the obligation of contracts clause is today totally moribund. Even prior to the most recent decisions, it still furnished the basis

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[2078] Marcus Brown Co. v. Feldman, 256 U.S. 170, 198 (1921), followed in Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

[2079] Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–548 (1924).

[2080] 290 U.S. 398 (1934).

[2081] 290 U.S. at 442, 444. *See also* Veix v. Sixth Ward Ass'n, 310 U.S. 32 (1940), in which was sustained a New Jersey statute amending in view of the Depression the law governing building and loan associations. The authority of the State to safeguard the vital interests of the people, said Justice Reed, "extends to economic needs as well." Id. at 39. In Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531–532 (1949), the Court dismissed out-of-hand a suggestion that a state law outlawing union security agreements was an invalid impairment of existing contracts, citing Blaisdell and Veix.

for some degree of judicial review as to the substantiality of the factual justification of a professed exercise by a state legislature of its police power, and in the case of legislation affecting the remedial rights of creditors, it still affords a solid and palpable barrier against legislative erosion. Nor is this surprising in view of the fact that, as we have seen, such rights were foremost in the minds of the framers of the clause. The Court's attitude toward insolvency laws, redemption laws, exemption laws, appraisement laws and the like, has always been that they may not be given retroactive operation,[2082] and the general lesson of these earlier cases is confirmed by the Court's decisions between 1934 and 1945 in certain cases involving state moratorium statutes. In *Home Building & Loan Ass'n v. Blaisdell*,[2083] the leading case, a closely divided Court sustained the Minnesota Moratorium Act of April 18, 1933, which, reciting the existence of a severe financial and economic depression for several years and the frequent occurrence of mortgage foreclosure sales for inadequate prices, and asserting that these conditions had created an economic emergency calling for the exercise of the State's police power, authorized its courts to extend the period for redemption from foreclosure sales for such additional time as they might deem just and equitable, although in no event beyond May 1, 1935.

The act also left the mortgagor in possession during the period of extension, subject to the requirement that he pay a reasonable rental for the property as fixed by the court. Contemporaneously, however, less carefully drawn statutes from Missouri and Arkansas, acts which were not as considerate of creditor's rights, were set aside as violative of the contracts clause.[2084] "A State is free to regulate the procedure in its courts even with reference to contracts already made," said Justice Cardozo for the Court, "and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow.... What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral secu-

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[2082] *See especially* Edwards v. Kearzey, 96 U.S. 595 (1878); Barnitz v. Beverly, 163 U.S. 118 (1896).

[2083] 290 U.S. 398 (1934).

[2084] W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935).

rity." [2085] On the other hand, in the most recent of this category of cases, the Court gave its approval to an extension by the State of New York of its moratorium legislation. While recognizing that business conditions had improved, the Court was of the opinion that there was reason to believe that "'the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate.'" [2086]

And meantime the Court had sustained legislation of the State of New York under which a mortgagee of real property was denied a deficiency judgment in a foreclosure suit where the state court found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage. [2087] "Mortgagees," the Court said, "are constitutionally entitled to no more than payment in full.... To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts.... The contract clause does not protect such a strategical, procedural advantage." [2088]

More important, the Court has been at pains most recently to reassert the vitality of the clause, although one may wonder whether application of the clause will be more than episodic.

"[T]he Contract Clause remains a part of our written Constitution." [2089] So saying, the Court struck down state legislation in two instances, one law involving the government's own contractual obligation and the other affecting private contracts. [2090] A finding that

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[2085] 295 U.S. at 62.

[2086] East New York Bank v. Hahn, 326 U.S. 230, 235 (1945), quoting New York Legislative Document (1942), No. 45, p. 25.

[2087] Honeyman v. Jacobs, 306 U.S. 539 (1939). *See also* Gelfert v. National City Bank, 313 U.S. 221 (1941).

[2088] 313 U.S. at 233–34.

[2089] United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977). "It is not a dead letter." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978). A majority of the Court seems fully committed to using the clause. Only Justices Brennan, White, and Marshall dissented in both cases. Chief Justice Burger and Justices Rehnquist and Stevens joined both opinions of the Court. Of the three remaining Justices, who did not participate in one or the other case, Justice Blackmun wrote the opinion in *United States Trust* while Justice Stewart wrote the opinion in *Spannaus* and Justice Powell joined it.

[2090] *United States Trust* involved a repeal of a covenant statutorily enacted to encourage persons to purchase New York-New Jersey Port Authority bonds by limiting the Authority's ability to subsidize rail passenger transportation. *Spannaus* involved a statute requiring prescribed employers who had a qualified pension plan to provide funds sufficient to cover full pensions for all employees who had worked at least 10 years if the employer either terminated the plan or closed his offices in

a contract has been "impaired" in some way is merely the preliminary step in evaluating the validity of the state action.[2091] But in both cases the Court applied a stricter-than-usual scrutiny to the statutory action, in the public contracts case precisely because it was its own obligation that the State was attempting to avoid and in the private contract case, apparently, because the legislation was in aid of a "narrow class."[2092] The approach in any event is one of balancing. "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."[2093] Having determined that a severe impairment had resulted in both cases,[2094] the Court moved on to assess the justification for the state action. In *United States Trust*, the test utilized by the Court was that an impairment would be upheld only if it were "necessary" and "reasonable" to serve an important public purpose. But the two terms were given somewhat restrictive meanings. Necessity is shown only when the State's objectives could not have been achieved through less dramatic modifications of the contract; reasonableness is a function of the extent to which alteration of the contract was prompted by circumstances unforeseen at the time of its formation. The repeal of the covenant in issue was found to fail both prongs of the test.[2095] In *Spannaus*, the Court drew from its prior cases four standards: did the law deal with a broad generalized economic or social problem, did it operate in an area already subject to state regulation at the time the contractual obligations were entered into, did it effect simply a temporary alteration of the contractual relationship, and did the law operate upon a broad class of affected individuals or concerns. The Court found

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the State, a law that greatly altered the company's liabilities under its contractual pension plan.

[2091] 431 U.S. at 21; 438 U.S. at 244.

[2092] 431 U.S. at 22-26; 438 U.S. at 248.

[2093] 438 U.S. at 245.

[2094] 431 U.S. at 17-21 (the Court was unsure of the value of the interest impaired but deemed it "an important security provision"); 438 U.S. 244–47 (statute mandated company to recalculate, and in one lump sum, contributions previously adequate).

[2095] 431 U.S. at 25–32 (State could have modified the impairment to achieve its purposes without totally abandoning the covenant, though the Court reserved judgment whether lesser impairments would have been constitutional, id. at 30 n.28, and it had alternate means to achieve its purposes; the need for mass transportation was obvious when covenant was enacted and State could not claim that unforeseen circumstances had arisen.)

that the challenged law did not possess any of these attributes and thus struck it down.[2096]

Whether these two cases portend an active judicial review of economic regulatory activities, in contrast to the extreme deference shown such legislation under the due process and equal protection clauses, is problematical. Both cases contain language emphasizing the breadth of the police powers of government that may be used to further the public interest and admitting limited judicial scrutiny. Nevertheless, "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[2097]

Clause 2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

Duties on Exports or Imports

Scope

Only articles imported from or exported to a foreign country, or "a place over which the Constitution has not extended its commands with respect to imports and their taxation," are comprehended by the terms "imports" and "exports."[2098] With respect to exports, the exemption from taxation "attaches to the export and not to the article before its exportation,"[2099] requiring an essentially factual inquiry into whether there have been acts of movement toward a final destination constituting sufficient entrance

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[2096] 438 U.S. at 244–51. *See also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (emphasizing the first but relying on all but the third of these tests in upholding a prohibition on pass-through of an oil and gas severance tax).

[2097] 438 U.S. at 242 (emphasis by Court).

[2098] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673 (1945). Goods brought from another State are not within the clause. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869). Justice Thomas has called recently for reconsideration of Woodruff and the possible application of the clause to interstate imports and exports. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609, 621 (1997) (dissenting).

[2099] Cornell v. Coyne, 192 U.S. 418, 427 (1904).

into the export stream as to invoke the protection of the clause.[2100] To determine how long imported wares remain under the protection of this clause, the Supreme Court enunciated the original package doctrine in the leading case of *Brown v. Maryland*. "When the importer has so acted upon the thing imported," wrote Chief Justice Marshall, "that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution."[2101] A box, case, or bale in which separate parcels of goods have been placed by the foreign seller is regarded as the original package, and upon the opening of such container for the purpose of using the separate parcels, or of exposing them for sale, each loses its character as an import and becomes subject to taxation as a part of the general mass of property in the State.[2102] Imports for manufacture cease to be such when the intended processing takes place,[2103] or when the original packages are broken.[2104] Where a manufacturer imports merchandise and stores it in his warehouse in the original packages, that merchandise does not lose its quality as an import, at least so long as it is not required to meet such immediate needs.[2105] The purchaser of imported goods is deemed to be the importer if he was the efficient cause of the importation, whether the title to the goods vested in him at the time of shipment, or after its arrival in this country.[2106] A state franchise tax measured by properly apportioned gross receipts may be imposed upon a railroad company in respect of the company's receipts for services in handling imports and exports at its marine terminal.[2107]

Privilege Taxes

A state law requiring importers to take out a license to sell imported goods amounts to an indirect tax on imports and hence is

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[2100] Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946); Empress Siderurgica v. County of Merced, 337 U.S. 154 (1947); Kosydar v. National Cash Register Co., 417 U.S. 62 (1974).

[2101] 25 U.S. (12 Wheat.) 419, 441–442 (1827).

[2102] May v. New Orleans, 178 U.S. 496, 502 (1900).

[2103] 178 U.S. at 501; Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928); McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940).

[2104] Low v. Austin, 80 U.S. (13 Wall.) 29 (1872); May v. New Orleans, 178 U.S. 496 (1900).

[2105] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 667 (1945). *But see* Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984) (overruling the earlier decision).

[2106] 324 U.S, at 664.

[2107] Canton R.R. v. Rogan, 340 U.S. 511 (1951).

unconstitutional.[2108] Likewise, a franchise tax upon foreign corporations engaged in importing nitrate and selling it in the original packages,[2109] a tax on sales by brokers[2110] and auctioneers[2111] of imported merchandise in original packages, and a tax on the sale of goods in foreign commerce consisting of an annual license fee plus a percentage of gross sales,[2112] have been held invalid. On the other hand, pilotage fees,[2113] a tax upon the gross sales of a purchaser from the importer,[2114] a license tax upon dealing in fish which, through processing, handling, and sale, have lost their distinctive character as imports,[2115] an annual license fee imposed on persons engaged in buying and selling foreign bills of exchange,[2116] and a tax upon the right of an alien to receive property as heir, legatee, or donee of a deceased person[2117] have been held not to be duties on imports or exports.

Property Taxes

Overruling a line of prior decisions which it thought misinterpreted the language of *Brown v. Maryland*, the Court now holds that the clause does not prevent a State from levying a nondiscriminatory, *ad valorem* property tax upon goods that are no longer in import transit.[2118] Thus, a company's inventory of imported tires maintained at its wholesale distribution warehouse could be included in the State's tax upon the entire inventory. The clause does not prohibit every "tax" with some impact upon imports or exports but reaches rather exactions directed only at imports or exports or commercial activity therein as such.[2119]

[2108] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 447 (1827).

[2109] Anglo-Chilean Corp. v. Alabama, 288 U.S. 218 (1933).

[2110] Low v. Austin, 80 U.S. (13 Wall.) 29, 33 (1872).

[2111] Cook v. Pennsylvania, 97 U.S. 566, 573 (1878).

[2112] Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917).

[2113] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 313 (1851).

[2114] Waring v. The Mayor, 75 U.S. (8 Wall.) 110, 122 (1869). *See also* Pervear v. Massachusetts. 72 U.S. (5 Wall.) 475, 478 (1867); Schollenberger v. Pennsylvania, 171 U.S. 1, 24 (1898).

[2115] Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

[2116] Nathan v. Louisiana, 49 U.S. (8 How.) 73, 81 (1850).

[2117] Mager v. Grima, 49 U.S. (8 How.) 490 (1850).

[2118] Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), overruling Low v. Austin, 80 U.S. (13 Wall.) 29 (1872), expressly, and, necessarily, Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), among others. The latter case was expressly overruled in Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984), involving the same tax and the same parties. In Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), property taxes were sustained on the basis that the materials taxed had lost their character as imports. On exports, *see* Selliger v. Kentucky, 213 U.S. 200 (1909) (property tax levied on warehouse receipts for whiskey exported to Germany invalid). *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76–78 (1993). *And see* id. at 81–82 (Justice Scalia concurring).

[2119] Michelin Tire Corp. v. Wages, 423 U.S. 276, 290–294 (1976). *Accord*: R. J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986) (tax on imported to-

Inspection Laws

Inspection laws "are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption." [2120] In *Turner v. Maryland*, [2121] the Court listed as recognized elements of inspection laws, the "quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds . . ." [2122] It sustained as an inspection law a charge for storage and inspection imposed upon every hogshead of tobacco grown in the State and intended for export, which the law required to be brought to a state warehouse to be inspected and branded. The Court has cited this section as a recognition of a general right of the States to pass inspection laws, and to bring within their reach articles of interstate, as well as of foreign, commerce. [2123] But on the ground that, "it has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse," it held that a state law forbidding the importation of intoxicating liquors into the State could not be sustained as an inspection law. [2124]

Clause 3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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bacco stored for aging in customs-bonded warehouse and destined for domestic manufacture and sale); *but cf.* Xerox Corp. v. County of Harris, 459 U.S. 145, 154 (1982) (similar tax on goods stored in customs-bonded warehouse is preempted "by Congress' comprehensive regulation of customs duties;" case, however, dealt with goods stored for export).

[2120] Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 488 (1888).

[2121] 107 U.S. 38 (1883).

[2122] 107 U.S. at 55.

[2123] Patapsco Guano Co. v. North Carolina, 171 U.S. 345, 361 (1898).

[2124] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888). The Twenty-first Amendment has had no effect on this principle. Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964).

Tonnage Duties

The prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, whether measured by the tonnage of the vessel or not, which are in effect charges for the privilege of entering, trading in, or lying in a port.[2125] But it does not extend to charges made by state authority, even if graduated according to tonnage,[2126] for services rendered to the vessel, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, or storage.[2127] For the purpose of determining wharfage charges, it is immaterial whether the wharf was built by the State, a municipal corporation, or an individual. Where the wharf was owned by a city, the fact that the city realized a profit beyond the amount expended did not render the toll objectionable.[2128] The services of harbor masters for which fees are allowed must be actually rendered, and a law permitting harbor masters or port wardens to impose a fee in all cases is void.[2129] A State may not levy a tonnage duty to defray the expenses of its quarantine system,[2130] but it may exact a fixed fee for examination of all vessels passing quarantine.[2131] A state license fee for ferrying on a navigable river is not a tonnage tax but rather is a proper exercise of the police power and the fact that a vessel is enrolled under federal law does not exempt it.[2132] In the *State Tonnage Tax Cases*,[2133] an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

Keeping Troops

This provision contemplates the use of the State's military power to put down an armed insurrection too strong to be con-

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[2125] Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265 (1935); Cannon v. City of New Orleans, 87 U.S. (20 Wall.) 577, 581 (1874); Transportation Co. v. Wheeling, 99 U.S. 273, 283 (1879).

[2126] Packet Co. v. Keokuk, 95 U.S. 80 (1877); Transportation Co. v. Parkersburg, 107 U.S. 691 (1883); Ouachita Packet Co. v. Aiken, 121 U.S. 444 (1887).

[2127] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851); Ex parte McNiel, 80 U.S. (13 Wall.) 236 (1872); Inman Steamship Company v. Tinker, 94 U.S. 238, 243 (1877); Packet Co. v. St. Louis, 100 U.S. 423 (1880); City of Vicksburg v. Tobin, 100 U.S. 430 (1880); Packet Co. v. Catlettsburg, 105 U.S. 559 (1882).

[2128] Huse v. Glover, 119 U.S. 543, 549 (1886).

[2129] Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31 (1867).

[2130] Peete v. Morgan, 86 U.S. (19 Wall.) 581 (1874).

[2131] Morgan v. Louisiana, 118 U.S. 455, 462 (1886).

[2132] Wiggins Ferry Co. v. City of East St. Louis, 107 U.S. 365 (1883). *See also* Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 212 (1885); Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326, 338 (1887); Osborne v. City of Mobile, 83 U.S. (16 Wall.) 479, 481 (1873).

[2133] 79 U.S. (12 Wall.) 204, 217 (1871).

trolled by civil authority,[2134] and the organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause.[2135]

Interstate Compacts

Background of Clause

Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the States to make compacts with each other was not surrendered under the Constitution.[2136] "The Compact," as the Supreme Court has put it, "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."[2137] In American history, the compact technique can be traced back to the numerous controversies that arose over the ill-defined boundaries of the original colonies. These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.[2138] When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes between two or more States over boundaries or "any cause whatever"[2139] and required the approval of Congress for any "treaty confederation or alliance" to which a State should be a party.[2140]

The Framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against "any treaty, alliance or confederation," and by the third clause they required the consent of Congress for "any agreement or compact." The significance of this distinction was pointed out by Chief Justice Taney in *Holmes v. Jennison*.[2141] "As these words ('agreement or compact') could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive.... The word 'agreement,' does not necessarily import and direct any express stipulation; nor is it necessary that it should be in writing."

"If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And

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[2134] Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).
[2135] Presser v. Illinois, 116 U.S. 252 (1886).
[2136] Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837).
[2137] Hinderlider v. La Plata Co., 304 U.S. 92, 104 (1938).
[2138] Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 691 (1925).
[2139] Article IX.
[2140] Article VI.
[2141] 39 U.S. (14 Pet.) 540 (1840).

the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."[2142] But in *Virginia v. Tennessee*,[2143] decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between States without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contracting States or to encroach upon the just supremacy of the United States. Adhering to this later understanding of the clause, the Court found no enhancement of state power *quoad* the Federal Government through entry into the Multistate Tax Compact and thus sustained the agreement among participating States without congressional consent.[2144]

Subject Matter of Interstate Compacts

For many years after the Constitution was adopted, boundary disputes continued to predominate as the subject matter of agreements among the States. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for state cooperation in carrying out affirmative programs for solving common problems.[2145] The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means. Another important use of this device was recognized by Congress in the act of June 6, 1934,[2146] whereby it consented in advance to agreements for the control of crime. The first response to this stim-

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[2142] 39 U.S. at 570, 571, 572.

[2143] 148 U.S. 503, 518 (1893). *See also* Stearns v. Minnesota, 179 U.S. 223, 244 (1900).

[2144] United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978). *See also* New Hampshire v. Maine, 426 U.S. 363 (1976).

[2145] Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); F. ZIMMERMAN AND M. WENDELL, INTERSTATE COMPACTS SINCE 1925 (1951); F. ZIMMERMAN AND M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS (1961).

[2146] 48 Stat. 909 (1934).

ulus was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which most of the States have given adherence.[2147] Subsequently, Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, many States have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments, the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, et cetera, and the framing of uniform state legislation for dealing with some of these.[2148]

Consent of Congress

The Constitution makes no provision with regard to the time when the consent of Congress shall be given or the mode or form by which it shall be signified.[2149] While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.[2150] The required consent is not necessarily an expressed consent; it may be inferred from circumstances.[2151] It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.[2152] The consent of Congress may be granted conditionally "upon terms appropriate to the subject and transgressing no constitutional limitations."[2153] Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.[2154]

Grants of Franchise to Corporations by Two States

It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the

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[2147] F. ZIMMERMAN AND M. WENDELL, INTERSTATE COMPACTS SINCE 1925 91 (1951).

[2148] 7 U.S.C. § 515; 15 U.S.C. § 717j; 16 U.S.C. § 552; 33 U.S.C. §§ 11, 567–567b.

[2149] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85 (1823).

[2150] Virginia v. Tennessee, 148 U.S. 503 (1893).

[2151] Virginia v. West Virginia, 78 U.S. (11 Wall.) 39 (1871).

[2152] Wharton v. Wise, 153 U.S. 155, 173 (1894).

[2153] James v. Dravo Contracting Co., 302 U.S. 134 (1937). *See also* Arizona v. California, 292 U.S. 341, 345 (1934). When it approved the New York-New Jersey Waterfront Compact, 67 Stat. 541, Congress, for the first time, expressly gave its consent to the subsequent adoption of implementing legislation by the participating States. De Veau v. Braisted, 363 U.S. 144, 145 (1960).

[2154] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856).

State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.[2155]

Legal Effect of Interstate Compacts

Whenever, by the agreement of the States concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts become binding upon all citizens of the signatory States and are conclusive as to their rights.[2156] Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial determination of existing rights.[2157] Valid interstate compacts are within the protection of the obligation of contracts clause,[2158] and a "sue and be sued" provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment.[2159] The Supreme Court in the exercise of its original jurisdiction may enforce interstate compacts following principles of general contract law.[2160] Congress also has authority to compel compliance with such compacts.[2161] Nor may a State read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the State's constitution as interpreted by the highest state court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the state constitution in such a case rests with the Supreme Court.[2162]

[2155] St. Louis & S. F. Ry. v. James, 161 U.S. 545, 562 (1896).

[2156] Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838).

[2157] Hinderlider v. La Plata Co., 304 U.S. 92, 104, 106 (1938).

[2158] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 13 (1823); Virginia v. West Virginia, 246 U.S. 565 (1918). *See also* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1852); Olin v. Kitzmiller, 259 U.S. 260 (1922).

[2159] Petty v. Tennessee-Missouri Comm'n, 359 U.S. 275 (1959).

[2160] Texas v. New Mexico, 482 U.S. 124 (1987). If the compact makes no provision for resolving impasse, then the Court may exercise its jurisdiction to apportion waters of interstate streams. In doing so, however, the Court will not rewrite the compact by ordering appointment of a third voting commissioner to serve as a tie-breaker; rather, the Court will attempt to apply the compact to the extent that its provisions govern the controversy. Texas v. New Mexico, 462 U.S. 554 (1983).

[2161] Virginia v. West Virginia, 246 U.S. 565, 601 (1918).

[2162] Dyer v. Sims, 341 U.S. 22 (1951).

ARTICLE II

EXECUTIVE DEPARTMENT

CONTENTS

EXECUTIVE DEPARTMENT

ARTICLE II

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

NATURE AND SCOPE OF PRESIDENTIAL POWER

Creation of the Presidency

Of all the issues confronting the members of the Philadelphia Convention, the nature of the presidency ranks among the most important and the resolution of the question one of the most significant steps taken.[1] The immediate source of Article II was the New York constitution, in which the governor was elected by the people and thus independent of the legislature, his term was three years and he was indefinitely re-eligible, his decisions except with regard to appointments and vetoes were unencumbered with a council, he was in charge of the militia, he possessed the pardoning power, and he was charged to take care that the laws were faithfully executed.[2] But when the Convention assembled and almost to its closing days, there was no assurance that the executive department would not be headed by plural administrators, would not be unalterably tied to the legislature, and would not be devoid of many of the powers normally associated with an executive.

Debate in the Convention proceeded against a background of many things, but most certainly uppermost in the delegates' minds was the experience of the States and of the national government under the Articles of Confederation. Reacting to the exercise of powers by the royal governors, the framers of the state constitu-

[1] The background and the action of the Convention is comprehensively examined in C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 (1923). A review of the Constitution's provisions being put into operation is J. HART, THE AMERICAN PRESIDENCY IN ACTION 1789 (1948).

[2] Hamilton observed the similarities and differences between the President and the New York Governor in THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 462-470. On the text, *see* New York Constitution of 1777, Articles XVII-XIX, in 5 F. Thorpe, *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Congress, 2d sess. (1909), 2632-2633.

tions had generally created weak executives and strong legislatures, though not in all instances. The Articles of Confederation vested all powers in a unicameral congress. Experience had demonstrated that harm was to be feared as much from an unfettered legislature as from an uncurbed executive and that many advantages of a reasonably strong executive could not be conferred on the legislative body.[3]

Nonetheless, the Virginia Plan, which formed the basis of discussion, offered in somewhat vague language a weak executive. Selection was to be by the legislature, and that body was to determine the major part of executive competency. The executive's salary was, however, to be fixed and not subject to change by the legislative branch during the term of the executive, and he was ineligible for re-election so that he need not defer overly to the legislature. A council of revision was provided, of which the executive was a part, with power to negative national and state legislation. The executive power was said to be the power to "execute the national laws" and to "enjoy the Executive rights vested in Congress by the Confederation." The Plan did not provide for a single or plural executive, leaving that issue open.[4]

When the executive portion of the Plan was taken up on June 1, James Wilson immediately moved that the executive should consist of a single person.[5] In the course of his remarks, Wilson demonstrated his belief in a strong executive, advocating election by the people, which would free the executive of dependence on the national legislature and on the States, proposing indefinite re-eligibility, and preferring an absolute negative though in concurrence with a council of revision.[6] The vote on Wilson's motion was put over until the questions of method of selection, term, mode of removal, and powers to be conferred had been considered; subsequently, the motion carried,[7] and the possibility of the development of a strong President was made real.

Only slightly less important was the decision finally arrived at not to provide for an executive council, which would participate not only in the executive's exercise of the veto power but also in the exercise of all his executive duties, notably appointments and treaty making. Despite strong support for such a council, the Conven-

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[3] C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 chs. 1-3 (1923).

[4] The plans offered and the debate is reviewed in C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 ch. 4 (1923). The text of the Virginia Plan may be found in 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (rev. ed. 1937).

[5] Id. at 65.

[6] Id. at 65, 66, 68, 69, 70, 71, 73.

[7] Id. at 93.

tion ultimately rejected the proposal and adopted language vesting in the Senate the power to "advise and consent" with regard to these matters.[8]

Finally, the designation of the executive as the "President of the United States" was made in a tentative draft reported by the Committee on Detail[9] and accepted by the Convention without discussion.[10] The same clause had provided that the President's title was to be "His Excellency,"[11] and, while this language was also accepted without discussion,[12] it was subsequently omitted by the Committee on Style and Arrangement[13] with no statement of the reason and no comment in the Convention.

Executive Power: Theory of the Presidential Office

The most obvious meaning of the language of Article II, § 1, is to confirm that the executive power is vested in a single person, but almost from the beginning it has been contended that the words mean much more than this simple designation of locus. Indeed, contention with regard to this language reflects the much larger debate about the nature of the Presidency. With Justice Jackson, we "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."[14] At the least, it is no doubt true that the "loose and general expressions" by which the powers and duties of the executive branch are denominated[15] place the President in a position in which he, as Professor Woodrow Wilson noted, "has the right, in law and conscience, to be as big a man as he can" and in which "only his capacity will set the limit."[16]

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[8] The last proposal for a council was voted down on September 7. 2 id. at 542.
[9] Id. at 185.
[10] Id. at 401.
[11] Id. at 185.
[12] Id. at 401.
[13] Id. at 597.
[14] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-635 (1952) (concurring opinion).
[15] A. UPSHUR, A BRIEF ENQUIRY INTO THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT 116 (1840).
[16] W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 202, 205 (1908).

Hamilton and Madison.—Hamilton's defense of President Washington's issuance of a neutrality proclamation upon the outbreak of war between France and Great Britain contains not only the lines but most of the content of the argument that Article II vests significant powers in the President as possessor of executive powers not enumerated in subsequent sections of Article II.[17] Said Hamilton: "The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America.' The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed*. It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties."

"The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, 'All legislative powers herein granted shall be vested in a congress of the United States.' In that which grants the executive power, the expressions are, 'The *executive power* shall be vested in a President of the United States.' The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free gov-

[17] 32 WRITINGS OF GEORGE WASHINGTON 430 (J. Fitzpatrick ed., 1939). *See* C. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT (1931).

ernment. The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument." [18]

Madison's reply to Hamilton, in five closely reasoned articles, [19] was almost exclusively directed to Hamilton's development of the contention from the quoted language that the conduct of foreign relations was in its nature an executive function and that the powers vested in Congress which bore on this function, such as the power to declare war, did not diminish the discretion of the President in the exercise of his powers. Madison's principal reliance was on the vesting of the power to declare war in Congress, thus making it a legislative function rather than an executive one, combined with the argument that possession of the exclusive power carried with it the exclusive right to judgment about the obligations to go to war or to stay at peace, negating the power of the President to proclaim the nation's neutrality. Implicit in the argument was the rejection of the view that the first section of Article II bestowed powers not vested in subsequent sections. "Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the executive; or . . . perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative." [20] The arguments are today pursued with as great fervor, as great learning, and with two hundred years experience, but the constitutional part of the

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[18] 7 WORKS OF ALEXANDER HAMILTON 76, 80-81 (J. C. Hamilton ed., 1851) (emphasis in original).

[19] 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611-654 (1865).

[20] Id. at 621. In the congressional debates on the President's power to remove executive officeholders, *cf.* C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 ch. 6 (1923), Madison had urged contentions quite similar to Hamilton's, finding in the first section of Article II and in the obligation to execute the laws a vesting of executive powers sufficient to contain the power solely on his behalf to remove subordinates. 1 ANNALS OF CONGRESS 496-497. Madison's language here was to be heavily relied on by Chief Justice Taft on this point in Myers v. United States, 272 U.S. 52, 115-126 (1926), *but compare*, Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467, 1474-1483, 1485-1486 (1938).

contentiousness still settles upon the reading of the vesting clauses of Articles I, II, and III.[21]

The Myers Case.—However much the two arguments are still subject to dispute, Chief Justice Taft, himself a former President, appears in *Myers v. United States*[22] to have carried a majority of the Court with him in establishing the Hamiltonian conception as official doctrine. That case confirmed one reading of the "Decision of 1789" in holding the removal power to be constitutionally vested in the President.[23] But its importance here lies in its interpretation of the first section of Article II. That language was read, with extensive quotation from Hamilton and from Madison on the removal power, as vesting all executive power in the President, the subsequent language was read as merely particularizing some of this power, and consequently the powers vested in Congress were read as exceptions which must be strictly construed in favor of powers retained by the President.[24] *Myers* remains the fountainhead of the latitudinarian constructionists of presidential power, but its dicta, with regard to the removal power, were first circumscribed in *Humphrey's Executor v. United States*,[25] and then considerably altered in *Morrison v. Olson*;[26] with regard to the President's "inherent" powers, the *Myers* dicta were called into considerable question by *Youngstown Sheet & Tube Co. v. Sawyer*.[27]

The Curtiss-Wright Case.—Further Court support of the Hamiltonian view was advanced in *United States v. Curtiss-Wright Export Corp.*,[28] in which Justice Sutherland posited the doctrine that the power of the National Government in foreign relations is not one of enumerated powers, but rather is inherent. The doctrine was then combined with Hamilton's contention that control of for-

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[21] *Compare* Calabresi & Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992), *with* Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994), and responses by Calabresi, Rhodes and Froomkin, id. at 1377, 1406, 1420.

[22] 272 U.S. 52 (1926). *See* Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467 (1938).

[23] C. THACH, THE CREATION OF THE PRESIDENCY, 1775-1789 ch. 6 (1923).

[24] Myers v. United States, 272 U.S. 52, 163-164 (1926). Professor Taft had held different views. "The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in its exercise. Such specific grant must be either in the federal constitution or in an act of congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . ." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-140 (1916).

[25] 295 U.S. 602 (1935).

[26] 487 U.S. 654, 685-93 (1988).

[27] 343 U.S. 579 (1952).

[28] 299 U.S. 304 (1936).

eign relations is exclusively an executive function with obvious implications for the power of the President. The case arose as a challenge to the delegation of power from Congress to the President with regard to a foreign relations matter. Justice Sutherland denied that the limitations on delegation in the domestic field were at all relevant in foreign affairs.

"The broad statement that the federal government can exercise no powers except those specifically enumerated in the constitution, and such implied powers—as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as were thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states .... That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source ...."

"As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America ...."

"It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties if they had never been mentioned in the Constitution, would have been vested in the federal government as necessary concomitants of nationality ...."

"Not only ... is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation ...." [29]

Scholarly criticism of Justice Sutherland's reasoning has demonstrated that his essential postulate, the passing of sovereignty in external affairs directly from the British Crown to the colonies as

[29] 299 U.S. at 315-16, 318

a collective unit, is in error.[30] Dicta in later cases controvert the conclusions drawn in *Curtiss-Wright* about the foreign relations power being inherent rather than subject to the limitations of the delegated powers doctrine.[31] The holding in *Kent v. Dulles*[32] that delegation to the Executive of discretion in the issuance of passports must be measured by the usual standards applied in domestic delegations appeared to circumscribe Justice Sutherland's more expansive view, but the subsequent limitation of that decision, though formally reasoned within its analytical framework, coupled with language addressed to the President's authority in foreign affairs, leaves clouded the vitality of that decision.[33] The case nonetheless remains with *Myers v. United States* the source and support of those contending for broad inherent executive powers.[34]

The Youngstown Case.—The only recent case in which the "inherent" powers of the President or the issue of what executive powers are vested by the first section of Article II has been exten-

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[30] Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L. J. 467 (1946); Patterson, *In re United States v. Curtiss-Wright Corp.*, 22 TEXAS L. REV. 286, 445 (1944); Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L. J. 1 (1973), reprinted in C. Lofgren, *'Government From Reflection and Choice'—Constitutional Essays on War, Foreign Relations, and Federalism* 167 (1986).

[31] *E.g.*, Ex parte Quirin, 317 U.S. 1, 25 (1942) (Chief Justice Stone); Reid v. Covert , 354 U.S. 1, 5-6 (1957) (plurality opinion, per Justice Black).

[32] 357 U.S. 116, 129 (1958).

[33] Haig v. Agee, 453 U.S. 280 (1981). For the reliance on *Curtiss-Wright*, *see* id. at 291, 293-94 & n.24, 307-08. *But see* Dames & Moore v. Regan, 453 U.S. 654, 659-62 (1981), qualified by id. at 678. *Compare* Webster v. Doe, 486 U.S. 592 (1988) (construing National Security Act as not precluding judicial review of constitutional challenges to CIA Director's dismissal of of employee, over dissent relying in part on Curtiss-Wright as interpretive force counseling denial of judicial review), *with* Department of the Navy v. Egan, 484 U.S. 518 (1988) (denying Merit Systems Protection Board authority to review the substance of an underlying security-clearance determination in reviewing an adverse action and noticing favorably President's inherent power to protect information without any explicit legislative grant). In Loving v. United States, 517 U.S. 748 (1996), the Court recurred to the original setting of *Curtiss-Wright*, a delegation to the President without standards. Congress, the Court found, had delegated to the President authority to structure the death penalty provisions of military law so as to bring the procedures, relating to aggravating and mitigating factors, into line with constitutional requirements, but Congress had provided no standards to guide the presidential exercise of the authority. Standards were not required, held the Court, because his role as Commander-in-Chief gave him responsibility to superintend the military establishment and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising the delegated authority itself possesses independent authority over the subject matter, the familiar limitations on delegation do not apply. Id. at 771-74.

[34] That the opinion "remains authoritative doctrine" is stated in L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 25-26 (1972). It is utilized as an interpretive precedent in AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES see, e.g., §§ 1, 204, 339 (1987). It will be noted, however, that the Restatement is circumspect about the reach of the opinion in controversies between presidential and congressional powers.

sively considered[35] is *Youngstown Sheet & Tube Co. v. Sawyer*,[36] and the multiple opinions there produced make difficult an evaluation of the matter. During the Korean War, President Truman seized the steel industry then in the throes of a strike. No statute authorized the seizure, and the Solicitor General defended the action as an exercise of the President's executive powers which were conveyed by the first section of Article II, by the obligation to enforce the laws, and by the vesting of the function of commander-in-chief. By vote of six-to-three, the Court rejected this argument and held the seizure void. But the doctrinal problem is complicated by the fact that Congress had expressly rejected seizure proposals in considering labor legislation and had authorized procedures not followed by the President which did not include seizure. Thus, four of the majority Justices[37] appear to have been decisively influenced by the fact that Congress had denied the power claimed and this in an area in which the Constitution vested the power to decide at least concurrently if not exclusively in Congress. Three and perhaps four Justices[38] appear to have rejected the Government's argument on the merits while three[39] accepted it in large measure. Despite the inconclusiveness of the opinions, it seems clear that the

[35] The issue is implicit in several of the opinions of the Justices in New York Times Co. v. United States, 403 U.S. 713 (1971). *See* id. at 727, 728-30 (Justice Stewart concurring), 752, 756-59 (Justice Harlan dissenting). Assertions of inherent power to sustain presidential action were made in Dames & Moore v. Regan, 453 U.S. 654 (1981), but the Court studiously avoided these arguments in favor of a somewhat facile statutory analysis. Separation-of-powers analysis informed the Court's decisions in United States v. Nixon, 418 U.S. 683 (1974), Nixon v. Administrator of General Services, 433 U.S. 425 (1977), Nixon v. Fitzgerald, 457 U.S. 731 (1982), and Harlow v. Fitzgerald, 457 U.S. 800 (1982). While perhaps somewhat latitudinarian in some respect of the President's powers, the analysis looks away from inherent powers. *But see* Haig v. Agee, 453 U.S. 280 (1981), in which the statutory and congressional ratification analyses is informed with a view of a range of presidential foreign affairs discretion combined with judicial deference according the President *de facto* much of the theoretically-based authority spelled out in *Curtiss-Wright*.

[36] 343 U.S. 579 (1952). *See* Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953). A case similar to Youngstown was AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (*en banc*), *cert. denied*, 443 U.S. 915 (1979), sustaining a presidential order denying government contracts to companies failing to comply with certain voluntary wage and price guidelines on the basis of statutory interpretation of certain congressional delegations.

[37] 343 U.S. 593, 597-602 (Justice Frankfurter concurring, though he also noted he expressly joined Justice Black's opinion as well), 634, 635-40 (Justice Jackson concurring), 655, 657 (Justice Burton concurring), 660 (Justice Clark concurring).

[38] 343 U.S. at 582 (Justice Black delivering the opinion of the Court), 629 (Justice Douglas concurring, but note his use of the Fifth Amendment just compensation argument), 634 (Justice Jackson concurring), 655 (Justice Burton concurring).

[39] 343 U.S. at 667 (Chief Justice Vinson and Justices Reed and Minton dissenting).

result was a substantial retreat from the proclamation of vast presidential powers made in *Myers* and *Curtiss-Wright*.[40]

The Practice in the Presidential Office.—However contested the theory of expansive presidential powers, the practice in fact has been one of expansion of those powers, an expansion that a number of "weak" Presidents and the temporary ascendancy of Congress in the wake of the Civil War has not stemmed. Perhaps the point of no return in this area was reached in 1801 when the Jefferson-Madison "strict constructionists" came to power and, instead of diminishing executive power and federal power in general, acted rather to enlarge both, notably by the latitudinarian construction of implied federal powers to justify the Louisiana Purchase.[41] After a brief lapse into Cabinet government, the executive in the hands of Andrew Jackson stamped upon the presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, "the oldest political institution of the race, the elective Kingship."[42] While the modern theory of presidential power was conceived primarily by Alexander Hamilton, the modern conception of the presidential office was the contribution primarily of Andrew Jackson.[43]

Executive Power: Separation-of-Powers Judicial Protection

In recent cases, the Supreme Court has pronouncedly protected the Executive Branch, applying separation-of-powers principles to invalidate what it perceived to be congressional usurpation of executive power, but its mode of analysis has lately shifted seemingly to permit Congress a greater degree of discretion.[44]

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[40] Myers v. United States, 272 U.S. 52 (1926); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). Note that in Dames & Moore v. Regan, 453 U.S. 654, 659-662, 668-669 (1981), the Court turned to Youngstown as embodying "much relevant analysis" on an issue of presidential power.

[41] For the debates on the constitutionality of the Purchase, *see* E. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812 (1920). The differences and similarities between the Jeffersonians and the Federalists can be seen by comparing L. WHITE, THE JEFFERSONIANS—A STUDY IN ADMINISTRATIVE HISTORY 1801-1829 (1951), with L. WHITE, THE FEDERALISTS—A STUDY IN ADMINISTRATIVE HISTORY (1948). That the responsibilities of office did not turn the Jeffersonians into Hamiltonians may be gleaned from Madison's veto of an internal improvements bill. 2 MESSAGES AND PAPERS OF THE PRESIDENTS 569 (J. Richardson comp., 1897).

[42] H. FORD, THE RISE AND GROWTH OF AMERICAN POLITICS 293 (1898).

[43] E. CORWIN, THE PRESIDENT—OFFICE AND POWERS 1787-1957 ch. 1 (4th ed. 1957).

[44] Not that there have not been a few cases prior to the present period. *See* Myers v. United States, 272 U.S. 52 (1926). But a hallmark of previous disputes between President and Congress has been the use of political combat to resolve them, rather than a resort to the courts. The beginning of the present period was Buckley v. Valeo, 424 U.S. 1, 109-143 (1976).

Significant change in the position of the Executive Branch respecting its position on separation of powers may be discerned in two briefs of the Department of Justice's Office of Legal Counsel, which may spell some measure of judicial modification of the formalist doctrine of separation and adoption of the functionalist approach to the doctrine.[45] The two opinions withdraw from the Department's earlier contention, following *Buckley v. Valeo*, that the execution of the laws is an executive function that may be carried out only by persons appointed pursuant to the appointments clause, thus precluding delegations to state and local officers and to private parties (as in *qui tam* actions), as well as to glosses on the take care clause and other provisions of the Constitution. Whether these memoranda signal long-term change depends on several factors, importantly on whether they are adhered to by subsequent administrations.

In striking down the congressional veto as circumventing Article I's bicameralism and presentment requirements attending exercise of legislative power, the Court also suggested in *INS v. Chadha*[46] that the particular provision in question, involving veto of the Attorney General's decision to suspend deportation of an alien, in effect allowed Congress impermissible participation in execution of the laws.[47] And in *Bowsher v. Synar*,[48] the Court held that Congress had invalidly vested executive functions in a legislative branch official. Underlying both decisions was the premise, stated by Chief Justice Burger's opinion of the Court in *Chadha*, that "the powers delegated to the three Branches are functionally

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[45] Memorandum for John Schmidt, Associate Attorney General, from Assistant Attorney General Walter Dellinger, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration (Sept. 7, 1995); *Memorandum for the General Counsels of the Federal Government*, from Assistant Attorney General Walter Dellinger, re: The Constitutional Separation of Powers Between the President and Congress (May 7, 1996). The principles laid down in the memoranda depart significantly from previous positions of the Department of Justice. For conflicting versions of the two approaches, *see* Constitutional Implications of the Chemical Weapons Convention: Hearings on the Constitution, Federalism, and Property Rights Before the Senate Judiciary Subcommittee, 104th Cong., 2d Sess. (1996), 11-26, 107-10 (Professor John C. Woo), 80-106 (Deputy Assistant Attorney General Richard L. Shiffrin).

[46] 462 U.S. 919 (1983).

[47] Although Chief Justice Burger's opinion of the Court described the veto decision as legislative in character, it also seemingly alluded to the executive nature of the decision to countermand the Attorney General's application of delegated power to a particular individual. "Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way . . . . Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 954-55. The Court's uncertainty is explicitly spelled out in Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).

[48] 478 U.S. 714 (1986).

identifiable," distinct, and definable.[49] In a "standing-to-sue" case, Justice Scalia for the Court denied that Congress could by statute confer standing on citizens not suffering particularized injuries to sue the Federal Government to compel it to carry out a duty imposed by Congress, arguing that to permit this course would be to allow Congress to divest the President of his obligation under the "take care" clause and to delegate the power to the judiciary.[50] On the other hand, the Court in the independent counsel case, while acknowledging that the contested statute did restrict to some degree a constitutionally delegated function, law enforcement, upheld the law upon a flexible analysis that emphasized that neither the legislative nor the judicial branch had aggrandized its power and that the incursion into executive power did not impermissibly interfere with the President's constitutionally assigned functions.[51]

At issue in *Synar* were the responsibilities vested in the Comptroller General by the "Gramm-Rudman-Hollings" Deficit Control Act,[52] which set maximum deficit amounts for federal spending for fiscal years 1986 through 1991, and which directed across-the-board cuts in spending when projected deficits would exceed the target deficits. The Comptroller was to prepare a report for each fiscal year containing detailed estimates of projected federal revenues and expenditures, and specifying the reductions, if any, necessary to meet the statutory target. The President was required to implement the reductions specified in the Comptroller's report. The Court viewed these functions of the Comptroller "as plainly entailing execution of the law in constitutional terms. Interpreting a law . . . to implement the legislative mandate is the very essence of 'execution' of the law," especially where "exercise [of] judgment" is called for, and where the President is required to implement the

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[49] 462 U.S. at 951.

[50] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992). Evidently, however, while Justices Kennedy and Souter joined this part of the opinion, id. at 579 (concurring in part and concurring in the judgment), they do not fully subscribe to the apparent full reach of Justice Scalia's doctrinal position, leaving the position, if that be true, supported in full only by a plurality.

[51] Morrison v. Olson, 487 U.S. 654 (l988). The opinion by Chief Justice Rehnquist was joined by seven of the eight participating Justices. Only Justice Scalia dissented. In Mistretta v. United States, 488 U.S. 361, 390-91 (1989), the Court, approving the placement of the Sentencing Commission in the judicial branch, denied that executive powers were diminished because of the historic judicial responsibility to determine what sentence to impose on a convicted offender. Earlier, in Young v. United States ex rel. Vuitton, 48l U.S. 787 (l987), the Court, in upholding the power of federal judges to appoint private counsel to prosecute contempt of court actions, rejected the assertion that the judiciary usurped executive power in appointing such counsel.

[52] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038.

interpretation.[53] Because Congress by earlier enactment had retained authority to remove the Comptroller General from office, the Court held, executive powers may not be delegated to him. "By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function."[54]

The Court in *Chadha* and *Synar* ignored or rejected assertions that its formalistic approach to separation of powers may bring into question the validity of delegations of legislative authority to the modern administrative state, sometimes called the "fourth branch." As Justice White asserted in dissent in *Chadha*, "by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments .... There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term."[55] Moreover, Justice White noted, "rules and adjudications by the agencies meet the Court's own definition of legislative action."[56] Justice Stevens, concurring in *Synar*, sounded the same chord in suggesting that the Court's holding should not depend on classification of "chameleon-like" powers as executive, legislative, or judicial.[57] The Court answered these assertions on two levels: that the bicameral protection "is not necessary" when legislative power has been delegated to another branch confined to implementing statutory standards set by Congress, and that "the Constitution does not so require."[58] In the same context, the Court acknowledged without disapproval that it had described some agency action as resembling lawmaking.[59] Thus *Chadha* may not be read as requiring that all "legislative power" as the Court defined it must be exercised by Congress, and *Synar* may not be read as requiring that all "executive power" as the Court defined it must be exercised by the executive. A more limited reading is that when Congress elects to exercise legislative power itself rather than delegate it, it must follow the prescribed bicameralism and presentment procedures, and when Congress elects to delegate legislative power or assign executive functions to the executive branch, it may not control exercise of those functions by itself exercising removal (or appointment) powers.

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[53] 478 U.S. at 732-33.
[54] 478 U.S. at 734.
[55] 462 U.S. at 985-86.
[56] 462 U.S. at 989.
[57] 478 U.S. at 736, 750.
[58] 462 U.S. at 953 n.16.
[59] Id.

A more flexible approach was followed in the independent counsel case. Here, there was no doubt that the statute limited the President's law enforcement powers. Upon a determination by the Attorney General that reasonable grounds exist for investigation or prosecution of certain high ranking government officials, he must notify a special, Article III court which appoints a special counsel. The counsel is assured full power and independent authority to investigate and, if warranted, to prosecute. Such counsel may be removed from office by the Attorney General only for cause as prescribed in the statute.[60] The independent counsel was assuredly more free from executive supervision than other federal prosecutors. Instead of striking down the law, however, the Court undertook a careful assessment of the degree to which executive power was invaded and the degree to which the President retained sufficient powers to carry out his constitutionally assigned duties. Also considered by the Court was the issue whether in enacting the statute Congress had attempted to aggrandize itself or had attempted to enlarge the judicial power at the expense of the executive.[61]

In the course of deciding that the President's action in approving the closure of a military base, pursuant to statutory authority, was not subject to judicial review, the Court enunciated a principle that may mean a great deal, constitutionally speaking, or that may not mean much of anything.[62] The lower court had held that, while review of presidential decisions on statutory grounds might be precluded, his decisions were reviewable for constitutionality; in that court's view, whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine. The Supreme Court found this analysis flawed. "Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority."[63] Thus, the Court drew a distinction between executive action undertaken without even the purported warrant of statutory authorization and executive action in excess of statutory

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[60] Pub. L. 95-52l, title VI, 92 Stat. l867, as amended by Pub. L. 97-409, 96 Stat. 2039, and Pub. L. 100-191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 et seq.

[61] 487 U.S. at 693-96. *See also* Mistretta v. United States, 488 U.S. 361, 380-84, 390-91, 408-11 (1989).

[62] Dalton v. Specter, 511 U.S. 462 (1994).

[63] 511 U.S. at 472.

authority. The former may violate separation of powers, while the latter will not.[64]

Doctrinally, the distinction is important and subject to unfortunate application.[65] Whether the brief, unilluminating discussion in *Dalton* will bear fruit in constitutional jurisprudence, however, is problematic.

TENURE

Formerly, the term of four years during which the President "shall hold office" was reckoned from March 4 of the alternate odd years beginning with 1789. This came about from the circumstance that under the act of September 13, 1788, of "the Old Congress," the first Wednesday in March, which was March 4, 1789, was fixed as the time for commencing proceedings under the Constitution. Although as a matter of fact Washington was not inaugurated until April 30 of that year, by an act approved March 1, 1792, it was provided that the presidential term should be reckoned from the fourth day of March next succeeding the date of election. And so things stood until the adoption of the Twentieth Amendment, by which the terms of President and Vice-President end at noon on the 20th of January.[66]

The prevailing sentiment of the Philadelphia Convention favored the indefinite eligibility of the President. It was Jefferson who raised the objection that indefinite eligibility would in fact be for life and degenerate into an inheritance. Prior to 1940, the idea that no President should hold office for more than two terms was generally thought to be a fixed tradition, although some quibbles had been raised as to the meaning of the word "term." The voters' departure from the tradition in electing President Franklin D. Roosevelt to third and fourth terms led to the proposal by Congress on March 24, 1947, of an amendment to the Constitution to embody the tradition in the Constitutional Document. The proposal became a part of the Constitution on February 27, 1951, in consequence of

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[64] *See The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 300-10 (1994).

[65] "As a matter of constitutional logic, the executive branch must have some warrant, either statutory or constitutional, for its actions. The source of all federal governmental authority is the Constitution and, because the Constitution contemplates that Congress may delegate a measure of its power to officials in the executive branch, statutes. The principle of separation of powers is a direct consequence of this scheme. Absent statutory authorization, it is unlawful for the President to exercise the powers of the other branches because the Constitution does not vest those powers in the President. The absence of statutory authorization is not merely a statutory defect; it is a constitutional defect as well." Id. at 305-06 (footnote citations omitted).

[66] As to the meaning of "the fourth day of March," *see* Warren, *Political Practice and the Constitution*, 89 U. PA. L. REV. 1003 (1941).

its adoption by the necessary thirty-sixth State, which was Minnesota.[67]

Clause 2. Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Clause 3. The Electors shall meet in their respective States and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a majority of the whole Number of Electors appointed: and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member

[67] E. Corwin, supra at 34-38, 331-339.

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

Clause 4. The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

ELECTORAL COLLEGE

The electoral college was one of the compromises by which the delegates were able to agree on the document finally produced. "This subject," said James Wilson, referring to the issue of the manner in which the President was to be selected, "has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide."[68] Adoption of the electoral college plan came late in the Convention, which had previously adopted on four occasions provisions for election of the executive by the Congress and had twice defeated proposals for election by the people directly.[69] Itself the product of compromise, the electoral college probably did not work as any member of the Convention could have foreseen, because the development of political parties and nomination of presidential candidates through them and designation of electors by the parties soon reduced the concept of the elector as an independent force to the vanishing point in practice if not in theory.[70] But the college remains despite numerous efforts to adopt another method, a relic perhaps but still a significant one. Clause 3 has, of course, been superceded by the Twelfth Amendment.

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[68] 2 M. Farrand, supra, p. 501.

[69] 1 id. at 21, 68-69, 80-81, 175-76, 230, 244; 2 id. at 29-32, 57-59, 63-64, 95, 99-106, 108-15, 118-21, 196-97, 401-04, 497, 499-502, 511-15, 522-29.

[70] *See* J. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT (1979); N. PIERCE, THE PEOPLES PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE (1968). The second presidential election, in 1792, saw the first party influence on the electors, with the Federalists and the Jeffersonians organizing to control the selection of the Vice-President. Justice Jackson once noted: "As an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis*." Ray v. Blair, 343 U.S. 214, 232 (1952). But, of course, the electors still do actually elect the President and Vice President.

"Appoint"

The word "appoint" as used in Clause 2 confers on state legislatures "the broadest power of determination."[71] Upholding a state law providing for selection of electors by popular vote from districts rather than statewide, the Court described the variety of permissible methods. "Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable."[72]

State Discretion in Choosing Electors

Although Clause 2 seemingly vests complete discretion in the States, certain older cases had recognized a federal interest in protecting the integrity of the process. Thus, the Court upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a presidential elector.[73] Its power to protect the choice of electors from fraud or corruption was sustained.[74] "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is helpless

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[71] McPherson v. Blacker, 146 U.S. 1, 27 (1892).

[72] 146 U.S. at 28-29.

[73] Ex parte Yarbrough, 110 U.S. 651 (1884).

[74] Burroughs and Cannon v. United States, 290 U.S. 534 (1934).

before the two great natural and historical enemies of all republics, open violence and insidious corruption." [75]

More recently, substantial curbs on state discretion have been instituted by both the Court and the Congress. In *Williams v. Rhodes*, [76] the Court struck down a complex state system which effectively limited access to the ballot to the electors of the two major parties. In the Court's view, the system violated the equal protection clause of the Fourteenth Amendment because it favored some and disfavored others and burdened both the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. For the Court, Justice Black denied that the language of Clause 2 immunized such state practices from judicial scrutiny. [77] Then, in *Oregon v. Mitchell*, [78] the Court upheld the power of Congress to reduce the voting age in presidential elections [79] and to set a thirty-day durational residency period as a qualification for voting in presidential elections. [80] Although the Justices were divided on the reasons, the rationale emerging from this case, considered with *Williams v. Rhodes*, [81] is that the Fourteenth Amendment limits state discretion in prescribing the manner of selecting electors and that Congress in enforcing the Fourteenth Amendment [82] may override state practices which violate that Amendment, and may substitute standards of its own.

Whether state enactments implementing the authority to appoint electors are subject to the ordinary processes of judicial re-

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[75] Ex parte Yarbrough, 110 U.S. 651, 657-658 (1884) (quoted in Burroughs and Cannon v. United States, 290 U.S. 534, 546 (1934)).

[76] 393 U.S. 23 (1968).

[77] "There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution .... [It cannot be] thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. [citing the Fifteenth, Nineteenth, and Twenty-fourth Amendments].... Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." 393 U.S. at 29.

[78] 400 U.S. 112 (1970).

[79] The Court divided five-to-four on this issue. Of the majority, four relied on Congress' power under the Fourteenth Amendment, and Justice Black relied on implied and inherent congressional powers to create and maintain a national government. 400 U.S. at 119-124 (Justice Black announcing opinion of the Court).

[80] The Court divided eight-to-one on this issue. Of the majority, seven relied on Congress' power to enforce the Fourteenth Amendment, and Justice Black on implied and inherent powers.

[81] 393 U.S. 23 (1968).

[82] *Cf.* Fourteenth Amendment, § 5.

view within a state, or whether placement of the appointment authority in state legislatures somehow limits the role of state judicial review, became an issue during the controversy over the Florida recount and the outcome of the 2000 presidential election. The Supreme Court did not resolve this issue, but in a remand to the Florida Supreme Court, suggested that the role of state courts in applying state constitutions may be constrained by operation of Clause 2.[83] Three Justices elaborated on this view in *Bush v. Gore*,[84] but the Court ended the litigation—and the recount—on the basis of an equal protection interpretation, without ruling on the Article II argument.

Constitutional Status of Electors

Dealing with the question of the constitutional status of the electors, the Court said in 1890: "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress. . . . In accord with the provisions of the Constitution, Congress has determined the times as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them."[85] The truth of the matter is that the electors are not "officers" at all, by the usual tests of office.[86] They have neither tenure nor salary, and

[83] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam) (remanding for clarification as to whether the Florida Supreme Court "saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2").

[84] Bush v. Gore, 531 U.S. 98, 111 (2000) (opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas). Relying in part on dictum in McPherson v. Blacker, 146 U.S. 1, 27 (1892), the three Justices reasoned that, because Article II confers the authority on a particular branch of state government (the legislature) rather than on a state generally, the customary rule requiring deference to state court interpretations of state law is not fully operative, and the Supreme Court "must ensure that postelection state-court actions do not frustrate" the legislature's policy as expressed in the applicable statute. 531 U.S. at 113.

[85] In re Green, 134 U.S. 377, 379-80 (1890).

[86] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

having performed their single function they cease to exist as electors.

This function is, moreover, "a federal function,"[87] because electors' capacity to perform results from no power which was originally resident in the States, but instead springs directly from the Constitution of the United States.[88]

In the face of the proposition that electors are state officers, the Court has upheld the power of Congress to act to protect the integrity of the process by which they are chosen.[89] But in *Ray v. Blair*,[90] the Court reasserted the conception of electors as state officers, with some significant consequences.

Electors as Free Agents

"No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices."[91] Writing in 1826, Senator Thomas Hart Benton admitted that the framers had intended electors to be men of "superior discernment, virtue, and information," who would select the President "according to their own will" and without reference to the immediate wishes of the people. "That this invention has failed of its objective in every election is a fact of such universal notoriety, that no one can dispute it. That it ought to have failed is equally uncontestable; for such independence in the electors was wholly incompatible with the safety of the people. [It] was, in fact, a chimerical and impractical idea in any community."[92]

Electors constitutionally remain free to cast their ballots for any person they wish and occasionally they have done so.[93] A recent instance occurred when a 1968 Republican elector in North Carolina chose to cast his vote not for Richard M. Nixon, who had won a plurality in the State, but for George Wallace, the independent candidate who had won the second greatest number of votes. Members of both the House of Representatives and of the Senate objected to counting that vote for Mr. Wallace and insisted

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[87] Hawke v. Smith, 253 U.S. 221 (1920).

[88] Burroughs and Cannon v. United States, 290 U.S. 534, 535 (1934).

[89] Ex parte Yarbrough, 110 U.S. 651 (1884); Burroughs and Cannon v. United States, 290 U.S. 534 (1934).

[90] 343 U.S. 214 (1952).

[91] 343 U.S. at 232 (Justice Jackson dissenting). *See* THE FEDERALIST, No. 68 (J. Cooke ed. 1961), 458 (Hamilton); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1457 (1833).

[92] S. Rep. No. 22, 19th Cong., 1st Sess. 4 (1826).

[93] All but the most recent instances are summarized in N. Pierce, supra, 122-124.

that it should be counted for Mr. Nixon, but both bodies decided to count the vote as cast.[94]

The power of either Congress[95] or of the States to enact legislation binding electors to vote for the candidate of the party on the ticket of which they run has been the subject of much argument.[96] It remains unsettled and the Supreme Court has touched on the issue only once and then tangentially. In *Ray v. Blair*,[97] the Court upheld, against a challenge of invalidity under the Twelfth Amendment, a rule of the Democratic Party of Alabama, acting under delegated power of the legislature, which required each candidate for the office of presidential elector to take a pledge to support the nominees of the party's convention for President and Vice President. The state court had determined that the Twelfth Amendment, following language of Clause 3, required that electors be absolutely free to vote for anyone of their choice. Said Justice Reed for the Court:

"It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice. Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another, they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary."

"However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art.

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[94] 115 CONG. REC. 9-11, 145-171, 197-246 (1969).

[95] Congress has so provided in the case of electors of the District of Columbia, 75 Stat. 818 (1961), D.C. Code § 1-1108(g), but the reference in the text is to the power of Congress to bind the electors of the States.

[96] At least thirteen States do have statutes binding their electors, but none has been tested in the courts.

[97] 343 U.S. 214 (1952).

II,§ 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Ala. Code, Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice."

"We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge."[98] Justice Jackson, with Justice Douglas, dissented: "It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as 'due process of law,' 'equal protection,' or 'commerce among the states.' But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions."[99]

Clause 5. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been Fourteen Years a Resident within the United States.

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[98] 343 U.S. at 228-31.
[99] 343 U.S. at 232-33.

QUALIFICATIONS

All Presidents since and including Martin Van Buren were born in the United States subsequent to the Declaration of Independence. The principal issue with regard to the qualifications set out in this clause is whether a child born abroad of American parents is "a natural born citizen" in the sense of the clause. Such a child is a citizen as a consequence of statute.[100] Whatever the term "natural born" means, it no doubt does not include a person who is "naturalized." Thus, the answer to the question might be seen to turn on the interpretation of the first sentence of the first section of the Fourteenth Amendment, providing that "[a]ll persons born or naturalized in the United States" are citizens.[101] Significantly, however, Congress, in which a number of Framers sat, provided in the Naturalization act of 1790 that "the children of citizens of the United States, that may be born beyond the sea, . . . shall be considered as *natural born citizens* . . . ."[102] This phrasing followed the literal terms of British statutes, beginning in 1350, under which persons born abroad, whose parents were both British subjects, would enjoy the same rights of inheritance as those born in England; beginning with laws in 1709 and 1731, these statutes expressly provided that such persons were natural-born subjects of the crown.[103] There is reason to believe, therefore, that the phrase includes persons who become citizens at birth by statute because of their status in being born abroad of American citizens.[104] Whether the Supreme Court would decide the issue should it ever arise

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[100] 8 U.S.C. § 1401.

[101] Reliance on the provision of an Amendment adopted subsequent to the constitutional provision being interpreted is not precluded by but is strongly militated against by the language in Freytag v. Commissioner, 501 U.S. 868, 886-887 (1991), in which the Court declined to be bound by the language of the 25th Amendment in determining the meaning of "Heads of Departments" in the appointments clause. *See also* id. at 917 (Justice Scalia concurring). If the Fourteenth Amendment is relevant and the language is exclusive, that is, if it describes the only means by which persons can become citizens, then, anyone born outside the United States would have to be considered naturalized in order to be a citizen, and a child born abroad of American parents is to be considered "naturalized" by being statutorily made a citizen at birth. Although dictum in certain cases supports this exclusive interpretation of the Fourteenth Amendment, United States v. Wong Kim Ark, 169 U.S. 649, 702-703 (1898); *cf.* Montana v. Kennedy, 366 U.S. 308, 312 (1961), the most recent case in its holding and language rejects it. Rogers v. Bellei, 401 U.S. 815 (1971).

[102] Act of March 26, 1790, 1 Stat. 103, 104 (emphasis supplied). *See* Weedin v. Chin Bow, 274 U.S. 657, 661-666 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 672-675 (1898). With minor variations, this language remained law in subsequent reenactments until an 1802 Act, which omitted the italicized words for reasons not discernable. *See* Act of Feb. 10, 1855, 10 Stat. 604 (enacting same provision, for offspring of American-citizen fathers, but omitting the italicized phrase).

[103] 25 Edw. 3, Stat. 2 (1350); 7 Anne, ch. 5, § 3 (1709); 4 Geo. 2, ch. 21 (1731).

[104] *See, e.g.*, Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1 (1968).

in a "case or controversy"—as well as how it might decide it—can only be speculated about.

Clause 6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President declaring what Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected.

PRESIDENTIAL SUCCESSION

When the President is disabled or is removed or has died, to what does the Vice President succeed: to the "powers and duties of the said office," or to the office itself? There is a reasonable amount of evidence from the proceedings of the convention from which to conclude that the Framers intended the Vice President to remain Vice President and to exercise the powers of the President until, in the words of the final clause, "a President shall be elected." Nonetheless, when President Harrison died in 1841, Vice President Tyler, after initial hesitation, took the position that he was automatically President,[105] a precedent which has been followed subsequently and which is now permanently settled by section 1 of the Twenty-fifth Amendment. That Amendment also settles a number of other pressing questions with regard to presidential inability and succession.

Clause 7. The President shall, at stated Times, receive for his Services, a Compensation which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

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[105] E. Corwin, supra at 53-59, 344 n. 46.

COMPENSATION AND EMOLUMENTS

Clause 7 may be advantageously considered in the light of the rulings and learning arising out of parallel provision regarding judicial salaries.[106]

Clause 8. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:— "I do solemly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

OATH OF OFFICE

What is the time relationship between a President's assumption of office and his taking the oath? Apparently, the former comes first, this answer appearing to be the assumption of the language of the clause. The Second Congress assumed that President Washington took office on March 4, 1789,[107] although he did not take the oath until the following April 30.

That the oath the President is required to take might be considered to add anything to the powers of the President, because of his obligation to "preserve, protect and defend the Constitution," might appear to be rather a fanciful idea. But in President Jackson's message announcing his veto of the act renewing the Bank of the United States there is language which suggests that the President has the right to refuse to enforce both statutes and judicial decisions based on his own independent decision that they were unwarranted by the Constitution.[108] The idea next turned up in a message by President Lincoln justifying his suspension of the writ of *habeas corpus* without obtaining congressional authorization.[109] And counsel to President Johnson during his impeachment trial adverted to the theory, but only in passing.[110] Beyond these

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[106] *Cf.* 13 Ops. Atty. Gen. 161 (1869), holding that a specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him which, in the case of the President, would be unconstitutional if the act of Congress levying the tax was passed during his official term.

[107] Act of March 1, 1792, 1 Stat. 239, § 12.

[108] 2 J. Richardson, supra at 576. Chief Justice Taney, who as a member of Jackson's Cabinet had drafted the message, later repudiated this possible reading of the message. 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 223-224 (1926).

[109] 6 J. Richardson, supra at 25.

[110] 2 TRIAL OF ANDREW JOHNSON 200, 293, 296 (1868).

isolated instances, it does not appear to be seriously contended that the oath adds anything to the President's powers.

SECTION 2. Clause 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Office, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

COMMANDER-IN-CHIEF

Development of the Concept

Surprisingly little discussion of the Commander-in-Chief clause is found in the Convention or in the ratifying debates. From the evidence available, it appears that the Framers vested the duty in the President because experience in the Continental Congress had disclosed the inexpediency of vesting command in a group and because the lesson of English history was that danger lurked in vesting command in a person separate from the responsible political leaders.[111] But the principal concern here is the nature of the power granted by the clause.

The Limited View.—The purely military aspects of the Commander-in-Chiefship were those that were originally stressed. Hamilton said the office "would amount to nothing more than the supreme command and direction of the Military and naval forces, as first general and admiral of the confederacy."[112] Story wrote in his Commentaries: "The propriety of admitting the president to be

[111] May, *The President Shall Be Commander in Chief*, in THE ULTIMATE DECISION—THE PRESIDENT AS COMMANDER IN CHIEF (E. May ed., 1960), 1. In the Virginia ratifying convention, Madison, replying to Patrick Henry's objection that danger lurked in giving the President control of the military, said: "Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether?" 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 393 (1836). In the North Carolina convention, Iredell said: "From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations can only be expected from one person." 4 id. at 107.

[112] THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 465.

commander in chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents."[113] In 1850, Chief Justice Taney, for the Court, said: "His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."

"... But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question."[114] Even after the Civil War, a powerful minority of the Court described the role of President as Commander-in-Chief simply as "the command of the forces and the conduct of campaigns."[115]

The Prize Cases.—The basis for a broader conception was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.[116] In his famous message to Congress of July 4, 1861,[117] Lincoln advanced the claim that the "war power" was his for the purpose of suppressing rebellion, and in the *Prize Cases*[118] of 1863 a divided Court sustained

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[113] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1486 (1833).

[114] Fleming v. Page, 50 U.S. (9 How.) 603, 615, 618 (1850).

[115] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

[116] 1 Stat. 424 (1795): 2 Stat. 443 (1807), now 10 U.S.C. §§ 331-334. *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32-33 (1827), asserting the finality of the President's judgment of the existence of a state of facts requiring his exercise of the powers conferred by the act of 1795.

[117] 7 J. Richardson, supra at 3221, 3232.

[118] 67 U.S. (2 Bl.) 635 (1863).

this theory. The immediate issue was the validity of the blockade which the President, following the attack on Fort Sumter, had proclaimed of the Southern ports.[119] The argument was advanced that a blockade to be valid must be an incident of a "public war" validly declared, and that only Congress could, by virtue of its power "to declare war," constitutionally impart to a military situation this character and scope. Speaking for the majority of the Court, Justice Grier answered: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers of the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other.'"

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized '*a state of war as existing by the act of the Republic of Mexico*.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress."

"This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."

"... Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court

[119] 7 J. Richardson, supra at 3215, 3216, 3481.

that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." [120]

Impact of the Prize Cases on World Wars I and II.—In brief, the powers claimable for the President under the Commander-in-Chief clause at a time of wide-spread insurrection were equated with his powers under the clause at a time when the United States is engaged in a formally declared foreign war. [121] And since Lincoln performed various acts especially in the early months of the Civil War which, like increasing the Army and Navy, admittedly fell within the constitutional provinces of Congress, it seems to have been assumed during World Wars I and II that the Commander-in-Chiefship carried with it the power to exercise like powers practically at discretion, not merely in wartime but even at a time when war became a strong possibility. No attention was given the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly did, [122] with the exception of his suspension of the *habeas corpus* privilege, which was regarded by many as attributable to the President in the situation then existing, by virtue of his duty to take care that the laws be faithfully executed. [123] Nor was this the only respect in which war or the approach of war was deemed to operate to enlarge the scope of power claimable by the President as Commander-in-Chief in wartime. [124]

Presidential Theory of the Commander-in-Chiefship in World War II—And Beyond

In his message to Congress of September 7, 1942, in which he demanded that Congress forthwith repeal certain provisions of the

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[120] 67 U.S. (2 Bl.) at 668-70.

[121] *See generally*, E. CORWIN, TOTAL WAR AND THE CONSTITUTION (1946).

[122] 12 Stat. 326 (1861).

[123] J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118-139 (rev. ed. 1951).

[124] *E.g.*, Attorney General Biddle's justification of seizure of a plant during World War II: "As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war.... In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort." 40 Ops. Atty. Gen. 312, 319-320 (1944). Prior to the actual beginning of hostilities, Attorney General Jackson asserted the same justification upon seizure of an aviation plant. E. CORWIN, TOTAL WAR AND THE CONSTITUTION 47-48 (1946).

Emergency Price Control Act of the previous January 30th,[125] President Roosevelt formulated his conception of his powers as "Commander in Chief in wartime" as follows:

"I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos."

"In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."

"At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do."

"The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war."

"I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress. . . ."

"The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat."

"When the war is won, the powers under which I act automatically revert to the people—to whom they belong."[126]

Presidential War Agencies.—While congressional compliance with the President's demand rendered unnecessary an effort on his part to amend the Price Control Act, there were other matters as to which he repeatedly took action within the normal field of congressional powers, not only during the war, but in some instances prior to it. Thus, in exercising both the powers which he claimed as Commander-in-Chief and those which Congress conferred upon him to meet the emergency, Mr. Roosevelt employed new emergency agencies, created by himself and responsible directly to him, rather than the established departments or existing independent regulatory agencies.[127]

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[125] 56 Stat. 23 (1942).

[126] 88 CONG. REC. 7044 (1942). Congress promptly complied, 56 Stat. 765 (1942), so that the President was not required to act on his own. *But see* E. Corwin, supra, 65-66.

[127] For a listing of the agencies and an account of their creation to the close of 1942, *see* Vanderbilt, *War Powers and Their Administration*, in 1942 ANNUAL SURVEY OF AMERICAN LAW 106 (New York Univ.).

Constitutional Status of Presidential Agencies.—The question of the legal status of the presidential agencies was dealt with judicially but once. This was in the decision of the United States Court of Appeals of the District of Columbia in *Employers Group v. National War Labor Board*,[128] which was a suit to annul and enjoin a "directive order" of the War Labor Board. The Court refused the injunction on the ground that the time when the directive was issued any action of the Board was "informatory," "at most advisory." In support of this view the Court quoted approvingly a statement by the chairman of the Board itself: "These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the nonstrike, no-lock-out agreement and . . . to carry out the directives of the tribunal created under that agreement by the Commander in Chief."[129] Nor, the Court continued, had the later War Labor Disputes Act vested War Labor Board orders with any greater authority, with the result that they were still judicially unenforceable and unreviewable. Following this theory, the War Labor Board was not an office wielding power, but a purely advisory body, such as Presidents have frequently created in the past without the aid or consent of Congress. Congress itself, nevertheless, both in its appropriation acts and in other legislation, treated the presidential agencies as in all respects offices.[130]

Evacuation of the West Coast Japanese.—On February 19, 1942, President Roosevelt issued an executive order, "by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy," providing, as a safeguard against subversion and sabotage, power for his military commanders to designate areas from which "any person" could be excluded or removed and to set up facilities for such persons elsewhere.[131] Pursuant to this order, more than 112,000 residents of the Western States, all of Japanese descent and more than two out of every three of whom were natural-born citizens, were removed from their homes and herded into temporary camps and later into "relocation centers" in several States.

It was apparently the original intention of the Administration to rely on the general principle of military necessity and the power of the Commander-in-Chief in wartime as authority for the reloca-

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[128] 143 F.2d 145 (D.C. Cir. 1944).
[129] 143 F.2d at 149.
[130] E. Corwin, supra at 244, 245, 459.
[131] E.O. 9066, 7 FED. REG. 1407 (1942).

tions. But before any action of importance was taken under the order, Congress ratified and adopted it by the Act of March 21, 1942,[132] by which it was made a misdemeanor to knowingly enter, remain in, or leave prescribed military areas contrary to the orders of the Secretary of War or of the commanding officer of the area. The cases which subsequently arose in consequence of the order were decided under the order plus the Act. The question at issue, said Chief Justice Stone for the Court, "is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional . . . [power] to impose the curfew restriction here complained of."[133] This question was answered in the affirmative, as was the similar question later raised by an exclusion order.[134]

Presidential Government of Labor Regulations.—The most important segment of the home front regulated by what were in effect presidential edicts was the field of labor relations. Exactly six months before Pearl Harbor, on June 7, 1941, Mr. Roosevelt, citing his proclamation thirteen days earlier of an unlimited national emergency, issued an Executive Order seizing the North American Aviation Plant at Inglewood, California, where, on account of a strike, production was at a standstill.[135] Attorney General Jackson justified the seizure as growing out of the "duty constitutionally and inherently rested upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States a going concern," as well as "to obtain supplies for which Congress has appropriated the money, and which it has directed the President to obtain."[136] Other seizures followed, and on January 12, 1942, Mr. Roosevelt, by Executive Order 9017, created the National War Labor Board. "Whereas," the order read in part, "by reason of the state of war declared

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[132] 56 Stat. 173 (1942).

[133] Hirabayashi v. United States, 320 U.S. 81, 91-92 (1943).

[134] Korematsu v. United States, 323 U.S. 214 (1944). Long afterward, in *1984*, a federal court granted a writ of *coram nobis* and overturned Korematsu's conviction, Korematsu v. United States, 584 F. Supp. 1406 (N.D.Cal. 1984), and in *1986*, a federal court vacated Hirabayashi's conviction for failing to register for evacuation but let stand the conviction for curfew violations. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D.Wash. 1986). Other cases were pending, but Congress then implemented the recommendations of the Commission on Wartime Relocation and Internment of Civilians by acknowledging "the fundamental injustice of the evacuation, relocation and internment," and apologizing on behalf of the people of the United States. P. L. 100-383, 102 Stat. 903, 50 U.S.C. App. § 1989 *et seq*. Reparations were approved, and each living survivor of the internment was to be compensated in an amount roughly approximating $20,000.

[135] E.O. 8773, 6 Fed. Reg. 2777 (1941).

[136] E. CORWIN, TOTAL WAR AND THE CONSTITUTION 47-48 (1946).

to exist by joint resolutions of Congress, . . . the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and Whereas as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for a peaceful adjustment of such disputes. Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered: 1. There is hereby created in the Office for Emergency Management a National War Labor Board . . . ." [137] In this field, too, Congress intervened by means of the War Labor Disputes Act of June 25, 1943, [138] which, however, still left ample basis for presidential activity of a legislative character. [139]

Sanctions Implementing Presidential Directives.—To implement his directives as Commander-in-Chief in wartime, and especially those which he issued in governing labor disputes, President Roosevelt often resorted to "sanctions," which may be described as penalties lacking statutory authorization. Ultimately, the President sought to put sanctions in this field on a systematic basis. The order empowered the Director of Economic Stabilization, on receiving a report from the National War Labor Board that someone was not complying with its orders, to issue "directives" to the appropriate department or agency requiring that privileges, benefits, rights, or preferences enjoyed by the noncomplying party be withdrawn. [140]

Sanctions were also occasionally employed by statutory agencies, such as OPA, to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942. [141] In *Steuart & Bro. v. Bowles*, [142] the Supreme Court had the opportunity to regularize this type of executive emergency legislation. Here, a retail dealer in fuel oil was charged with having violated a rationing order of OPA by obtaining large quantities of oil from its supplier without surrendering ration coupons, by delivering many thousands of gallons of fuel oil without requiring ration coupons, and so on, and was prohibited by the agency from receiving oil for resale or trans-

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[137] 7 Fed. Reg. 237 (1942).

[138] 57 Stat. 163 (1943).

[139] *See* Vanderbilt, *War Powers and their Administration*, in 1945 ANNUAL SURVEY OF AMERICAN LAW 254, 271-273 (N.Y. Univ.).

[140] E.O. 9370, 8 Fed. Reg. 11463 (1943).

[141] 56 Stat. 23 (1942).

[142] 322 U.S. 398 (1944).

fer for the ensuing year. The offender conceded the validity of the rationing order in support of which the suspension order was issued but challenged the validity of the latter as imposing a penalty that Congress had not enacted and asked the district court to enjoin it.

The court refused to do so and was sustained by the Supreme Court in its position. Said Justice Douglas, speaking for the Court: "Without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated.... But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it.... These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit.... Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a previous supply of material needed for the manufacture of articles of war.... From the point of view of the factory owner from whom the materials were diverted the action would be harsh.... But in time of war the national interest cannot wait on individual claims to preference. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil."[143] Sanctions were, therefore, constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power which they supported and were directly conservative of the interests which this power was created to protect and advance. It is certain, however, that sanctions not uncommonly exceeded this pattern.[144]

The Postwar Period.—The end of active hostilities did not terminate either the emergency or the federal-governmental response to it. President Truman proclaimed the termination of hostilities on December 31, 1946,[145] and Congress enacted a joint resolution which repealed a great variety of wartime statutes and set termination dates for others in July, 1947.[146] Signing the resolution, the President said that the emergencies declared in 1939 and

[143] 322 U.S. at 404-05.
[144] E. Corwin, supra at 249-250.
[145] Proc. 2714, 12 Fed. Reg. 1 (1947).
[146] S.J. Res. 123, 61 Stat. 449 (1947).

1940 continued to exist and that it was "not possible at this time to provide for terminating all war and emergency powers."[147] The hot war was giving way to the Cold War.

Congress thereafter enacted a new Housing and Rent Act to continue the controls begun in 1942[148] and continued the military draft.[149] With the outbreak of the Korean War, legislation was enacted establishing general presidential control over the economy again,[150] and by executive order the President created agencies to exercise the power.[151] 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.*,[152] the Court held constitutional the new rent control law on the ground that cessation of hostilities did not conclude the Government's powers but that the power continued to remedy the evil arising out of the emergency. Yet, Justice Douglas noted for the Court that "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision."[153] Justice Jackson, while concurring, noted that he found the war power "the most dangerous one to free government in the whole catalogue of powers" and cautioned that its exercise should "be scrutinized with care."[154] And in *Ludecke v. Watkins*,[155] four Justices were prepared to hold that the presumption in the statute under review of continued war with Germany was fiction and not to be utilized.

But the postwar was a time of reaction against the wartime exercise of power by President Roosevelt, and President Truman was not permitted the same liberties. The Twenty-second Amendment, writing into permanent law the two-term custom, the "Great Debate" about our participation in NATO, the attempt to limit the treaty-making power, and other actions, bespoke the reaction.[156] The Supreme Court signalized this reaction when it struck down

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[147] Woods v. Cloyd W. Miller Co., 333 U.S. 138, 140 n.3 (1948).
[148] 61 Stat. 193 (1947).
[149] 62 Stat. 604 (1948).
[150] Defense Production Act of 1950, 64 Stat. 798.
[151] E.O. 10161, 15 Fed. Reg. 6105 (1950).
[152] 333 U.S. 138 (1948).
[153] 333 U.S. at 143-44.
[154] 333 U.S. at 146-47.
[155] 335 U.S. 160 (1948).
[156] *See* A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION—ITS ORIGINS AND DEVELOPMENT ch. 31 (4th ed. 1970).

the President's action in seizing the steel industry while it was struck during the Korean War.[157]

Nonetheless, the long period of the Cold War and of active hostilities in Korea and Indochina, in addition to the issue of the use of troops in the absence of congressional authorization, further created conditions for consolidation of powers in the President. In particular, a string of declarations of national emergencies, most, in whole or part, under the Trading with the Enemy Act,[158] undergirded the exercise of much presidential power. In the storm of response to the Vietnamese conflict, here, too, Congress reasserted legislative power to curtail what it viewed as excessive executive power, repealing the Trading with the Enemy Act and enacting in its place the International Emergency Economic Powers Act,[159] which did not alter most of the range of powers delegated to the President but which did change the scope of the power delegated to declare national emergencies.[160] Congress also passed the National Emergencies Act, prescribing procedures for the declaration of national emergencies, for their termination, and for presidential reporting to Congress in connection with national emergencies. To end the practice of declaring national emergencies for an indefinite duration, Congress provided that any emergency not otherwise terminated would expire one year after its declaration unless the President published in the Federal Register and transmitted to Congress a notice that the emergency would continue in effect.[161] Whether the balance of power between President and Congress shifted at all is not really a debatable question.

The Cold War and After: Presidential Power To Use Troops Overseas Without Congressional Authorization

Reaction after World War II did not persist, but soon ran its course, and the necessities, real and only perceived, of the United States' role as world power and chief guarantor of the peace operated to expand the powers of the President and to diminish congressional powers in the foreign relations arena. President Truman did not seek congressional authorization before sending troops to Korea, and subsequent Presidents similarly acted on their own in putting troops into many foreign countries, including the Domini-

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

[158] § 301(1), 55 Stat. 838, 839-840 (1941).

[159] 91 Stat. 1626, 50 U.S.C. §§ 1701-1706.

[160] Congress authorized the declaration of a national emergency based only on "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or the economy of the United States . . . ." 50 U.S.C. §1701.

[161] P. L. 94-412, 90 Stat. 1255 (1976).

can Republic, Lebanon, Grenada, Panama, and the Persian Gulf, and most notably Indochina.[162] Eventually, public opposition precipitated another constitutional debate whether the President had the authority to commit troops to foreign combat without the approval of Congress, a debate that went on inconclusively between Congress and Executive[163] and one which the courts were content generally to consign to the exclusive consideration of those two bodies. The substance of the debate concerns many facets of the President's powers and responsibilities, including his obligations to protect the lives and property of United States citizens abroad, to execute the treaty obligations of the Nation, to further the national security interests of the Nation, and to deal with aggression and threats of aggression as they confront him. Defying neat summarization, the considerations nevertheless merit at least an historical survey and an attempted categorization of the arguments.

The Historic Use of Force Abroad.—In 1912, the Department of State published a memorandum prepared by its Solicitor which set out to justify the *Right to Protect Citizens in Foreign Countries by Landing Forces*.[164] In addition to the justification, the memorandum summarized 47 instances in which force had been used, in most of them without any congressional authorization. Twice revised and reissued, the memorandum was joined by a 1928 independent study and a 1945 work by a former government official in supporting conclusions that drifted away from the original justification of the use of United States forces abroad to the use of such forces at the discretion of the President and free from control by Congress.[165]

New lists and revised arguments were published to support the actions of President Truman in sending troops to Korea and of Presidents Kennedy and Johnson in sending troops first to Viet-

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[162] *See* the discussion in National Commitments Resolution, Report of the Senate Committee on Foreign Relations, S. Rep. No. 91-129, 91st Congress, 1st sess. (1969); U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations, 90th Congress, 1st sess. (1967), 16-19 (Professor Bartlett).

[163] *See* under Article I, § 8, cls. 11-14.

[164] J. Clark, *Memorandum by the Solicitor for the Department of State*, in RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (1912).

[165] Id., (Washington: 1929; 1934); M. OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928); J. ROGERS, WORLD POLICING AND THE CONSTITUTION (1945). The burden of the last cited volume was to establish that the President was empowered to participate in United Nations peacekeeping actions without having to seek congressional authorization on each occasion; it may be said to be one of the earliest, if not the earliest, propoundings of the doctrine of inherent presidential powers to use troops abroad outside the narrow compass traditionally accorded those powers.

nam and then to Indochina generally,[166] and new lists have been propounded.[167] The great majority of the instances cited involved fights with pirates, landings of small naval contingents on barbarous or semibarbarous coasts to protect commerce, the dispatch of small bodies of troops to chase bandits across the Mexican border, and the like, and some incidents supposedly without authorization from Congress did in fact have underlying statutory or other legislative authorization. Some instances, *e.g.*, President Polk's use of troops to precipitate war with Mexico in 1846, President Grant's attempt to annex the Dominican Republic, President McKinley's dispatch of troops into China during the Boxer Rebellion, involved considerable exercises of presidential power, but in general purposes were limited and congressional authority was sought for the use of troops against a sovereign state or in such a way as to constitute war. The early years of this century saw the expansion in the Caribbean and Latin America both of the use of troops for the furthering of what was perceived to be our national

[166] *E.g.*, H. Rep. No. 127, 82d Congress, 1st Sess. (1951), 55-62; Corwin, *Who Has the Power to Make War?* NEW YORK TIMES MAGAZINE (July 31, 1949), 11; *Authority of the President to Repel the Attack in Korea*, 23 DEPT. STATE BULL. 173 (1950); Department of State, Historical Studies Division, *Armed Actions Taken by the United States Without a Declaration of War, 1789-1967* (Res. Proj. No. 806A (Washington: 1967)). That the compilation of such lists was more than a defense against public criticism can be gleaned from a revealing discussion in Secretary of State Acheson's memoirs detailing why the President did not seek congressional sanction for sending troops to Korea. "There has never, I believe, been any serious doubt—in the sense of non-politically inspired doubt—of the President's constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent was fully set out in the State Department's memorandum of July 3, 1950, extensively published. But the wisdom of the decision not to ask for congressional approval has been doubted. . . ."

After discussing several reasons establishing the wisdom of the decision, the Secretary continued: "The President agreed, moved also, I think, by another passionately held conviction. His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made." D. ACHESON, PRESENT AT THE CREATION 414, 415 (1969).

[167] War Powers Legislation: Hearings Before the Senate Foreign Relations Committee, 92d Congress, 1st Sess. (1971), 347, 354-355, 359-379 (Senator Goldwater); Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53 (1972). The most complete list as of the time prepared is Collier, *Instances of Use of United States Armed Forces Abroad, 1798-1989*, CONG. RES. SERV. (1989), which was cited for its numerical total in United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990). For an effort to reconstruct the development and continuation of the listings, *see* F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR 142-145 (2d ed. 1989).

interests and of the power of the President to deploy the military force of the United States without congressional authorization.[168]

The pre-war actions of Presidents Wilson and Franklin Roosevelt advanced in substantial degrees the fact of presidential initiative, although the theory did not begin to catch up with the fact until the "Great Debate" over the commitment of troops by the United States to Europe under the Atlantic Pact. While congressional authorization was obtained, that debate, the debate over the United Nations charter, and the debate over Article 5 of the North Atlantic Treaty of 1949, declaring that "armed attack" against one signatory was to be considered as "an attack" against all signatories, provided the occasion for the formulation of a theory of independent presidential power to use the armed forces in the national interest at his discretion.[169] Thus, Secretary of State Acheson told Congress: "Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution."[170]

The Theory of Presidential Power.—The fullest expression of the presidential power proponents has been in defense of the course followed in Indochina. Thus, the Legal Adviser of the State Department, in a widely circulated document, contended: "Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power

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[168] Of course, considerable debate continues with respect to the meaning of the historical record. For reflections of the narrow reading, *see* National Commitments Resolution, Report of the Senate Committee on Foreign Relations, S. Rep. No. 91-129, 1st Sess. (1969); J. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993). On the broader reading and finding great presidential power, *see* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); Emerson, *Making War Without a Declaration*, 17 J. LEGIS. 23 (1990).

[169] For some popular defenses of presidential power during the "Great Debate," *see* Corwin, *Who Has the Power to Make War?* NEW YORK TIMES MAGAZINE (July 31, 1949), 11; Commager, *Presidential Power: The Issue Analyzed*, NEW YORK TIMES MAGAZINE (January 14, 1951), 11. *Cf.* Douglas, *The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion of South Korea*, 96 CONG. REC. 9647 (1950). President Truman and Secretary Acheson utilized the argument from the U. N. Charter in defending the United States actions in Korea, and the Charter defense has been made much of since. *See, e.g.*, Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L. J. 597 (1993).

[170] Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Foreign Relations and Armed Services Committees, 82d Congress, 1st sess. (1951), 92.

to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States. . . ."

"In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and security of the United States."

"Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet Nam is required, and that military measures against the source of Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures." [171]

Opponents of such expanded presidential powers have contended, however, that the authority to initiate war was not divided between the Executive and Congress but was vested exclusively in Congress. The President had the duty and the power to repeal sudden attacks and act in other emergencies, and in his role as Commander-in-Chief he was empowered to direct the armed forces for any purpose specified by Congress. [172] Though Congress asserted itself in some respects, it never really managed to confront the President's power with any sort of effective limitation, until recently.

The Power of Congress to Control the President's Discretion.—Over the President's veto, Congress enacted the War Powers

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[171] Meeker, *The Legality of United States Participation in the Defense of Viet Nam*, 54 DEPT. STATE BULL. 474, 484-485 (1966). *See also* Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (1969); Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 VA. J. INT. L. 43 (1969); *Documents Relating to the War Powers of Congress, The President's Authority as Commander-in-Chief and the War in Indochina*, Senate Committee on Foreign Relations, 91st Congress, 2d sess. (Comm. Print) (1970), 1 (Under Secretary of State Katzenbach), 90 (J. Stevenson, Legal Adviser, Department of State), 120 (Professor Moore), 175 (Assistant Attorney General Rehnquist).

[172] *E.g.*, F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR (2d ed. 1989), F.; J. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations, 90th Congress, 1st sess. (1967), 9 (Professor Bartlett); War Powers Legislation: Hearings Before the Senate Committee on Foreign Relations, 92d Cong., 1st sess. (1971), 7 (Professor Commager), 75 (Professor Morris), 251 (Professor Mason).

Resolution,[173] designed to redistribute the war powers between the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President's powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set. The Resolution states that the President's power to commit United States troops into hostilities, or into situations of imminent involvement in hostilities, is limited to instances of (1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.[174] In the absence of a declaration of war, a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhostile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation.[175] The President is required to terminate the use of troops in the reported situation within 60 days of reporting, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President's certification to Congress of unavoidable military necessity respecting the safety of the troops.[176] Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.[177] The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may

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[173] P.L. 93-148, 87 Stat. 555, 50 U.S.C. §§ 1541-1548. For the congressional intent and explanation, *see* H. Rep. No. 93-287, S. Rep. No. 93-220, and H. Rep. No. 93-547 (Conference Report), all 93d Congress, 1st Sess. (1973). The President's veto message is H. Doc. No. 93-171, 93d Congress. 1st Sess. (1973). All this material is collected in *The War Powers Resolution—Relevant Documents, Reports, Correspondence*, House Committee on Foreign Affairs, 103d Cong., 2d Sess. (Comm. Print) (GPO: 1994), 1-46. For a narrative account of passage and an assessment of the disputed compliance to date, from the congressional point of view, *see The War Powers Resolution*, A Special Study of the House Committee on Foreign Affairs, 102d Cong., 2d Sess. (Comm. Print) (GPO: 1982).

[174] 87 Stat. 554, 2(c), 50 U.S.C. § 1541(c).

[175] Id. at § 1543(a).

[176] Id. at § 1544(b).

[177] Id. at § 1544(c). It is the general consensus that, following INS v. Chadha, 462 U.S. 919 (1983), this provision of the Resolution is unconstitutional.

so empower the President unless it is supplemented by implementing legislation specifically addressed to the issue.[178]

Aside from its use as a rhetorical device, the War Powers Resolution has been of little worth in reordering presidential-congressional relations in the years since its enactment. All Presidents operating under it have expressly or implicitly considered it to be an unconstitutional infringement on presidential powers, and on each occasion of use abroad of United States troops the President in reporting to Congress has done so "consistent[ly] with" the reporting section but not pursuant to the provision.[179] Upon the invasion of Kuwait by Iraqi troops in 1990, President Bush sought not congressional authorization but a United Nations Security Council resolution authorizing the use of force by member Nations. Only at the last moment did the President seek authorization from Congress, he and his officials contending he had the power to act unilaterally.[180] Congress after intensive debate voted, 250 to 183 in the House of Representatives and 53 to 46 in the Senate, to authorize the President to use United States troops pursuant to the U. N. resolution and purporting to bring the act within the context of the War Powers Resolution.[181]

Although there is recurrent talk within Congress and without with regard to amending the War Powers Resolution to strengthen it, no consensus has emerged, and there is little evidence that there exists within Congress the resolve to exercise the responsibility concomitant with strengthening it.[182]

The President as Commander of the Armed Forces

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why

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[178] 50 U.S.C. § 1547(a).

[179] *See* the text of the reports in *The War Powers Resolution—Relevant Documents, Reports, Correspondence*, supra at 47 (Pres. Ford on transport of refugees from Danang), 55 (Pres. Carter on attempted rescue of Iranian hostages), 73 (Pres. Reagan on use of troops in Lebanon), 113 (Pres. Reagan on Grenada), 144 (Pres. Bush on Panama), 147, 149 (Pres. Bush on Persian Gulf), 189 (Pres. Bush on Somalia), 262 (Pres. Clinton on Haiti).

[180] *See* Crisis in the Persian Gulf Region: U. S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services, 101st Cong., 2d Sess. (1990), 701 (Secretary Cheney) (President did not require "any additional authorization from the Congress" before attacking Iraq). On the day following his request for supporting legislation from Congress, President Bush, in answer to a question about the requested action, stated: "I don't think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions." 27 WEEKLY COMP. PRES. DOC. 25 (Jan. 8, 1991).

[181] P. L. 102-1, 105 Stat. 3.

[182] *See*, on proposals to amend and on congressional responsibility, J. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

he should do so, and he has been known to resolve personally important questions of military policy. Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating McClellan to action; Wilson in 1918 settled the question of an independent American command on the Western Front; Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki.[183] As against an enemy in the field, the President possesses all the powers which are accorded by international law to any supreme commander. "He may invade the hostile country, and subject it to the sovereignty and authority of the United States."[184] In the absence of attempts by Congress to limit his power, he may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States, and his authority to do this sometimes survives cessation of hostilities.[185] He may employ secret agents to enter the enemy's lines and obtain information as to its strength, resources, and movements.[186] He may, at least with the assent of Congress, authorize commercial intercourse with the enemy.[187] He may also requisition property and compel services from American citizens and friendly aliens who are situated within the theatre of military operations when necessity requires, thereby incurring for the United States the obligation to render "just compensation."[188] By the same warrant, he may bring hostilities to a conclusion by arranging an armistice, stipulating conditions which may determine to a great extent the ensuing peace.[189] He may not, however, affect a permanent acquisition of territory,[190] though he may govern recently acquired territory until Congress sets up a more permanent regime.[191]

The President is the ultimate tribunal for the enforcement of the rules and regulations which Congress adopts for the govern-

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[183] For a review of how several wartime Presidents have operated in this sphere, *see* THE ULTIMATE DECISION—THE PRESIDENT AS COMMANDER IN CHIEF (E. May ed., 1960).

[184] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[185] Madsen v. Kinsella, 343 U.S. 341, 348 (1952). *See also* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[186] Totten v. United States, 92 U.S. 105 (1876).

[187] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73 (1875); Haver v. Yaker, 76 U.S. (9 Wall.) 32 (1869).

[188] Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Totten v. United States, 92 U.S. 105 (1876); 40 Ops. Atty. Gen. 250, 253 (1942).

[189] *Cf.* the Protocol of August 12, 1898, which largely foreshadowed the Peace of Paris, 30 Stat. 1742 and President Wilson's Fourteen Points, which were incorporated in the Armistice of November 11, 1918.

[190] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[191] Santiago v. Nogueras, 214 U.S. 260 (1909). As to temporarily occupied territory, *see* Dooley v. United States, 182 U.S. 222, 230-231 (1901).

ment of the forces, and which are enforced through courts-martial.[192] Indeed, until 1830, courts-martial were convened solely on the President's authority as Commander-in-Chief.[193] Such rules and regulations are, moreover, it would seem, subject in wartime to his amendment at discretion.[194] Similarly, the power of Congress to "make rules for the government and regulation of the land and naval forces" (Art. I, § 8, cl. 14) did not prevent President Lincoln from promulgating in April, 1863, a code of rules to govern the conduct in the field of the armies of the United States which was prepared at his instance by a commission headed by Francis Lieber and which later became the basis of all similar codifications both here and abroad.[195] One important power that the President lacks is that of choosing his subordinates, whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with the advice and consent of the Senate, though undoubtedly Congress could if it wished vest their appointment in "the President alone."[196] Also, the President's power to dismiss an officer from the service, once unlimited, is today confined by statute in time of peace to dismissal "in pursuance of the sentence of a general court-martial or in mitigation thereof."[197] But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his place.[198] The President's power of dismissal in time of war Congress has never attempted to limit.

The Commander-in-Chief a Civilian Officer.—Is the Commander-in-Chiefship a military or a civilian office in the contemplation of the Constitution? Unquestionably the latter. An opinion by a New York surrogate deals adequately, though not authoritatively, with the subject: "The President receives his compensation for his services, rendered as Chief Executive of the Nation, not for the individual parts of his duties. No part of his compensation is paid from sums appropriated for the military or naval forces; and it is equally clear under the Constitution that the President's duties as

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[192] Swaim v. United States, 165 U.S. 553 (1897); and cases there reviewed. *See also* Givens v. Zerbst, 255 U.S. 11 (1921).

[193] 15 Ops. Atty. Gen. 297, n; *cf.* 1 Ops. Atty. Gen. 233, 234, where the contrary view is stated by Attorney General Wirt.

[194] Ex parte Quirin, 317 U.S. 1, 28-29 (1942).

[195] General Orders, No. 100, Official Records, War Rebellion, ser. III, vol. III; April 24, 1863.

[196] *See, e.g.*, Mimmack v. United States, 97 U.S. 426, 437 (1878); United States v. Corson, 114 U.S. 619 (1885).

[197] 10 U.S.C. § 804.

[198] Mullan v. United States, 140 U.S. 240 (1891); Wallace v. United States, 257 U.S. 541 (1922).

Commander in Chief represent only a part of duties ex officio as Chief Executive [Article II, sections 2 and 3 of the Constitution] and that the latter's office is a civil office. [Article II, section 1 of the Constitution ....] The President does not enlist in, and he is not inducted or drafted into, the armed forces. Nor, is he subject to court-martial or other military discipline. On the contrary, Article II, section 4 of the Constitution provides that 'The President, [Vice President] and All Civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery or other high Crimes and Misdemeanors.' ... The last two War Presidents, President Wilson and President Roosevelt, both clearly recognized the civilian nature of the President's position as Commander in Chief. President Roosevelt, in his Navy Day Campaign speech at Shibe Park, Philadelphia, on October 27, 1944, pronounced this principle as follows:–'It was due to no accident and no oversight that the framers of our Constitution put the command of our armed forces under civilian authority. It is the duty of the Commander in Chief to appoint the Secretaries of War and Navy and the Chiefs of Staff.' It is also to be noted that the Secretary of War, who is the regularly constituted organ of the President for the administration of the military establishment of the Nation, has been held by the Supreme Court of the United States to be merely a civilian officer, not in military service. (*United States v. Burns*, 79 U.S. 246 (1871)). On the general principle of civilian supremacy over the military, by virtue of the Constitution, it has recently been said: 'The supremacy of the civil over the military is one of our great heritages.' *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1945)." [199]

Martial Law and Constitutional Limitations

Two theories of martial law are reflected in decisions of the Supreme Court. The first, which stems from the Petition of Right, 1628, provides that the common law knows no such thing as martial law; [200] that is to say, martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity, leaving the civil courts to be the final judges of necessity. [201] By the second theory, martial law can

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[199] Surrogate's Court, Duchess County, New York, ruling July 25, 1950, that the estate of Franklin D. Roosevelt was not entitled to tax benefits under sections 421 and 939 of the Internal Revenue Code, which extends certain tax benefits to persons dying in the military services of the United States. New York Times, July 26, 1950, p. 27, col. 1.

[200] C. FAIRMAN, THE LAW OF MARTIAL RULE 20-22 (1930); A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 283, 290 (5th ed. 1923).

[201] Id. at 539-44.

be validly and constitutionally established by supreme political authority in wartime. In the early years of the Supreme Court, the American judiciary embraced the latter theory as it held in *Luther v. Borden* [202] that state declarations of martial law were conclusive and therefore not subject to judicial review. [203] In this case, the Court found that the Rhode Island legislature had been within its rights in resorting to the rights and usages of war in combating insurrection in that State. The decision in the *Prize Cases*, [204] while not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

The Civil War being safely over, however, a divided Court, in the elaborately argued *Milligan* case, [205] reverting to the older doctrine, pronounced void President Lincoln's action, following his suspension of the writ of *habeas corpus* in September, 1863, in ordering the trial by military commission of persons held in custody as "spies" and "abettors of the enemy." The salient passage of the Court's opinion bearing on this point is the following: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." [206] Four Justices, speaking by Chief Justice Chase, while holding Milligan's trial to have been void because violative of the Act of March 3, 1863, governing the custody and trial of persons who had been deprived of the *habeas corpus* privilege, declared their belief that Congress could have authorized Milligan's trial. Said the Chief Justice: "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct

[202] 48 U.S. (7 How.) 1 (1849). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32-33 (1827).
[203] 48 U.S. (7 How.) at 45.
[204] 67 U.S. (2 Bl.) 635 (1863).
[205] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
[206] 71 U.S. at 127.

of campaigns. That power and duty belong to the President and Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions."

"... We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists."

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."[207] In short, only Congress can authorize the substitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

At the turn of the century, however, the Court appears to have retreated from its stand in *Milligan* insofar as it held in *Moyer v. Peabody*[208] that "the Governor's declaration that a state of insurrection existed is conclusive of that fact.... The plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances.... So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."[209] The "good faith" test of *Moyer*, however, was superseded by the "direct relation" test of *Sterling v. Constantin*,[210] where the Court made it very clear that "[i]t does not follow ... that every sort of action the Governor may take, no matter how justified by the exigency or subversive of pri-

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[207] 71 U.S. at 139-40. In Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1864), the Court had held while war was still flagrant that it had no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the Army, commanding a military department.

[208] 212 U.S. 78 (1909).

[209] 212 U.S. at 83-85.

[210] 287 U.S. 378 (1932). "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace" Id. at 399-400.

vate right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. . . . What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[211]

Martial Law in Hawaii.—The question of the constitutional status of martial law was raised again in World War II by the proclamation of Governor Poindexter of Hawaii, on December 7, 1941, suspending the writ of *habeas corpus* and conferring on the local commanding General of the Army all his own powers as governor and also "all of the powers normally exercised by the judicial officers . . . of this territory . . . during the present emergency and until the danger of invasion is removed." Two days later the Governor's action was approved by President Roosevelt. The regime which the proclamation set up continued with certain abatements until October 24, 1944.

By section 67 of the Organic Act of April 30, 1900,[212] the Territorial Governor was authorized "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of *habeas corpus*, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." By section 5 of the Organic Act, "the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States." In a brace of cases which reached it in February 1945, but which it contrived to postpone deciding till February 1946,[213] the Court, speaking by Justice Black, held that the term "martial law" as employed in the Organic Act, "while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."[214]

The Court relied on the majority opinion in *Ex parte Milligan*. Chief Justice Stone concurred in the result. "I assume also," he said, "that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts,"[215] but added

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[211] 287 U.S. at 400-01. This holding has been ignored by States on numerous occasions. *E.g.*, Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935); and Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939).

[212] 31 Stat. 141, 153 (1900).

[213] Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[214] 327 U.S. at 324.

[215] 327 U.S. at 336.

that the military authorities themselves had failed to show justifying facts in this instance. Justice Burton, speaking for himself and Justice Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion. He warned that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight."[216]

Articles of War: The Nazi Saboteurs.—In 1942 eight youths, seven Germans and one an American, all of whom had received training in sabotage in Berlin, were brought to this country aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status. In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring *habeas corpus* proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the land and naval forces; and (3) that the tribunal trying them had not been constituted in accordance with the requirements of the Articles of War.

The first argument the Court met as follows: The act of Congress in providing for the trial before military tribunals of offenses against the law of war is sufficiently definite, although Congress has not undertaken to codify or mark the precise boundaries of the law of war, or to enumerate or define by statute all the acts which that law condemns. "... [T]hose who during time of war pass surreptitiously from enemy territory into ... [that of the United States], discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission."[217] The second argument it disposed of by showing that petitioners' case was of a kind that was never deemed to be within the terms of the Fifth and Sixth Amendments, citing in confirma-

[216] 327 U.S. at 343.

[217] Ex parte Quirin, 317 U.S. 1, 29-30, 35 (1942).

tion of this position the trial of Major Andre.[218] The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises,[219] thereby, in effect, attributing to the President the right to amend the Articles of War in a case of the kind before the Court *ad libitum*.

The decision might well have rested on the ground that the Constitution is without restrictive force in wartime in a situation of this sort. The saboteurs were invaders; their penetration of the boundary of the country, projected from units of a hostile fleet, was essentially a military operation, their capture was a continuation of that operation. Punishment of the saboteurs was therefore within the President's purely martial powers as Commander-in-Chief. Moreover, seven of the petitioners were enemy aliens, and so, strictly speaking, without constitutional status. Even had they been civilians properly domiciled in the United States at the outbreak of the war, they would have been subject under the statutes to restraint and other disciplinary action by the President without appeals to the courts.

Articles of War: World War II Crimes.—As a matter of fact, in General Yamashita's case,[220] which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice Rutledge's dissenting opinion in this case: "The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply."[221] And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under international law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as Supreme Commander bound by the prohibition in the Constitution of *ex post facto* laws, nor does international law forbid *ex post facto laws*.[222]

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[218] 317 U.S. at 41-42.
[219] 317 U.S. at 28-29.
[220] In re Yamashita, 327 U.S. 1 (1946).
[221] 327 U.S. at 81.
[222] *See* Gross, *The Criminality of Aggressive War*, 41 AM. POL. SCI. REV. 205 (1947).

Martial Law and Domestic Disorder.—President Washington himself took command of state militia called into federal service to quell the Whiskey Rebellion, but there were not too many occasions subsequently in which federal troops or state militia called into federal service were required.[223] Since World War II, however, the President, by virtue of his own powers and the authority vested in him by Congress,[224] has utilized federal troops on nine occasions, five of them involving resistance to desegregation decrees in the South.[225] In 1957, Governor Faubus employed the Arkansas National Guard to resist court-ordered desegregation in Little Rock, and President Eisenhower dispatched federal soldiers and brought the Guard under federal authority.[226] In 1962, President Kennedy dispatched federal troops to Oxford, Mississippi, when federal marshals were unable to control with rioting that broke out upon the admission of an African American student to the University of Mississippi.[227] In June and September of 1964, President Johnson sent troops into Alabama to enforce court decrees opening schools to blacks.[228] And in 1965, the President used federal troops and federalized local Guardsmen to protect participants in a civil rights march. The President justified his action on the ground that there was a substantial likelihood of domestic violence because state authorities were refusing to protect the marchers.[229]

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[223] United States Adjutant-General, *Federal Aid in Domestic Disturbances 1787-1903*, S. Doc. No. 209, 57th Congress, 2d sess. (1903); Pollitt, *Presidential Use of Troops to Enforce Federal Laws: A Brief History*, 36 N.C. L. REV. 117 (1958). United States Marshals were also used on approximately 30 occasions. United States Commission on Civil Rights, *Law Enforcement—A Report on Equal Protection in the South* (Washington: 1965), 155-159.

[224] 10 U.S.C. §§ 331-334, 3500, 8500, deriving from laws of 1795, 1 Stat. 424 1861, 12 Stat. 281, and 1871 17 Stat. 14.

[225] The other instances were in domestic disturbances at the request of state Governors.

[226] Proc. No. 3204, 22 Fed. Reg. 7628 (1957); E.O. 10730, 22 Fed. Reg. 7628. *See* 41 Ops. Atty. Gen. 313 (1957); *see also*, Cooper v. Aaron, 358 U.S. 1 (1958); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd sub nom* Faubus v. Aaron, 361 U.S. 197 (1959); Faubus v. United States, 254 F.2d 797 (8th Cir. 1958), *cert. denied*, 358 U.S. 829 (1958).

[227] Proc. No. 3497, 27 Fed. Reg. 9681 (1962); E.O. 11053, 27 Fed. Reg. 9693 (1962). *See* United States v. Barnett, 346 F.2d 99 (5th Cir. 1965).

[228] Proc. 3542, 28 Fed. Reg. 5707 (1963); E.O. 11111, 28 Fed. Reg. 5709 (1963); Proc. No. 3554, 28 Fed. Reg. 9861; E.O. 11118, 28 Fed. Reg. 9863 (1963). *See* Alabama v. United States, 373 U.S. 545 (1963).

[229] Proc. No. 3645, 30 Fed. Reg. 3739 (1965); E.O. 11207, 30 Fed. Reg. 2743 (1965). *See* Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

PRESIDENTIAL ADVISERS

The Cabinet

The authority in Article II, § 2, cl. 1 to require the written opinion of the heads of executive departments is the meager residue from a persistent effort in the Federal Convention to impose a council on the President.[230] The idea ultimately failed, partly because of the diversity of ideas concerning the council's make-up. One member wished it to consist of "members of the two houses," another wished it to comprise two representatives from each of three sections, "with a rotation and duration of office similar to those of the Senate." The proposal with the strongest backing was that it should consist of the heads of departments and the Chief Justice, who should preside when the President was absent. Of this proposal the only part to survive was the above cited provision. The consultative relation here contemplated is an entirely one-sided affair, is to be conducted with each principal officer separately and in writing, and is to relate only to the duties of their respective offices.[231] The *Cabinet*, as we know it today, that is to say, the Cabinet *meeting*, was brought about solely on the initiative of the first President,[232] and may be dispensed with on presidential initiative at any time, being totally unknown to the Constitution. Several Presidents have in fact reduced the Cabinet meeting to little more than a ceremony with social trimmings.[233]

PARDONS AND REPRIEVES

The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed,

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[230] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 70, 97, 110 (rev. ed. 1937); 2 id. at 285, 328, 335-37, 367, 537-42. Debate on the issue in the Convention is reviewed in C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 82, 83, 84, 85, 109, 126 (1923).

[231] E. Corwin, supra at 82.

[232] L. WHITE, THE FEDERALISTS—A STUDY IN ADMINISTRATIVE HISTORY ch. 4 (1948).

[233] E. Corwin, supra at 19, 61, 79-85, 211, 295-99, 312, 320-23, 490-93.

from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." Marshall continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.[234]

In the case of *Burdick v. United States*,[235] Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States," which he might have committed or participated in in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon," remarked Justice McKenna sententiously, "may be only a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected . . . ."[236] Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.[237] In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[238] Whether these words sound the death knell of the accept-

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[234] United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833).

[235] 236 U.S. 79, 86 (1915).

[236] 236 U.S. at 90-91.

[237] Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1872). In Brown v. Walker, 161 U.S. 591 (1896), the Court had said: "It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed." Id. at 599, citing British cases.

[238] Biddle v. Perovich, 274 U.S. 480, 486 (1927).

ance doctrine is perhaps doubtful.[239] They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty.[240]

Scope of the Power

The power embraces all "offences against the United States," except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered into the Treasury or paid an informer,[241] the power to pardon absolutely or conditionally, and the power to commute sentences, which, as seen above, is effective without the convict's consent.[242] It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the presidential prerogative, amounting as it does to a condonation of the offense.[243] It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by the first Roosevelt—to Aguinaldo's followers—in 1902.[244] Not, however, till after the Civil War was the point adjudicated, when it was decided in favor of presidential prerogative.[245]

Offenses Against the United States; Contempt of Court.— In the first place, contempt of court offenses are not offenses

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[239] *Cf.* W. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 73 (1941).

[240] Biddle v. Perovich, 274 U.S. 480, 486 (1927). In Schick v. Reed, 419 U.S. 256 (1976), the Court upheld the presidential commutation of a death sentence to imprisonment for life with no possibility of parole, the foreclosure of parole being contrary to the scheme of the Code of Military Justice. "The conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute." Id. at 264.

[241] 23 Ops. Atty. Gen. 360, 363 (1901); Illinois Cent. R.R. v. Bosworth, 133 U.S. 92 (1890).

[242] Ex parte William Wells, 59 U.S. (18 How.) 307 (1856). For the contrary view, *see* some early opinions of the Attorney General, 1 Ops. Atty. Gen. 341 (1820); 2 Ops. Atty. Gen. 275 (1829); 5 Ops. Atty. Gen. 687 (1795); *cf.* 4 Ops. Atty. Gen. 458 (1845); United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

[243] Ex parte United States, 242 U.S. 27 (1916). Amendment of sentence, however, within the same term of court, by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. United States v. Benz, 282 U.S. 304 (1931).

[244] *See* 1 J. Richardson, supra at 173, 293; 2 id. at 543; 7 id. at 3414, 3508; 8 id. at 3853; 14 id. at 6690.

[245] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872). *See also* United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870).

against the United States. In the second place, they are completed offenses.[246] The President cannot pardon by anticipation, otherwise he would be invested with the power to dispense with the laws, his claim to which was the principal cause of James II's forced abdication.[247] Lastly, the term has been held to include criminal contempts of court. Such was the holding in *Ex parte Grossman*,[248] where Chief Justice Taft, speaking for the Court, resorted once more to English conceptions as being authoritative in construing this clause of the Constitution. Said he: "The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt insofar as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law."[249] Nor was any new or special danger to be apprehended from this view of the pardoning power. "If," said the Chief Justice, "we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?" Indeed, he queried further, in view of the peculiarities of procedure in contempt cases, "may it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as

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[246] Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1867).

[247] F. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 302-306 (1920); 1 Ops. Atty. Gen. 342 (1820). That is, the pardon may not be in anticipation of the commission of the offense. A pardon may precede the indictment or other beginning of the criminal proceeding, Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1867), as indeed President Ford's pardon of former President Nixon preceded institution of any action. On the Nixon pardon controversy, *see* Pardon of Richard M. Nixon and Related Matters: Hearings Before the House Judiciary Subcommittee on Criminal Justice, 93d Congress 2d Sess. (1974).

[248] 267 U.S. 87 (1925).

[249] 267 U.S. at 110-11.

much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?" [250]

Effects of a Pardon: Ex parte Garland.—The great leading case is *Ex parte Garland*, [251] which was decided shortly after the Civil War. By an act passed in 1865, Congress had prescribed that before any person should be permitted to practice in a federal court he must take oath asserting that he had never voluntarily borne arms against the United States, had never given aid or comfort to enemies of the United States, and so on. Garland, who had been a Confederate sympathizer and so was unable to take the oath, had however received from President Johnson the same year "a full pardon 'for all offences by him committed, arising from participation, direct or implied, in the Rebellion,' . . ." The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Said Justice Field for a divided Court: "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching [thereto]; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." [252]

Justice Miller, speaking for the minority, protested that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice law. "The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the executive pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar." [253] Justice Field's language must today be regarded as much too sweeping in light of a decision rendered in 1914 in the case of *Carlesi v. New York*. [254] Carlesi had been convicted several years before of committing a federal offense. In the instant case, the prisoner was being tried for a subsequent

[250] 267 U.S. at 121, 122.
[251] 71 U.S. (4 Wall.) 333, 381 (1867).
[252] 71 U.S. at 380.
[253] 71 U.S. at 396-97.
[254] 233 U.S. 51 (1914).

offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent state offense. This conviction and sentence were upheld by the Supreme Court. While this case involved offenses against different sovereignties, the Court declared by way of dictum that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted."[255]

Limits to the Efficacy of a Pardon.—But Justice Field's latitudinarian view of the effect of a pardon undoubtedly still applies ordinarily where the pardon is issued *before conviction*. He is also correct in saying that a full pardon restores a convict to his "civil rights," and this is so even though simple completion of the convict's sentence would not have had that effect. One such right is the right to testify in court, and in *Boyd v. United States*, the Court held that the disability to testify being a consequence, according to principles of the common law, of the judgment of conviction, the pardon obliterated that effect.[256] But a pardon cannot "make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the

[255] 233 U.S. at 59.
[256] 142 U.S. 450 (1892).

United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law." [257]

Congress and Amnesty

Congress cannot limit the effects of a presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the Government during the Civil War, notwithstanding any executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Said Chief Justice Chase for the majority: "[T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end." [258] On the other hand, Congress itself, under the necessary and proper clause, may enact amnesty laws remitting penalties incurred under the national statutes. [259]

Clause 2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

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[257] Knote v. United States, 95 U.S. 149, 153-154 (1877).
[258] United States v. Klein, 80 U.S. (13 Wall.) 128, 143, 148 (1872).
[259] The Laura, 114 U.S. 411 (1885).

THE TREATY-MAKING POWER

President and Senate

The plan which the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court."[260] Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in these powers.[261] The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay, writing in *The Federalist*, foresaw that the initiative must often be seized by the President without benefit of senatorial counsel.[262] Yet, so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: "In these concerns the Senate are the Constitutional and the only responsible counsellors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient."[263]

Negotiation, a Presidential Monopoly.—Actually, the negotiation of treaties had long since been taken over by the President; the Senate's role in relation to treaties is today essentially legislative in character.[264] "He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it," declared Justice Sutherland for the Court in 1936.[265] The Senate must, moreover, content itself with such information as the President chooses to furnish it.[266] In performing the function that remains to it, however, it has several options. It may consent unconditionally to a proposed treaty, it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty, of reservations to the act of ratification, or of statements of understanding or other declarations, the formal difference between

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[260] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (rev. ed. 1937).

[261] Id. at 538-39.

[262] No. 64 (J. Cooke ed., 1961), 435-436.

[263] 31 ANNALS OF CONGRESS 106 (1818).

[264] Washington sought to use the Senate as a council, but the effort proved futile, principally because the Senate balked. For the details *see* E. Corwin, supra, at 207-217.

[265] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[266] E. Corwin, supra, at 428-429.

the first two and the third being that amendments and reservations, if accepted by the President must be communicated to the other parties to the treaty, and, at least with respect to amendments and often reservations as well, require reopening negotiations and changes, whereas the other actions may have more problematic results.[267] The act of ratification for the United States is the President's act, but it may not be forthcoming unless the Senate has consented to it by the required two-thirds of the Senators present, which signifies two-thirds of a quorum, otherwise the consent rendered would not be that of the Senate as organized under the Constitution to do business.[268] Conversely, the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiation, which he is entirely free to do.[269]

Treaties as Law of the Land

Treaty commitments of the United States are of two kinds. In the language of Chief Justice Marshall in 1829: "A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is intraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument."

"In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court."[270] To the same effect, but more accurate, is Justice Miller's language for the Court a half

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[267] Treaties and Other International Agreements: The Role of the United States Senate, A Study Prepared for the Senate Committee on Foreign Relations by the Congressional Research Service, 103d Cong., 1st Sess. (Comm. Print) (1993), 96-98 (hereinafter CRS Study); *see also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (hereinafter Restatement, Foreign Relations) (1987). *See* Fourteen Diamond Rings v. United States, 183 U.S. 176, 183 (1901).

[268] *Cf.* Art. I, § 5, cl. 1; *see also* Missouri Pac. Ry. v. Kansas, 248 U.S. 276, 283-84 (1919).

[269] For instance, *see* S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 53 (2d ed. 1916); CRS Study, supra, 109-120.

[270] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). *See* THE FEDERALIST No. 75 (J. Cooke ed. 1961), 504-505.

century later, in the *Head Money Cases*: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." [271]

Origin of the Conception.—How did this distinctive feature of the Constitution come about, by virtue of which the treaty-making authority is enabled to stamp upon its promises the quality of municipal law, thereby rendering them enforceable by the courts without further action? The short answer is that Article VI, paragraph 2, makes treaties the supreme law of the land on the same footing with acts of Congress. The clause was a direct result of one of the major weaknesses of the Articles of Confederation. Although the Articles entrusted the treaty-making power to Congress, fulfillment of Congress' promises was dependent on the state legislatures. [272] Particularly with regard to provisions of the Treaty of Peace of 1783, [273] in which Congress stipulated to protect the property rights of British creditors of American citizens and of the former Loyalists, [274] the promises were not only ignored but were deliberately flouted by many legislatures. [275] Upon repeated British protests, John Jay, the Secretary for Foreign Affairs, suggested to Congress that it request state legislatures to repeal all legislation repugnant to the Treaty of Peace and to authorize their courts to carry the treaty into effect. [276] Although seven States did comply to some extent, the impotency of Congress to effectuate its treaty guarantees was obvious to the Framers who devised Article VI, paragraph 2, to take care of the situation. [277]

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[271] 112 U.S. 580, 598 (1884). For treaty provisions operative as "law of the land" (self-executing), *see* S. Crandall, supra, at 36-42, 49-62, 151, 153-163, 179, 238-239, 286, 321, 338, 345-346. For treaty provisions of an "executory" character, *see* id. at 162-63, 232, 236, 238, 493, 497, 532, 570, 589. *See also* CRS Study, supra, at 41-68; Restatement, Foreign Relations, supra, §§ 111-115.

[272] S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT ch. 3. (2d ed. 1916)

[273] Id. at 30-32. For the text of the Treaty, *see* 1 *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers (1776-1909)*, 586 S. DOC. NO. 357, 61st Congress, 2d sess. (W. Malloy ed., 1910).

[274] Id. at 588.

[275] R. MORRIS, JOHN JAY, THE NATION, AND THE COURT 73-84 (1967).

[276] S. Crandall, supra, at 36-40.

[277] The Convention at first leaned toward giving Congress a negative over state laws which were contrary to federal statutes or treaties, 1 M. Farrand, supra, at 47, 54, and then adopted the Paterson Plan which made treaties the supreme law

Treaties and the States.—As it so happened, the first case in which the Supreme Court dealt with the question of the effect of treaties on state laws involved the same issue that had prompted the drafting of Article VI, paragraph 2. During the Revolutionary War, the Virginia legislature provided that the Commonwealth's paper money, which was depreciating rapidly, was to be legal currency for the payment of debts and to confound creditors who would not accept the currency provided that Virginia citizens could pay into the state treasury debts owed by them to subjects of Great Britain, which money was to be used to prosecute the war, and that the auditor would give the debtor a certificate of payment which would discharge the debtor of all future obligations to the creditor.[278] The Virginia scheme directly contradicted the assurances in the peace treaty that no bars to collection by British creditors would be raised, and in *Ware v. Hylton*[279] the Court struck down the state law as violative of the treaty that Article VI, paragraph 2, made superior. Said Justice Chase: "A treaty cannot be the *Supreme law* of the land, that is of all the *United States*, if any act of a *State Legislature* can stand in its way. If the constitution of a State ... must give way to a treaty, and fall before it; can it be questioned, whether the *less* power, an act of the state legislature, must not be prostrate? It is the declared will of *the people* of the *United States* that every treaty made, by the authority of the *United States* shall be superior to the *Constitution* and *laws* of *any individual State*; and their will alone is to decide."[280]

In *Hopkirk v. Bell*,[281] the Court further held that this same treaty provision prevented the operation of a Virginia statute of limitation to bar collection of antecedent debts. In numerous subsequent cases, the Court invariably ruled that treaty provisions superseded inconsistent state laws governing the right of aliens to inherit real estate.[282] Such a case was *Hauenstein v. Lynham*,[283] in

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of the land, binding on state judges, and authorized the Executive to use force to compel observance when such treaties were resisted. Id. at 245, 316, 2 id. at 27-29. In the draft reported by the Committee on Detail, the language thus adopted was close to the present supremacy clause; the draft omitted the authorization of force from the clause, id. at 183, but in another clause the legislative branch was authorized to call out the militia to, inter alia, "enforce treaties". Id. at 182. The two words were struck subsequently "as being superfluous" in view of the supremacy clause. Id. at 389-90.

[278] 9 W. HENING, STATUTES OF VIRGINIA 377-380 (1821).

[279] 3 U.S. (3 Dall.) 199 (1796).

[280] 3 U.S. at 236-37 (emphasis by Court).

[281] 7 U.S. (3 Cr.) 454 (1806).

[282] *See* the discussion and cases cited in Hauenstein v. Lynham, 100 U.S. 483, 489-90 (1880).

[283] 100 U.S. 483 (1880). In Kolovrat v. Oregon, 366 U.S. 187, 197-98 (1961), the International Monetary Fund (Bretton Woods) Agreement of 1945, to which the United States and Yugoslavia were parties, and an Agreement of 1948 between

which the Court upheld the right of a citizen of the Swiss Republic, under the treaty of 1850 with that country, to recover the estate of a relative dying intestate in Virginia, to sell the same, and to export the proceeds of the sale.[284]

Certain more recent cases stem from California legislation, most of it directed against Japanese immigrants. A statute which excluded aliens ineligible to American citizenship from owning real estate was upheld in 1923 on the ground that the treaty in question did not secure the rights claimed.[285] But in *Oyama v. California*,[286] a majority of the Court indicated a strongly held opinion that this legislation conflicted with the equal protection clause of the Fourteenth Amendment, a view which has since received the endorsement of the California Supreme Court by a narrow majority.[287] Meantime, California was informed that the rights of Ger-

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these two nations, coupled with continued American observance of an 1881 treaty granting reciprocal rights of inheritance to Yugoslavian and American nations, were held to preclude Oregon from denying Yugoslavian aliens their treaty rights because of a fear that Yugoslavian currency laws implementing such Agreements prevented American nationals from withdrawing the proceeds from the sale of property inherited in the latter country.

[284] *See also* Geofroy v. Riggs, 133 U.S. 258 (1890); Sullivan v. Kidd, 254 U.S. 433 (1921); Nielsen v. Johnson, 279 U.S. 47 (1929); Kolovrat v. Oregon, 366 U.S. 187 (1961). But a right under treaty to acquire and dispose of property does not except aliens from the operation of a state statute prohibiting conveyances of homestead property by any instrument not executed by both husband and wife. Todok v. Union State Bank, 281 U.S. 449 (1930). Nor was a treaty stipulation guaranteeing to the citizens of each country, in the territory of the other, equality with the natives of rights and privileges in respect to protection and security of person and property, violated by a state statute which denied to a non-resident alien wife of a person killed within the State, the right to sue for wrongful death. Such right was afforded to native resident relatives. Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268 (1909). The treaty in question having been amended in view of this decision, the question arose whether the new provision covered the case of death without fault or negligence in which, by the Pennsylvania Workmen's Compensation Act, compensation was expressly limited to resident parents; the Supreme Court held that it did not. Liberato v. Royer, 270 U.S. 535 (1926).

[285] Terrace v. Thompson, 263 U.S. 197 (1923).

[286] 332 U.S. 633 (1948). *See also* Takahashi v. Fish Comm'n, 334 U.S. 410 (1948), in which a California statute prohibiting the issuance of fishing licenses to persons ineligible to citizenship was disallowed, both on the basis of the Fourteenth Amendment and on the ground that the statute invaded a field of power reserved to the National Government, namely, the determination of the conditions on which aliens may be admitted, naturalized, and permitted to reside in the United States. For the latter proposition, Hines v. Davidowitz, 312 U.S. 52, 66 (1941), was relied upon.

[287] This occurred in the much advertised case of Sei Fujii v. State, 38 Cal. 2d 718, 242 P. 2d 617 (1952). A lower California court had held that the legislation involved was void under the United Nations Charter, but the California Supreme Court was unanimous in rejecting this view. The Charter provisions invoked in this connection [Arts. 1, 55 and 56], said Chief Justice Gibson, "[w]e are satisfied . . . were not intended to supersede domestic legislation." That is, the Charter provisions were not self-executing. Restatement, Foreign Relations, supra, § 701, Reporters' Note 5, pp. 155-56.

man nationals, under the Treaty of December 8, 1923, between the United States and the Reich, to whom real property in the United States had descended or been devised, to dispose of it, had survived the recent war and certain war legislation, and accordingly prevailed over conflicting state legislation.[288]

Treaties and Congress.—In the Convention, a proposal to require the adoption of treaties through enactment of a law before they should be binding was rejected.[289] But the years since have seen numerous controversies with regard to the duties and obligations of Congress, the necessity for congressional action, and the effects of statutes, in connection with the treaty power. For purposes of this section, the question is whether entry into and ratification of a treaty is sufficient in all cases to make the treaty provisions the "law of the land" or whether there are some types of treaty provisions which only a subsequent act of Congress can put into effect? The language quoted above[290] from *Foster v. Neilson*[291] early established that not all treaties are self-executing, for as Marshall there said, a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."[292]

Leaving aside the question when a treaty is and is not self-executing,[293] the issue of the necessity of congressional implementation and the obligation to implement has frequently roiled congressional debates. The matter arose initially in 1796 in connection with the Jay Treaty,[294] certain provisions of which required appropriations to carry them into effect. In view of the third clause of Article I, § 9, which says that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . .", it seems to have been universally conceded that Congress must be applied to if the treaty provisions were to be executed.[295] A bill was introduced into the House to appropriate the needed funds and its

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[288] Clark v. Allen, 331 U.S. 503 (1947). *See also* Kolovrat v. Oregon, 366 U.S. 187 (1961).

[289] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 392-394 (rev. ed. 1937).

[290] Supra, "Treaties as Law of the Land".

[291] 27 U.S. (2 Pet.) 253, 314 (1829).

[292] *Cf.* Whitney v. Robertson, 124 U.S. 190, 194 (1888): "When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect .... If the treaty contains stipulations which are self-executing that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment." S. Crandall, supra, chs. 11-15.

[293] *See* infra, "When Is a Treaty Self-Executing".

[294] 8 Stat. 116 (1794).

[295] The story is told in numerous sources. *E.g.*, S. Crandall, supra, at 165-171. For Washington's message refusing to submit papers relating to the treaty to the House, *see* J. Richardson, supra at 123.

supporters, within and without Congress, offered the contention that inasmuch as the treaty was now the law of the land the legislative branch was bound to enact the bill without further ado; opponents led by Madison and Gallatin contended that the House had complete discretion whether or not to carry into effect treaty provisions.[296] At the conclusion of the debate, the House voted not only the money but a resolution offered by Madison stating that it did not claim any agency in the treaty-making process, "but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good."[297] This early precedent with regard to appropriations has apparently been uniformly adhered to.[298]

Similarly, with regard to treaties which modify and change commercial tariff arrangements, the practice has been that the House always insisted on and the Senate acquiesced in legislation to carry into effect the provisions of such treaties.[299] The earliest congressional dispute came over an 1815 Convention with Great Britain,[300] which provided for reciprocal reduction of duties. President Madison thereupon recommended to Congress such legislation as the convention might require for effectuation. The Senate and some members of the House were of the view that no implementing legislation was necessary because of a statute, which already permitted the President to reduce duties on goods of nations that did not discriminate against United States goods; the House majority felt otherwise and compromise legislation was finally enacted acceptable to both points of view.[301] But subsequent cases have seen

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[296] Debate in the House ran for more than a month. It was excerpted from the ANNALS separately published as DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, DURING THE FIRST SESSION OF THE FOURTH CONGRESS UPON THE CONSTITUTIONAL POWERS OF THE HOUSE WITH RESPECT TO TREATIES (1796). A source of much valuable information on the views of the Framers and those who came after them on the treaty power, the debates are analyzed in detail in E. BYRD, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITES STATES 35-59 (1960).

[297] 5 ANNALS OF CONGRESS 771, 782 (1796). A resolution similar in language was adopted by the House in 1871. CONG. GLOBE, 42d Congress, 1st sess. (1871), 835.

[298] S. Crandall, supra, at 171-182; 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 549-552 (2d ed. 1929); *but see* RESTATEMENT, FOREIGN RELATIONS, supra, § 111, Reporters' Note 7, p. 57. *See also* H. Rep. 4177, 49th Congress, 2d Sess. (1887). *Cf.* De Lima v. Bidwell, 182 U.S. 1, 198 (1901).

[299] S. Crandall, supra, at 183-199.

[300] 8 Stat. 228.

[301] 3 Stat. 255 (1816). *See* S. Crandall, supra, at 184-188.

legislation enacted,[302] the Senate once refused ratification of a treaty, which purported to reduce statutorily-determined duties,[303] and congressional enactment of authority for the President to negotiate reciprocal trade agreements all seem to point to the necessity of some form of congressional implementation.

What other treaty provisions need congressional implementation is subject to argument. In a 1907 memorandum approved by the Secretary of State, it is said, in summary of the practice and reasoning from the text of the Constitution, that the limitations on the treaty power which necessitate legislative implementation may "be found in the provisions of the Constitution which expressly confide in Congress or in other branches of the Federal Government the exercise of certain of the delegated powers. . . ."[304] The same thought has been expressed in Congress[305] and by commentators.[306] Resolution of the issue seems particularly one for the attention of the legislative and executive branches rather than for the courts.

Congressional Repeal of Treaties.—It is in respect to his contention that, when it is asked to carry a treaty into effect, Congress has the constitutional right, and indeed the duty, to determine the matter according to its own ideas of what is expedient, that Madison has been most completely vindicated by developments. This is seen in the answer which the Court has returned to the question: What happens when a treaty provision and an act of Congress conflict? The answer is, that neither has any intrinsic superiority over the other and that therefore the one of later date will prevail *leges posteriores priores contrarias abrogant*. In short,

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[302] Id. at 188-195; 1 W. Willoughby, supra, at 555-560.

[303] S. Crandall, supra, at 189-190.

[304] Anderson, *The Extent and Limitations of the Treaty-Making Power*, 1 AM. J. INT'L L. 636, 641 (1907).

[305] At the conclusion of the 1815 debate, the Senate conferees noted in their report that some treaties might need legislative implementation, which Congress was bound to provide, but did not indicate what in their opinion made some treaties self-executing and others not. 29 ANNALS OF CONGRESS 160 (1816). The House conferees observed that they thought, and that in their opinion the Senate conferees agreed, that legislative implementation was necessary to carry into effect all treaties which contained "stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory. . . ." Id. at 1019. Much the same language was included in a later report, H. Rep. No. 37, 40th Congress, 2d Sess. (1868). Controversy with respect to the sufficiency of Senate ratification of the Panama Canal treaties to dispose of United States property therein to Panama was extensive. A divided Court of Appeals for the District of Columbia reached the question and held that Senate approval of the treaty alone was sufficient. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U. S. 907 (1978).

[306] T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 175 (3d ed. 1898); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 353-356 (1922).

the treaty commitments of the United States do not diminish Congress' constitutional powers. To be sure, legislative repeal of a treaty as law of the land may amount to a violation of it as an international contract in the judgment of the other party to it. In such case, as the Court has said: "Its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress."[307]

Treaties Versus Prior Acts of Congress.—The cases are numerous in which the Court has enforced statutory provisions which were recognized by it as superseding prior treaty engagements. Chief Justice Marshall early asserted that the converse would be true as well,[308] that a treaty which is self-executing is the law of the land and prevails over an earlier inconsistent statute, a proposition repeated many times in dicta.[309] But there is dispute whether in fact a treaty has ever been held to have repealed or superseded an inconsistent statute. Willoughby, for example, says: "In fact, however, there have been few (the writer is not certain that there has been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized,

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[307] Head Money Cases, 112 U.S. 580, 598-599 (1884). The repealability of treaties by act of Congress was first asserted in an opinion of the Attorney General in 1854. 6 Ops. Atty. Gen. 291. The year following the doctrine was adopted judicially in a lengthy and cogently argued opinion of Justice Curtis, speaking for a United States circuit court in Taylor v. Morton, 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass 1855). *See also* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883); Botiller v. Dominguez, 130 U.S. 238 (1889); The Chinese Exclusion Case, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Fong Yue Ting v. United States, 149 U.S. 698, 721 (1893). "Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate." La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899). *Cf.* Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165-166 (1868), wherein it is stated *obiter* that "Congress is bound to regard the public treaties, and it had no power . . . to nullify [Indian] titles confirmed many years before. . . ."

[308] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-315 (1829). In a later case, it was determined in a different situation that by its terms the treaty in issue, which had been assumed to be executory in the earlier case, was self-executing. United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

[309] *E.g.*, United States v. Lee Yen Tai, 185 U.S. 213, 220-221 (1902); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871); Johnson v. Browne, 205 U.S. 309, 320-321 (1907); Whitney v. Roberston, 124 U.S. 190, 194 (1888).

but such treaty action has not operated to repeal or annul the existing law upon the subject."[310]

The one instance that may be an exception[311] is *Cook v. United States*.[312] There, a divided Court held that a 1924 treaty with Great Britain, allowing the inspection of English vessels for contraband liquor and seizure if any was found only if such vessels were within the distance from the coast that could be traversed in one hour by the vessel suspecting of endeavoring to violate the prohibition laws, had superseded the authority conferred by a section of the Tariff Act of 1922[313] for Coast Guard officers to inspect and seize any vessel within four leagues—12 miles—of the coast under like circumstances. The difficulty with the case is that the Tariff Act provision had been reenacted in 1930,[314] so that a simple application of the rule of the later governing should have caused a different result. It may be suspected that the low estate to which Prohibition had fallen and a desire to avoid a diplomatic controversy should the seizure at issue have been upheld were more than slightly influential in the Court's decision.

When Is a Treaty Self-Executing.—Several references have been made above to a distinction between treaties as self-executing and as merely executory. But what is it about a treaty that makes it the law of the land and which gives a private citizen the right to rely on it in a court of law? As early as 1801, the Supreme Court took notice of a treaty, and finding it applicable to the situation before it, gave judgment for the petitioner based on it.[315] In *Foster v. Neilson*,[316] Chief Justice Marshall explained that a treaty is to be regarded in courts "as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." It appears thus that the Court has had in mind two characteristics of treaties which keep them from being self-executing. First, "when the terms of the stipulation import a con-

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[310] 1 W. Willoughby, supra, at 555.

[311] Other cases, which are cited in some sources, appear distinguishable. United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801), applied a treaty entered into subsequent to enactment of a statute abrogating all treaties then in effect between the United States and France, so that it is inaccurate to refer to the treaty as superseding a prior statute. In United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876), the treaty with an Indian tribe in which the tribe ceded certain territory, later included in a State, provided that a federal law restricting the sale of liquor on the reservation would continue in effect in the territory ceded; the Court found the stipulation an appropriate subject for settlement by treaty and the provision binding. *And see* Charlton v. Kelly, 229 U.S. 447 (1913).

[312] 288 U.S. 102 (1933).

[313] 42 Stat. 858, 979, § 581.

[314] 46 Stat. 590, 747, § 581.

[315] United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801).

[316] 27 U.S. (2 Pet.) 253, 314-15 (1829).

tract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court."[317] In other words, the treaty itself may by its terms require implementation, as by an express stipulation for legislative execution.[318]

Second, the nature of the stipulation may require legislative execution. That is, with regard to the issue discussed above, whether the delegated powers of Congress impose any limitation on the treaty power, it may be that a treaty provision will be incapable of execution without legislative action. As one authority says: "Practically this distinction depends upon whether or not the courts and the executive are able to enforce the provision without enabling legislation. Fundamentally it depends upon whether the obligation is imposed on private individuals or on public authorities. . . ."

"Treaty provisions which define the rights and obligations of private individuals and lay down general principles for the guidance of military, naval or administrative officials in relation thereto are usually considered self-executing. Thus treaty provisions assuring aliens equal civil rights with citizens, defining the limits of national jurisdiction, and prescribing rules of prize, war and neutrality, have been so considered . . . ."

"On the other hand certain treaty obligations are addressed solely to public authorities, of which may be mentioned those requiring the payment of money, the cession of territory, the guarantee of territory or independence, the conclusion of subsequent treaties on described subjects, the participation in international organizations, the collection and supplying of information, and direction of postal, telegraphic or other services, the construction of buildings, bridges, lighthouses, etc."[319] It may well be that these two characteristics merge with each other at many points and the

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[317] Id.

[318] Generally, the qualifications may have been inserted in treaties out of a belief in their constitutional necessity or because of some policy reason. In regard to the former, it has always apparently been the practice to insert in treaties affecting the revenue laws of the United States a proviso that they should not be deemed effective until the necessary laws to carry them into operation should be enacted by Congress. 1 W. Willoughby, supra, at 558. Perhaps of the same nature was a qualification that cession of certain property in the Canal Zone should be dependent upon action by Congress inserted in Article V of the 1955 Treaty with Panama. TIAS 3297, 6 U.S.T. 2273, 2278. In regard to the latter, it may be noted that Article V of the Webster-Ashburton Treaty, 8 Stat. 572, 575 (1842), providing for the transfer to Canada of land in Maine and Massachusetts was conditioned upon assent by the two States and payment to them of compensation. S. Crandall, supra, at 222-224.

[319] Q. Wright, supra, at 207-208. *See also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 156-162 (1972).

language of the Court is not always helpful in distinguishing them.[320]

Treaties and the Necessary and Proper Clause.—What power, or powers, does Congress exercise when it enacts legislation for the purpose of carrying treaties of the United States into effect? When the subject matter of the treaty falls within the ambit of Congress' enumerated powers, then it is these powers which it exercises in carrying such treaty into effect. But if the treaty deals with a subject which falls within the national jurisdiction because of its international character, then recourse is had to the necessary and proper clause. Thus, of itself, Congress would have had no power to confer judicial powers upon foreign consuls in the United States, but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation.[321] Congress could not confer judicial power upon American consuls abroad to be there exercised over American citizens, but the treaty-power can and has, and Congress has passed legislation perfecting such agreements, and such legislation has been upheld.[322]

Again, Congress of itself could not provide for the extradition of fugitives from justice, but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.[323] And Congress could not ordinarily penalize private acts of violence within a State, but it can punish such acts if they deprive aliens of their rights under a treaty.[324] Referring to such legislation, the Court has said: "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power."[325] In a word, the treaty-power cannot

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[320] Thus, *compare* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-315 (1829), *with* Cook v. United States, 288 U.S. 102, 118-19 (1933).

[321] Acts of March 2, 1829, 4 Stat. 359 and of February 24, 1855, 10 Stat. 614.

[322] *See* In re Ross, 140 U.S. 453 (1891), where the treaty provisions involved are given. The supplementary legislation, later reenacted at Rev. Stat. 4083-4091, was repealed by the Joint Res. of August 1, 1956, 70 Stat. 774. The validity of the Ross case was subsequently questioned. *See* Reid v. Covert, 354 U.S. 1, 12, 64, 75 (1957).

[323] 18 U.S.C. §§ 3181-3195.

[324] Baldwin v. Franks, 120 U.S. 678, 683 (1887).

[325] Neely v. Henkel, 180 U.S. 109, 121 (1901). A different theory is offered by Justice Story in his opinion for the court in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), in the following words: "Treaties made between the United States and

purport to amend the Constitution by adding to the list of Congress' enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass; the only question that can be raised as to such measures is whether they are "necessary and proper" measures for the carrying of the treaty in question into operation.

The foremost example of this interpretation is *Missouri v. Holland*.[326] There, the United States and Great Britain had entered into a treaty for the protection of migratory birds,[327] and Congress had enacted legislation pursuant to the treaty to effectuate it.[328] The State objected that such regulation was reserved to the States by the Tenth Amendment and that the statute infringed on this reservation, pointing to lower court decisions voiding an earlier act not based on a treaty.[329] Noting that treaties "are declared the supreme law of the land," Justice Holmes for the Court said: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[330] "It is obvious," he continued, "that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[331] Since the treaty and thus the stat-

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foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfill all the obligations of treaties." Id. at 619. Story was here in quest of arguments to prove that Congress had power to enact a fugitive slave law, which he based on its power "to carry into effect rights expressly given and duties expressly enjoined" by the Constitution. Id. at 618-19. However, the treaty-making power is neither a right nor a duty, but one of the powers "vested by this Constitution in the Government of the United States." Art. I, § 8, cl. 18.

[326] 252 U.S. 416 (1920).

[327] 39 Stat. 1702 (1916).

[328] 40 Stat. 755 (1918).

[329] United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915). The Court did not purport to decide whether those cases were correctly decided. Missouri v. Holland, 252 U.S. 416, 433 (1920). Today, there seems no doubt that Congress' power under the commerce clause would be deemed more than adequate, but at that time a majority of the Court had a very restrictive view of the commerce power. *Cf.* Hammer v. Dagenhart, 247 U.S. 251 (1918).

[330] Missouri v. Holland, 252 U.S. 416, 432 (1920).

[331] 252 U.S. at 433. The internal quotation is from Andrews v. Andrews, 188 U.S. 14, 33 (1903).

ute dealt with a matter of national and international concern, the treaty was proper and the statute was one "necessary and proper" to effectuate the treaty.

Constitutional Limitations on the Treaty Power

A question growing out of the discussion above is whether the treaty power is bounded by constitutional limitations. By the supremacy clause, both statutes and treaties "are declared . . . to be the supreme law of the land, and no superior efficacy is given to either over the other."[332] As statutes may be held void because they contravene the Constitution, it should follow that treaties may be held void, the Constitution being superior to both. And indeed the Court has numerous times so stated.[333] It does not appear that the Court has ever held a treaty unconstitutional,[334] although there are examples in which decision was seemingly based on a reading compelled by constitutional considerations.[335] In fact, there would be little argument with regard to the general point were it not for certain dicta in Justice Holmes' opinion in *Missouri v. Holland*.[336] "Acts of Congress," he said, "are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." Although he immediately followed this passage with a cautionary "[w]e do not mean to imply that there are no qualifications to the treaty-making power . . . ,"[337] the Justice's lan-

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[332] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[333] "The treaty is ... a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States." Doe v. Braden, 57 U.S. (16 How.) 635, 656 (1853). "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." The Cherokee Tobacco, 78 U.S. (11 Wall.), 616, 620 (1871). *See also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 700 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

[334] 1 W. Willoughby, supra, at 561; L. Henkin, supra, at 137. In Power Authority of New York v. FPC, 247 F.2d 538 (2d Cir. 1957), a reservation attached by the Senate to a 1950 treaty with Canada was held invalid. The court observed that the reservation was properly not a part of the treaty but that if it were it would still be void as an attempt to circumvent constitutional procedures for enacting amendments to existing federal laws. The Supreme Court vacated the judgment on mootness grounds. 355 U.S. 64 (1957). In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), an executive agreement with Canada was held void as conflicting with existing legislation. The Supreme Court affirmed on nonconstitutional grounds. 348 U.S. 296 (1955).

[335] *Cf.* City of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Rocca v. Thompson, 223 U.S. 317 (1912).

[336] 252 U.S. 416 (1920).

[337] 252 U.S. at 433. Subsequently, he also observed: "The treaty in question does not contravene any prohibitory words to be found in the Constitution." Id.

guage and the holding by which it appeared that the reserved rights of the States could be invaded through the treaty power led in the 1950s to an abortive effort to amend the Constitution to restrict the treaty power.[338]

Controversy over the Holmes language apparently led Justice Black in *Reid v. Covert*[339] to deny that the difference in language of the supremacy clause with regard to statutes and with regard to treaties was relevant to the status of treaties as inferior to the Constitution. "There is nothing in this language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."[340]

Establishment of the general principle, however, is but the beginning; there is no readily agreed-upon standard for determining what the limitations are. The most persistently urged proposition in limitation has been that the treaty power must not invade the reserved powers of the States. In view of the sweeping language of

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[338] The attempt, the so-called "Bricker Amendment," was aimed at the expansion into reserved state powers through treaties as well as executive agreements. The key provision read: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." S.J. Res. 43, 82d Congress, 1st Sess. (1953), § 2. *See also* S.J. Res. 1, 84th Congress, 1st Sess. (1955), § 2. Extensive hearings developed the issues thoroughly but not always clearly. Hearings on S.J. Res. 130: Before a Subcommittee of the Senate Judiciary Committee, 82d Congress, 2d Sess. (1952). Hearings on S.J. Res. 1 & 43: Before a Subcommittee of the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953); Hearings on S.J. Res. 1: Before a Subcommittee of the Senate Judiciary Committee, 84th Congress, 1st Sess. (1955). *See* L. Henkin, supra, at 383-85.

[339] 354 U.S. 1 (1957) (plurality opinion).

[340] 354 U.S. at 16-17. For discussions of the issue, *see* Restatement, Foreign Relations, § 302; Nowak & Rotunda, *A Comment on the Creation and Resolution of a 'Non-Problem:' Dames & Moore v. Regan, the Foreign Affairs Power, and the Role of the Courts*, 29 UCLA L. REV. 1129 (1982); L. Henkin, supra, at 137-156.

the supremacy clause, it is hardly surprising that this argument has not prevailed.[341] Nevertheless, the issue, in the context of Congress' power under the necessary and proper clause to effectuate a treaty dealing with a subject arguably within the domain of the States, was presented as recently as 1920, when the Court upheld a treaty and implementing statute providing for the protection of migratory birds.[342] "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."[343] The gist of the holding followed. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed."[344]

The doctrine which seems deducible from this case and others is "that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded."[345] It is not, in other words, the treaty power which enlarges either the federal power or the congressional power, but the

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[341] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cr.) 603 (1813); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Hauenstein v. Lynham, 100 U.S. 483 (1880). Jefferson, in his list of exceptions to the treaty power, thought the Constitution "must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way." Jefferson's Manual of Parliamentary Practice, § 594, reprinted in THE RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES, H. Doc. 102-405, 102d Congress, 2d Sess. (1993), 298-299. But this view has always been the minority one. Q. Wright, supra, at 92 n. 97. The nearest the Court ever came to supporting this argument appears to be Frederickson v. Louisiana, 64 U.S. (23 How.) 445, 448 (1860).

[342] Missouri v. Holland, 252 U.S. 416 (1920).

[343] 252 U.S. at 433.

[344] 252 U.S. at 435.

[345] 1 W. Willoughby, supra, at 569. *And see* L. Henkin, supra, at 143-148; Restatement, Foreign Relations, § 302, Comment d, & Reporters' Note 3, pp. 154-157.

international character of the interest concerned which might be acted upon.

Dicta in some of the cases lend support to the argument that the treaty power is limited by the delegation of powers among the branches of the National Government [346] and especially by the delegated powers of Congress, although it is not clear what the limitation means. If it is meant that no international agreement could be constitutionally entered into by the United States within the sphere of such powers, the practice from the beginning has been to the contrary; [347] if it is meant that treaty provisions dealing with matters delegated to Congress must, in order to become the law of the land, receive the assent of Congress through implementing legislation, it states not a limitation on the power of making treaties as international conventions but rather a necessary procedure before certain conventions are cognizable by the courts in the enforcement of rights under them.

It has also been suggested that the prohibitions against governmental action contained in the Constitution, the Bill of Rights particularly, limit the exercise of the treaty power. No doubt this is true, though again there are no cases which so hold. [348]

One other limitation of sorts may be contained in the language of certain court decisions which seem to say that only matters of "international concern" may be the subject of treaty negotiations. [349] While this may appear to be a limitation, it does not take account of the elasticity of the concept of "international concern" by which the subject matter of treaties has constantly expanded over the years. [350] At best, any attempted resolution of the issue of limitations must be an uneasy one. [351]

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[346] *E.g.*, Geofroy v. Riggs, 133 U.S. 258, 266-267 (1890); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). Jefferson listed as an exception from the treaty power "those subjects of legislation in which [the Constitution] gave a participation to the House of Representatives," although he admitted "that it would leave very little matter for the treaty power to work on." Jefferson's Manual, supra, at 299.

[347] Q. Wright, supra, at 101-103. *See also*, L. Henkin, supra, at 148-151.

[348] *Cf.* Reid v. Covert, 354 U.S. 1 (1957). *And see* Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

[349] "[I]t must be assumed that the framers of the Constitution intended that [the treaty power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty. . . ." Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). With the exceptions noted, "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." Geofroy v. Riggs, 133 U.S. 258, 267 (1890). "The treatymaking power of the United States . . . does extend to all proper subjects of negotiation between our government and other nations." Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

[350] *Cf.* L. Henkin, supra, at 151-56.

[351] Other reservations which have been expressed may be briefly noted. It has been contended that the territory of a State could not be ceded without such State's

In brief, the fact that all the foreign relations power is vested in the National Government and that no formal restriction is imposed on the treaty-making power in the international context[352] leaves little room for the notion of a limited treaty-making power with regard to the reserved rights of the States or in regard to the choice of matters concerning which the Federal Government may treat with other nations; protected individual rights appear to be sheltered by specific constitutional guarantees from the domestic effects of treaties, and the separation of powers at the federal level may require legislative action to give municipal effect to international agreements.

Interpretation and Termination of Treaties as International Compacts

The repeal by Congress of the "self-executing" clauses of a treaty as "law of the land" does not of itself terminate the treaty as an international contract, although it may very well provoke the other party to the treaty to do so. Hence, the questions arise where the Constitution lodges this power and where it lodges the power to interpret the contractual provisions of treaties. The first case of outright abrogation of a treaty by the United States occurred in 1798, when Congress by the Act of July 7 of that year, pronounced the United States freed and exonerated from the stipulations of the Treaties of 1778 with France.[353] This act was followed two days later by one authorizing limited hostilities against the same country; in the case of *Bas v. Tingy*,[354] the Supreme Court treated the act of abrogation as simply one of a bundle of acts declaring "public war" upon the French Republic.

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consent. Geofroy v. Riggs, 133 U.S. 258, 267 (1890), citing Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 541 (1885). *Cf.* the Webster-Ashburton Treaty, Article V, 8 Stat. 572, 575. *But see* S. Crandall, supra, at 220-229; 1 W. Willoughby, supra, at 572-576.

A further contention is that while foreign territory can be annexed to the United States by the treaty power, it could not be incorporated with the United States except with the consent of Congress. Downes v. Bidwell, 182 U.S. 244, 310-344 (1901) (four Justices dissenting). This argument appears to be a variation of the one in regard to the correct procedure to give domestic effect to treaties.

Another argument grew out the XII Hague Convention of 1907, proposing an International Prize Court with appellate jurisdiction from national courts in prize cases. President Taft objected that no treaty could transfer to a tribunal not known to the Constitution any part of the judicial power of the United States and a compromise was arranged. Q. Wright, supra, at 117-118; H. REP. NO. 1569, 68th Congress, 2d Sess. (1925).

[352] *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-576 (1840).

[353] 1 Stat. 578 (1798).

[354] 4 U.S. (4 Dall.) 37 (1800). *See also* Gray v. United States, 21 Ct. Cl. 340 (1886), with respect to claims arising out of this situation.

Termination of Treaties by Notice.—Typically, a treaty provides for its termination by notice of one of the parties, usually after a prescribed time from the date of notice. Of course, treaties may also be terminated by agreement of the parties, or by breach by one of the parties, or by some other means. But it is in the instance of termination by notice that the issue has frequently been raised: where in the Government of the United States does the Constitution lodge the power to unmake treaties?[355] Reasonable arguments may be made locating the power in the President alone, in the President and Senate, or in the Congress. Presidents generally have asserted the foreign relations power reposed in them under Article II and the inherent powers argument made in *Curtiss-Wright*. Because the Constitution requires the consent of the Senate for making a treaty, one can logically argue that its consent is as well required for terminating it. Finally, because treaties are, like statutes, the supreme law of the land, it may well be argued that, again like statutes, they may be undone only through lawmaking by the entire Congress; additionally, since Congress may be required to implement treaties and may displace them through legislation, this argument is reenforced.

Definitive resolution of this argument appears only remotely possible. Historical practice provides support for all three arguments and the judicial branch seems unlikely to essay any answer.

While abrogation of the French treaty, mentioned above, is apparently the only example of termination by Congress through a public law, many instances may be cited of congressional actions mandating terminations by notice of the President or changing the legal environment so that the President is required to terminate. The initial precedent in the instance of termination by notice pursuant to congressional action appears to have occurred in 1846,[356] when by joint resolution Congress authorized the President at his discretion to notify the British government of the abrogation of the

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[355] The matter was most extensively canvassed in the debate with respect to President Carter's termination of the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan). *See, e.g.*, the various views argued in Treaty Termination: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st Sess. (1979). On the issue generally, *see* Restatement, Foreign Relations, § 339; CRS Study, supra, 158-167; L. Henkin, supra, at 167-171; Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979); Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577 (1980).

[356] *Compare* the different views of the 1846 action in Treaty Termination: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st Sess. (1979), 160-162 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), and in Taiwan: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st Sess. (1979), 300 (memorandum of Senator Goldwater).

Convention of August 6, 1827, relative to the joint occupation of the Oregon Territory. As the President himself had requested the resolution, the episode is often cited to support the theory that international conventions to which the United States is a party, even those terminable on notice, are terminable only through action of Congress.[357] Subsequently, Congress has often passed resolutions denouncing treaties or treaty provisions, which by their own terms were terminable on notice, and Presidents have usually, though not invariably, carried out such resolutions.[358] By the La Follette-Furuseth Seaman's Act,[359] President Wilson was directed, "within ninety days after the passage of the act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expiration of the periods of notice provided for in such treaties," and the required notice was given.[360] When, however, by section 34 of the Jones Merchant Marine Act of 1920, the same President was authorized and directed within ninety days to give notice to the other parties to certain treaties, with which the Act was not in conflict but which might restrict Congress in the future from enacting discriminatory tonnage duties, President Wilson refused to comply, asserting that he "did not deem the direction contained in section 34 . . . an exercise of any constitutional power possessed by Congress."[361] The same attitude toward section 34 was continued by Presidents Harding and Coolidge.[362]

Very few precedents exist in which the President terminated a treaty after obtaining the approval of the Senate alone. The first occurred in 1854-1855, when President Pierce requested and re-

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[357] S. Crandall, supra, at 458-459.

[358] Id. at 459-62; Q. Wright, supra, at 258.

[359] 38 Stat. 1164 (1915).

[360] S. Crandall, supra, at 460. *See* Van der Weyde v. Ocean Transp. Co., 297 U. S. 114 (1936).

[361] 41 Stat. 1007. *See* Reeves, *The Jones Act and the Denunciation of Treaties*, 15 AM. J. INT'L. L. 33 (1921). In 1879, Congress passed a resolution requiring the President to abrogate a treaty with China, but President Hayes vetoed it, partly on the ground that Congress as an entity had no role to play in ending treaties, only the President with the advice and consent of the Senate. 9 J. Richardson, supra at 4466, 4470-4471. For the views of President Taft on the matter in context, *see* W. TAFT, THE PRESIDENCY, ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS 112-113 (1916).

[362] Since this time, very few instances appear in which Congress has requested or directed termination by notice, but they have resulted in compliance. *E.g.*, 65 Stat. 72 (1951) (directing termination of most-favored-nation provisions with certain Communist countries in commercial treaties); 70 Stat. 773 (1956) (requesting renunciation of treaty rights of extraterritoriality in Morroco). The most recent example appears to be § 313 of the Anti-Apartheid Act of 1986, which required the Secretary of State to terminate immediately, in accordance with its terms, the tax treaty and protocol with South Africa that had been concluded on Decemberr 13, 1946. P. L. 99-440, 100 Stat. 3515, 22 U.S.C. § 5063.

ceived Senate approval to terminate a treaty with Denmark.[363] When the validity of this action was questioned in the Senate, the Committee on Foreign Relations reported that the procedure was correct, that prior full-Congress actions were incorrect, and that the right to terminate resides in the treaty-making authorities, the President and the Senate.[364]

Examples of treaty terminations in which the President acted alone are much disputed with respect both to facts and to the underlying legal circumstances.[365] Apparently, President Lincoln was the first to give notice of termination in the absence of prior congressional authorization or direction, and Congress shortly thereafter by joint resolution ratified his action.[366] The first such action by the President, with no such subsequent congressional action, appears to be that of President McKinley in 1899, in terminating an 1850 treaty with Switzerland, but the action may be explainable as the treaty being inconsistent with a subsequently enacted law.[367] Other such renunciations by the President acting on his own have been similarly explained and similarly the explanations have been controverted. While the Department of State, in setting forth legal justification for President Carter's notice of termination of the treaty with Taiwan, cited many examples of the President acting alone, many of these are ambiguous and may be explained away by, i.e., conflicts with later statutes, changed circumstances, or the like.[368]

No such ambiguity accompanied President Carter's action on the Taiwan treaty,[369] and a somewhat lengthy Senate debate was provoked. In the end, the Senate on a preliminary vote approved a "sense of the Senate" resolution claiming for itself a consenting

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[363] 5 J. Richardson, supra at 279, 334.

[364] S. Rep. No. 97, 34th Congress, 1st Sess. (1856), 6-7. The other instance was President Wilson's request, which the Senate endorsed, for termination of the International Sanitary Convention of 1903. *See* 61 CONG. REC. 1793-1794 (1921). *See* CRS Study, supra at 161-62.

[365] *Compare, e.g.*, Treaty Termination: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st Sess. (1979), 156-191 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), *with* Taiwan: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st Sess. (1979), 300-307 (memorandum of Senator Goldwater). *See* CRS Study, supra at 164-66.

[366] 13 Stat. 568 (1865).

[367] The treaty, *see* 11 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 894 (1970), was probably at odds with the Tariff Act of 1897. 30 Stat. 151.

[368] *Compare* the views expressed in the Hansell and Goldwater memoranda, supra. For expressions of views preceding the immediate controversy, *see, e.g.*, Riesenfeld, *The Power of Congress and the President in International Relations*, 25 CALIF. L. REV. 643, 658-665 (1937); Nelson, *The Termination of Treaties and Executive Agreements by the United States*, 42 MINN. L. REV. 879 (1958).

[369] Note that the President terminated the treaty in the face of an expression of the sense of Congress that prior consultation between President and Congress should occur. 92 Stat. 730, 746 (1978).

role in the termination of treaties, but no final vote was ever taken and the Senate thus did not place itself in conflict with the President.[370] However, several Members of Congress went to court to contest the termination, apparently the first time a judicial resolution of the question had been sought. A divided Court of Appeals, on the merits, held that presidential action was sufficient by itself to terminate treaties, but the Supreme Court, no majority agreeing on a common ground, vacated that decision and instructed the trial court to dismiss the suit.[371] While no opinion of the Court bars future litigation, it appears that the political question doctrine or some other rule of judicial restraint will leave such disputes to the contending forces of the political branches.[372]

Determination Whether a Treaty Has Lapsed.—There is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in *Charlton v. Kelly*[373] is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach.... That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case.... The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition."[374] So also it is primarily for the political depart-

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[370] Originally, S. Res. 15 had disapproved presidential action alone, but it was amended and reported by the Foreign Relations Committee to recognize at least 14 bases of presidential termination. S. Rep. No. 119, 96th Congress, 1st Sess. (1979). In turn, this resolution was amended to state the described sense of the Senate view, but the matter was never brought to final action. *See* 125 CONG. REC. 13672, 13696, 13711, 15209, 15859 (1979).

[371] Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (*en banc*), *vacated and remanded*, 444 U.S. 996 (1979). Four Justices found the case nonjusticiable because of the political question doctrine, id. at 1002, but one other Justice in the majority and one in dissent rejected this analysis. Id. at 998 (Justice Powell), 1006 (Justice Brennan). The remaining three Justices were silent on the doctrine.

[372] *Cf.* Baker v. Carr, 369 U.S. 186, 211-13, 217 (1962).

[373] 229 U.S. 447 (1913).

[374] 229 U.S. at 473-76.

ments to determine whether certain provisions of a treaty have survived a war in which the other contracting state ceased to exist as a member of the international community.[375]

Status of a Treaty a Political Question.—It is clear that many questions which arise concerning a treaty are of a political nature and will not be decided by the courts. In the words of Justice Curtis in *Taylor v. Morton*:[376] It is not "a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise.... These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws and it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our system of government." Chief Justice Marshall's language in *Foster v. Neilson*[377] is to the same effect.

Indian Treaties

In the early cases of *Cherokee Nation v. Georgia*,[378] and *Worcester v. Georgia*,[379] the Court, speaking by Chief Justice Marshall, held, first, that the Cherokee Nation was not a sovereign state within the meaning of that clause of the Constitution which extends the judicial power of the United States to controversies "between a State or the citizens thereof and foreign states, citizens or subjects." Second, it held: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, had adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our

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[375] Clark v. Allen, 331 U.S. 503 (1947).

[376] 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass. 1855).

[377] 27 U.S. (2 Pet.) 253, 309 (1829). Baker v. Carr, 369 U.S. 186 (1962), qualifies this certainty considerably, and Goldwater v. Carter, 444 U.S. 996 (1979), prolongs the uncertainty. *See* L. Henkin, supra at 208-16; Restatement, Foreign Relations, § 326.

[378] 30 U.S. (5 Pet.) 1 (1831).

[379] 31 U.S. (6 Pet.) 515 (1832).

diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."[380]

Later cases established that the power to make treaties with the Indian tribes was coextensive with the power to make treaties with foreign nations,[381] that the States were incompetent to interfere with rights created by such treaties,[382] that as long as the United States recognized the national character of a tribe, its members were under the protection of treaties and of the laws of Congress and their property immune from taxation by a State,[383] that a stipulation in an Indian treaty that laws forbidding the introduction, of liquors into Indian territory was operative without legislation, and binding on the courts although the territory was within an organized county of a State,[384] and that an act of Congress contrary to a prior Indian treaty repealed it.[385]

Present Status of Indian Treaties.—Today, the subject of Indian treaties is a closed account in the constitutional law ledger. By a rider inserted in the Indian Appropriation Act of March 3, 1871, it was provided "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[386] Subsequently, the power of Congress to withdraw or modify tribal rights previously granted by treaty has been invariably upheld.[387] Statutes modifying rights of members in tribal lands,[388] granting a right of way for a railroad through lands ceded by treaty to an Indian tribe,[389] or extending the application of revenue laws respecting liquor and tobacco over Indian territories, despite an earlier treaty exemption,[390] have been sustained.

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[380] 31 U.S. at 558.

[381] Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 192 (1876); Dick v. United States, 208 U.S. 340, 355-56 (1908).

[382] The New York Indians, 72 U.S. (5 Wall.) 761 (1867).

[383] The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1867).

[384] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 196 (1876).

[385] The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). *See also* Ward v. Race Horse, 163 U.S. 504, 511 (1896); Thomas v. Gay, 169 U.S. 264, 270 (1898).

[386] 16 Stat. 566; Rev. Stat. § 2079, now contained in 25 U.S.C. § 71.

[387] Ward v. Race Horse, 163 U.S. 504 (1896).

[388] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

[389] Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890).

[390] The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871).

When, on the other hand, definite property rights have been conferred upon individual Native Americans, whether by treaty or under an act of Congress, they are protected by the Constitution to the same extent and in the same way as the private rights of other residents or citizens of the United States. Hence it was held that certain Indian allottees under an agreement according to which, in part consideration of their relinquishment of all their claim to tribal property, they were to receive in severalty allotments of lands which were to be nontaxable for a specified period, acquired vested rights of exemption from State taxation which were protected by the Fifth Amendment against abrogation by Congress.[391]

A regular staple of each Term's docket of the Court is one or two cases calling for an interpretation of the rights of Native Americans under some treaty arrangement vis-a-vis the Federal Government or the States. Thus, though no treaties have been negotiated for decades and none presumably ever will again, litigation concerning old treaties seemingly will go on.

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The capacity of the United States to enter into agreements with other nations is not exhausted in the treaty-making power. The Constitution recognizes a distinction between "treaties" and "agreements" or "compacts" but does not indicate what the difference is.[392] The differences, which once may have been clearer, have been seriously blurred in practice within recent decades. Once a stepchild in the family in which treaties were the preferred offspring, the executive agreement has surpassed in number and perhaps in international influence the treaty formally signed, submitted for ratification to the Senate, and proclaimed upon ratification.

During the first half-century of its independence, the United States was party to sixty treaties but to only twenty-seven published executive agreements. By the beginning of World War II, there had been concluded approximately 800 treaties and 1,200 executive agreements. In the period 1940-1989, the Nation entered

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[391] Choate v. Trapp, 224 U.S. 665, 677-78 (1912); Jones v. Meehan, 175 U.S. 1 (1899). *See also* Hodel v. Irving, 481 U.S. 704 (1987) (section of law providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates Fifth Amendment's taking clause by completely abrogating rights of intestacy and devise).

[392] *Compare* Article II, § 2, cl. 2, and Article VI, cl. 2, *with* Article I, 10, cls. 1 and 3. *Cf.* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-572 (1840). And note the discussion in Weinberger v. Rossi, 456 U.S. 25, 28-32 (1982).

into 759 treaties and into 13,016 published executive agreements. Cumulatively, in 1989, the United states was a party to 890 treaties and 5,117 executive agreements. To phrase it comparatively, in the first 50 years of its history, the United States concluded twice as many treaties as executive agreements. In the 50-year period from 1839 to 1889, a few more executive agreements than treaties were entered into. From 1889 to 1939, almost twice as many executive agreements as treaties were concluded. Between 1939 and 1993, executive agreements comprised more than 90% of the international agreements concluded.[393]

One must, of course, interpret the raw figures carefully. Only a very small minority of all the executive agreements entered into were based solely on the powers of the President as Commander-in-Chief and organ of foreign relations; the remainder were authorized in advance by Congress by statute or by treaty provisions ratified by the Senate.[394] Thus, consideration of the constitutional significance of executive agreements must begin with a differentiation among the kinds of agreements which are classed under this single heading.[395]

Executive Agreements by Authorization of Congress

Congress early authorized officers of the executive branch to enter into negotiations and to conclude agreements with foreign governments, authorizing the borrowing of money from foreign

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[393] CRS Study, xxxiv-xxxv, supra, 13-16. Not all such agreements, of course, are published, either because of national-security/secrecy considerations or because the subject matter is trivial. In a 1953 hearing exchange, Secretary of State Dulles estimated that about 10,000 executive agreements had been entered into in connection with the NATO treaty. "Every time we open a new privy, we have to have an executive agreement." Hearing on S.J. Res. 1 and S.J. Res. 43: Before a Subcommittee of the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953), 877.

[394] One authority concluded that of the executive agreements entered into between 1938 and 1957, only 5.9 percent were based exclusively on the President's constitutional authority. McLaughlin, *The Scope of the Treaty Power in the United States—II*, 43 MINN. L. REV. 651, 721 (1959). Another, somewhat overlapping study found that in the period 1946-1972, 88.3% of executive agreements were based at least in part on statutory authority; 6.2% were based on treaties, and 5.5% were based solely on executive authority. *International Agreements: An Analysis of Executive Regulations and Practices*, Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (Comm. Print) (1977), 22 (prepared by CRS).

[395] "[T]he distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 AMER. J. INT. L. 697 (Supp.) (1935). *See* E. Byrd, supra at 148-151. Many scholars have aggressively promoted the use of executive agreements, in contrast to treaties, as a means of enhancing the role of the United States, especially the role of the President, in the international system. *See* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (Pts. I & II)*, 54 YALE L. J. 181, 534 (1945).

countries[396] and appropriating money to pay off the government of Algiers to prevent pirate attacks on United States shipping.[397] Perhaps the first formal authorization in advance of an executive agreement was enactment of a statute that permitted the Postmaster General to "make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post offices."[398] Congress has also approved, usually by resolution, other executive agreements, such as the annexing of Texas and Hawaii and the acquisition of Samoa.[399] A prolific source of executive agreements has been the authorization of reciprocal arrangements between the United States and other countries for the securing of protection for patents, copyrights, and trademarks.[400]

Reciprocal Trade Agreements.—The most copious source of executive agreements has been legislation which provided authority for entering into reciprocal trade agreements with other nations.[401] Such agreements in the form of treaties providing for the reciprocal reduction of duties subject to implementation by Congress were frequently entered into,[402] but beginning with the Tariff Act of 1890,[403] Congress began to insert provisions authorizing the Executive to bargain over reciprocity with no necessity of subsequent legislative action. The authority was widened in successive acts.[404] Then, in the Reciprocal Trade Agreements Act of 1934,[405] Congress authorized the President to enter into agreements with other nations for reductions of tariffs and other impediments to international trade and to put the reductions into effect through proclamation.[406]

The Constitutionality of Trade Agreements.—In *Field v. Clark*,[407] legislation conferring authority on the President to conclude trade agreements was sustained against the objection that it

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[396] 1 Stat. 138 (1790). *See* E. Byrd, supra at 53 n.146.
[397] W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 41 (1941).
[398] Id. at 38-40. The statute was 1 Stat. 232, 239, 26 (1792).
[399] McClure at 62-70.
[400] Id. at 78-81; S. Crandall, supra at 127-31; *see* CRS Study, supra at 52-55.
[401] Id. at 121-27; W. McClure, supra at 83-92, 173-89.
[402] Id. at 8, 59-60.
[403] § 3, 26 Stat. 567, 612.
[404] Tariff Act of 1897, § 3, 30 Stat. 15, 203; Tariff Act of 1909, 36 Stat. 11, 82.
[405] 48 Stat. 943, § 350(a), 19 U.S.C. §§ 1351-1354.
[406] *See* the continued expansion of the authority. Trade Expansion Act of 1962, 76 Stat. 872, § 201, 19 U.S.C. § 1821; Trade Act of 1974, 88 Stat. 1982, as amended, 19 U.S.C. §§ 2111, 2115, 2131(b), 2435. Congress has, with respect to the authorization to the President to negotiate multilateral trade agreements under the auspices of GATT, constrained itself in considering implementing legislation, creating a "fast-track" procedure under which legislation is brought up under a tight timetable and without the possibility of amendment. 19 U.S.C. §§ 2191-2194.
[407] 143 U.S. 649 (1892).

attempted an unconstitutional delegation "of both legislative and treaty-making powers." The Court met the first objection with an extensive review of similar legislation from the inauguration of government under the Constitution. The second objection it met with a curt rejection: "What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The Court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President."[408] Although two Justices disagreed, the question has never been revived. However, in *B. Altman & Co. v. United States*,[409] decided twenty years later, a collateral question was passed upon. This was whether an act of Congress which gave the federal circuit courts of appeal jurisdiction of cases in which "the validity or construction of any treaty . . . was drawn in question" embraced a case involving a trade agreement which had been made under the sanction of the Tariff Act of 1897. Said the Court: "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court."[410]

The Lend-Lease Act.—The most extensive delegation of authority ever made by Congress to the President to enter into executive agreements occurred within the field of the cognate powers of the two departments, the field of foreign relations, and took place at a time when war appeared to be in the offing and was in fact only a few months away. The legislation referred to is the Lend-

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[408] 143 U.S. at 694. *See also* Dames & Moore v. Regan, 453 U.S. 654 (1981), in which the Court sustained a series of implementing actions by the President pursuant to executive agreements with Iran in order to settle the hostage crisis. The Court found that Congress had delegated to the President certain economic powers underlying the agreements and that his suspension of claims powers had been implicitly ratified over time by Congress' failure to set aside the asserted power. *Also see* Weinberger v. Rossi, 456 U.S. 25, 29-30 n.6 (1982).

[409] 224 U.S. 583 (1912).

[410] 224 U.S. at 601.

Lease Act of March 11, 1941,[411] by which the President was empowered for over two years—and subsequently for additional periods whenever he deemed it in the interest of the national defense to do so—to authorize "the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government," to manufacture in the government arsenals, factories, and shipyards, or "otherwise procure," to the extent that available funds made possible, "defense articles"—later amended to include foodstuffs and industrial products—and "sell, transfer title to, exchange, lease, lend, or otherwise dispose of," the same to the "government of any country whose defense the President deems vital to the defense of the United States," and on any terms that he "deems satisfactory." Under this authorization the United States entered into Mutual Aid Agreements whereby the Government furnished its allies in World War II forty billions of dollars worth of munitions of war and other supplies.

International Organizations.—Overlapping of the treaty-making power through congressional-executive cooperation in international agreements is also demonstrated by the use of resolutions approving the United States joining of international organizations[412] and participating in international conventions.[413]

Executive Agreements Authorized by Treaties

Arbitration Agreements.—In 1904 and 1905, Secretary of State John Hay negotiated a series of treaties providing for the general arbitration of international disputes. Article II of the treaty with Great Britain, for example, provided as follows: "In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute and the scope of the powers of the Arbitrators, and fixing the periods for the formation of the Arbitral Tribunal and the several stages of the procedure."[414] The Senate approved the British treaty by the constitutional majority having, however, first amended it by substituting the word "treaty" for "agreement." President Theodore Roosevelt, characterizing the "ratification" as equivalent to rejection, sent the treaties to repose in the archives. "As a matter of historical practice," Dr. McClure comments, "the *compromis* under which disputes have been arbitrated include both treaties and executive agree-

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[411] 55 Stat. 31.

[412] *E.g.*, 48 Stat. 1182 (1934), authorizing the President to accept membership for the United States in the International Labor Organization.

[413] *See* E. Corwin, supra at 216.

[414] W. McClure, supra at 13-14.

ments in goodly numbers,"[415] a statement supported by both Willoughby and Moore.[416]

Agreements Under the United Nations Charter.—Article 43 of the United Nations Charter provides: "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."[417] This time the Senate did not boggle over the word "agreement."

The United Nations Participation Act of December 20, 1945, implements these provisions as follows: "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements."[418]

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[415] Id. at 14.

[416] 1 W. Willoughby, supra at 543.

[417] A Decade of American Foreign Policy, S. Doc. No. 123, 81st Cong., 1st Sess., 126 (1950).

[418] Id. at 158.

Status of Forces Agreements.—Status of Forces Agreements, negotiated pursuant to authorizations contained in treaties between the United States and foreign nations in the territory of which American troops and their dependents are stationed, afford the United States a qualified privilege, which may be waived, of trying by court martial soldiers and their dependents charged with commission of offenses normally within the exclusive criminal jurisdiction of the foreign signatory power. When the United States, in conformity with the waiver clause in such an Agreement, consented to the trial in a Japanese court of a soldier charged with causing the death of a Japanese woman on a firing range in that country, the Court could "find no constitutional barrier" to such action.[419] However, at least five of the Supreme Court Justices were persuaded to reject at length the contention that such Agreements could sustain, as necessary and proper for their effectuation, implementing legislation subsequently found by the Court to contravene constitutional guaranties set forth in the Bill of Rights.[420]

Executive Agreements on the Sole Constitutional Authority of the President

Many types of executive agreements comprise the ordinary daily grist of the diplomatic mill. Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story's words, "the mere private rights of sovereignty."[421] Crandall lists scores of such agreements entered into with other governments by the authorization of the President.[422] Such agreements were ordinarily directed to particular and comparatively trivial disputes and by the settlement they effect of these cease *ipso facto* to be operative. Also, there are such time-honored diplomatic devices as the "protocol" which marks a stage in the negotiation of a treaty, and the *modus vivendi*, which is designed to serve as a temporary substitute for one. Executive agreements become of constitutional significance when they constitute a determinative factor of future foreign policy and hence of the country's destiny. In consequence particularly of our participation in World War II and our immersion in the conditions of international tension which prevailed both before and after the war, Presidents have entered into agreements

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[419] Wilson v. Girard, 354 U.S. 524 (1957).

[420] Reid v. Covert, 354 U.S. 1, 16-17 (1957) (plurality opinion); id. at 66 (Justice Harlan concurring).

[421] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1397 (1833).

[422] S. Crandall, supra, ch. 8; *see also* W. McClure, supra, chs. 1, 2.

with other governments some of which have approximated temporary alliances. It cannot be justly said, however, that in so doing they have acted without considerable support from precedent.

An early instance of executive treaty-making was the agreement by which President Monroe in 1817 brought about a delimitation of armaments on the Great Lakes. The arrangement was effected by an exchange of notes, which nearly a year later were laid before the Senate with a query as to whether it was within the President's power, or whether advice and consent of the Senate was required. The Senate approved the agreement by the required two-thirds vote, and it was forthwith proclaimed by the President without there having been a formal exchange of ratifications.[423] Of a kindred type, and owing much to the President's capacity as Commander-in-Chief, was a series of agreements entered into with Mexico between 1882 and 1896 according each country the right to pursue marauding Indians across the common border.[424] Commenting on such an agreement, the Court remarked, a bit uncertainly: "While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters [from foreign vessels] in the absence of positive legislation to that effect."[425] Justice Gray and three other Justices were of the opinion that such action by the President must rest upon express treaty or statute.[426]

Notable expansion of presidential power in this field first became manifest in the administration of President McKinley. At the outset of war with Spain, the President proclaimed that the United States would consider itself bound for the duration by the last three principles of the Declaration of Paris, a course which, as Professor Wright observes, "would doubtless go far toward establishing these three principles as international law obligatory upon the United States in future wars."[427] Hostilities with Spain were brought to an end in August, 1898, by an armistice the conditions of which largely determined the succeeding treaty of peace,[428] just

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[423] Id. at 49-50.

[424] Id. at 81-82.

[425] Tucker v. Alexandroff, 183 U.S. 424, 435 (1902).

[426] Id. at 467. The first of these conventions, signed July 29, 1882, had asserted its constitutionality in very positive terms. Q. Wright, supra at 239 (quoting Watts v. United States, 1 Wash. Terr. 288, 294 (1870)).

[427] Id. at 245.

[428] S. Crandall, supra at 103-04.

as did the Armistice of November 11, 1918, determine in great measure the conditions of the final peace with Germany in 1918. It was also President McKinley who in 1900, relying on his own sole authority as Commander-in-Chief, contributed a land force of 5,000 men and a naval force to cooperate with similar contingents from other Powers to rescue the legations in Peking from the Boxers; a year later, again without consulting either Congress or the Senate, he accepted for the United States the Boxer Indemnity Protocol between China and the intervening Powers.[429] Commenting on the Peking protocol, Willoughby quotes with approval the following remark: "This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character . . . purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot."[430]

It was during this period, too, that John Hay, as McKinley's Secretary of State, initiated his "Open Door" policy, by notes to Great Britain, Germany, and Russia, which were soon followed by similar notes to France, Italy and Japan. These in substance asked the recipients to declare formally that they would not seek to enlarge their respective interests in China at the expense of any of the others; and all responded favorably.[431] Then, in 1905, the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War Taft, then in the Far East, and Count Katsura, amounting to a secret treaty, by which the Roosevelt administration assented to the establishment by Japan of a military protectorate in Korea.[432] Three years later, Secretary of State Root and the Japanese ambassador at Washington entered into the Root-Takahira Agreement to uphold the *status quo* in the Pacific and maintain the principle of equal opportunity for commerce and industry in China.[433] Meantime, in 1907, by a "Gentleman's Agreement," the Mikado's government had agreed to curb the emigration of Japanese subjects to the

[429] Id. at 104.
[430] 1 W. Willoughby, supra at 539.
[431] W. McClure, supra at 98.
[432] Id. at 96-97.
[433] Id. at 98-99.

United States, thereby relieving the Washington government from the necessity of taking action that would have cost Japan loss of face. The final result of this series of executive agreements touching American relations in and with the Far East was the product of President Wilson's diplomacy. This was the Lansing-Ishii Agreement, embodied in an exchange of letters dated November 2, 1917, by which the United States recognized Japan's "special interests" in China, and Japan assented to the principle of the Open Door in that country.[434]

The Litvinov Agreement.—The executive agreement attained its modern development as an instrument of foreign policy under President Franklin D. Roosevelt, at times threatening to replace the treaty-making power, not formally but in effect, as a determinative element in the field of foreign policy. The President's first important utilization of the executive agreement device took the form of an exchange of notes on November 16, 1933, with Maxim M. Litvinov, the USSR Commissar for Foreign Affairs, whereby American recognition was extended to the Soviet Union and certain pledges made by each official.[435]

The Hull-Lothian Agreement.—With the fall of France in June, 1940, President Roosevelt entered into two executive agreements the total effect of which was to transform the role of the United States from one of strict neutrality toward the European war to one of semi-belligerency. The first agreement was with Canada and provided for the creation of a Permanent Joint Board on Defense which would "consider in the broad sense the defense of the north half of the Western Hemisphere."[436] Second, and more important than the first, was the Hull-Lothian Agreement of September 2, 1940, under which, in return for the lease for ninety-nine years of certain sites for naval bases in the British West Atlantic, the United States handed over to the British Government fifty over-age destroyers which had been reconditioned and recommissioned.[437] And on April 9, 1941, the State Department, in consideration of the just-completed German occupation of Denmark, entered into an executive agreement with the Danish minister in

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[434] Id. at 99-100.

[435] Id. at 140-44.

[436] Id. at 391.

[437] Id. at 391-93. Attorney General Jackson's defense of the presidential power to enter into the arrangement placed great reliance on the President's "inherent" powers under the Commander-in-Chief clause and as sole organ of foreign relations but ultimately found adequate statutory authority to take the steps deemed desirable. 39 Ops. Atty. Gen. 484 (1940).

Washington, whereby the United States acquired the right to occupy Greenland for purposes of defense.[438]

The Post-War Years.—Post-war diplomacy of the United States was greatly influenced by the executive agreements entered into at Cairo, Teheran, Yalta, and Potsdam.[439] For a period, the formal treaty—the signing of the United Nations Charter and the entry into the multinational defense pacts, like NATO, SEATO, CENTRO, and the like—reestablished itself, but soon the executive agreement, as an adjunct of treaty arrangement or solely through presidential initiative, again became the principal instrument of United States foreign policy, so that it became apparent in the 1960s that the Nation was committed in one way or another to assisting over half the countries of the world protect themselves.[440] Congressional disquietitude did not result in anything more substantial than passage of a "sense of the Senate" resolution expressing a desire that "national commitments" be made more solemnly in the future than in the past.[441]

The Domestic Obligation of Executive Agreements

When the President enters into an executive agreement, what sort of obligation is thereby imposed upon the United States? That international obligations of potentially serious consequences may be imposed is obvious and that such obligations may linger for long periods of time is equally obvious.[442] But the question is more directly pointed to the domestic obligations imposed by such agreements; are treaties and executive agreements interchangeable insofar as domestic effect is concerned?[443] Executive agreements entered into pursuant to congressional authorization and probably

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[438] 4 Dept. State Bull. 443 (1941).

[439] *See A Decade of American Foreign Policy, Basic Documents 1941-1949*, S. Doc. No. 123, 81st Congress, 1st Sess. (1950), pt. 1.

[440] For a congressional attempt to evaluate the extent of such commitments, *see* United States Security Agreements and Commitments Abroad: Hearings Before a Subcommittee of the Senate Foreign Relations Committee, 91st Congress, 1st Sess. (1969), 10 pts.; *see also* U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Foreign Relations Committee, 90th Congress, 1st Sess. (1967).

[441] The "National Commitments Resolution," S. Res. 85, 91st Congress, 1st Sess., passed by the Senate June 25, 1969. *See also* S. Rep. No. 797, 90th Congress, 1st Sess. (1967). *See* the discussion of these years in CRS study, supra at 169-202.

[442] In 1918, Secretary of State Lansing assured the Senate Foreign Relations Committee that the Lansing-Ishii Agreement had no binding force on the United States, that it was simply a declaration of American policy so long as the President and State Department might choose to continue it. 1 W. Willoughby, supra at 547. In fact, it took the Washington Conference of 1921, two formal treaties, and an exchange of notes to eradicate it, while the "Gentlemen's Agreement" was finally ended after 17 years only by an act of Congress. W. McClure, supra at 97, 100.

[443] *See* E. Byrd, supra at 151-57.

through treaty obligations present little doctrinal problem; those arrangements by which the President purports to bind the Nation solely on the basis of his constitutional powers, however, do raise serious questions.

Until recently, it was the view of most judges and scholars that this type of executive agreement did not become the "law of the land" pursuant to the supremacy clause because the treaty format was not adhered to.[444] A different view seemed to underlie the Supreme Court decision in *B. Altman & Co. v. United States*,[445] in which it was concluded that a jurisdictional statute reference to "treaty" encompassed an executive agreement. The idea flowered in *United States v. Belmont*,[446] where the Court, in an opinion by Justice Sutherland, following on his *Curtiss-Wright*[447] opinion, gave domestic effect to the Litvinov Agreement. At issue was whether a district court of the United States was correct in dismissing an action by the United States, as assignee of the Soviet Union, for certain moneys which had once been the property of a Russian metal corporation the assets of which had been appropriated by the Soviet government. The lower court had erred, the Court ruled. The President's act in recognizing the Soviet government, and the accompanying agreements, constituted, said the Justice, an international compact which the President, "as the sole organ" of international relations for the United States, was authorized to enter upon without consulting the Senate. Nor did state laws and policies make any difference in such a situation, for while the supremacy of treaties is established by the Constitution in express terms, yet the same rule holds "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States."[448]

In *United States v. Pink*,[449] decided five years later, the same course of reasoning was reiterated with added emphasis. The question here involved was whether the United States was entitled under the Executive Agreement of 1933 to recover the assets of the New York branch of a Russian insurance company. The company argued that the decrees of confiscation of the Soviet Government

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[444] *E.g.*, United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. Willoughby, supra at 589. The State Department held the same view. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 426 (1944).

[445] 224 U.S. 583 (1912).

[446] 301 U.S. 324 (1937).

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

[448] 299 U.S. at 330-32.

[449] 315 U.S. 203 (1942).

did not apply to its property in New York and could not consistently with the Constitution of the United States and that of New York. The Court, speaking by Justice Douglas, brushed these arguments aside. An official declaration of the Russian government itself settled the question of the extraterritorial operation of the Russian decree of nationalization and was binding on American courts. The power to remove such obstacles to full recognition as settlement of claims of our nationals was "a modest implied power of the President who is the 'sole organ of the Federal Government in the field of international relations'.... It was the judgment of the political department that full recognition of the Soviet Government required the settlement of outstanding problems including the claims of our nationals.... We would usurp the executive function if we held that the decision was not final and conclusive on the courts."

"It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.... But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.... Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum ... must give way before the superior Federal policy evidenced by a treaty or international compact or agreement...."

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.' ... It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government has diligently endeavored to establish...."

"No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitu-

tional sphere, seeks enforcement of its foreign policy in the courts."[450]

No Supreme Court decision subsequent to *Belmont* and *Pink* is available for consideration.[451] Whether the cases in fact turned on the particular fact that the executive agreement in question was incidental to the President's right to recognize a foreign state, despite the language which equates treaties and executive agreements for purposes of domestic law, cannot be known. Certainly, executive agreements entered into solely on the authority of the President's constitutional powers are not the law of the land because of the language of the Supremacy Clause, and the absence of any congressional participation denies them the political requirements they may well need to attain this position. Nonetheless, so long as *Belmont* and *Pink* remain unqualified, it must be considered that executive agreements do have a significant status in domestic law.[452] This status was another element in the movement for a constitutional amendment in the 1960s to limit the President's powers in this field, a movement that ultimately failed.[453]

THE EXECUTIVE ESTABLISHMENT

Office

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."[454]

Ambassadors and Other Public Ministers.—The term "ambassadors and other public ministers," comprehends "all officers having diplomatic functions, whatever their title or designation."[455]

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[450] 315 U.S. at 229-34. Chief Justice Stone and Justice Roberts dissented.

[451] The decision in Dames & Moore v. Regan, 453 U.S. 654 (1981), is rich in learning on many topics involving executive agreements, but the Court's conclusion that Congress had either authorized various presidential actions or had long acquiesced in others leaves the case standing for little on our particular issue of this section.

[452] *But see* United States v. Guy W. Capps, Inc., 204 F. 2d 655 (4th Cir. 1953), wherein Chief Judge Parker held that an executive agreement entered into by the President without congressional authorization or ratification could not displace domestic law inconsistent with such agreement. The Supreme Court affirmed on other grounds and declined to consider this matter. 348 U.S. 296 (1955).

[453] There were numerous variations in language, but typical was § 3 of S.J. Res. 1, as reported by the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953), which provided: "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article." The limitation relevant on this point was in § 2, which provided: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

[454] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

[455] 7 Ops. Atty. Gen. 168 (1855).

It was originally assumed that such offices were established by the Constitution itself, by reference to the Law of Nations, with the consequence that appointments might be made to them whenever the appointing authority—the President and Senate—deemed desirable.[456] During the first sixty-five years of the Government, Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation, even of ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term, the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents.

In 1814, however, when President Madison appointed, during a recess of the Senate, the Commissioners who negotiated the Treaty of Ghent, the theory on which the above legislation was based was drawn into question. Inasmuch, it was argued, as these offices had never been established by law, no vacancy existed to which the President could constitutionally make a recess appointment. To this argument, it was answered that the Constitution recognizes "two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first descriptions organize the Government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive."[457]

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[456] It was so assumed by Senator William Maclay. THE JOURNAL OF WILLIAM MACLAY 109-10 (E. Maclay ed., 1890).

[457] 26 ANNALS OF CONGRESS 694-722 (1814) (quotation appearing at 699); 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350-353 (1865).

By the opening section of the act of March 1, 1855, it was provided that "from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary," with a specified annual compensation for each, "to the following countries. . . ." In the body of the act was also this provision: "The President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the Government at the time of their appointment. . . ."[458] The question of the interpretation of the act having been referred to Attorney General Cushing, he ruled that its total effect, aside from its salary provisions, was recommendatory only. It was "to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more."[459]

This line of reasoning is only partially descriptive of the facts. The Foreign Service Act of 1946,[460] pertaining to the organization of the foreign service, diplomatic as well as consular, contains detailed provisions as to grades, salaries, promotions, and, in part, as to duties. Under the terms thereof the President, by and with the advice and consent of the Senate, appoints ambassadors, ministers, foreign service officers, and consuls, but in practice the vast proportion of the selections are made in conformance to recommendations of a Board of the Foreign Service.

Presidential Diplomatic Agents.—What the President may have lost in consequence of the intervention of Congress in this field of diplomatic appointments, he has made good through his early conceded right to employ, in the discharge of his diplomatic function, so-called "special," "personal," or "secret" agents without consulting the Senate. When President Jackson's right to resort to this practice was challenged in the Senate in 1831, it was defended by Edward Livingston, Senator from Louisiana, to such good purpose that Jackson made him Secretary of State. "The practice of appointing secret agents," said Livingston, "is coeval with our existence as a nation, and goes beyond our acknowledgement as such by other powers. All those great men who have figured in the history of our diplomacy, began their career, and performed some of their most important services in the capacity of secret agents, with

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[458] 10 Stat. 619, 623.

[459] 7 Ops. Atty. Gen. 186, 220 (1855).

[460] 60 Stat. 999, superseded by the Foreign Service Act of 1980, P. L. 96-465, 94 Stat. 2071, 22 U.S.C. § 3901 *et seq*.

full powers. Franklin, Adams, Lee, were only commissioners; and in negotiating a treaty with the Emperor of Morocco, the selection of the secret agent was left to the Ministers appointed to make the treaty; and, accordingly, in the year 1785, Mr. Adams and Mr. Jefferson appointed Thomas Barclay, who went to Morocco and made a treaty, which was ratified by the Ministers at Paris."

"These instances show that, even prior to the establishment of the Federal Government, secret plenipotentiaries were known, as well in the practice of our own country as in the general law of nations: and that these secret agents were not on a level with messengers, letter carriers, or spies, to whom it has been found necessary in argument to assimilate them. On the 30th March, 1795, in the recess of the Senate, by letters patent under the great broad seal of the United States, and the signature of their President, (that President being George Washington,) countersigned by the Secretary of State, David Humphreys was appointed commissioner plenipotentiary for negotiating a treaty of peace with Algiers. By instructions from the President, he was afterwards authorized to employ Joseph Donaldson as agent in that business. In May, of the same year, he did appoint Donaldson, who went to Algiers, and in September of the same year concluded a treaty with the Dey and Divan, which was confirmed by Humphreys, at Lisbon, on the 28th November in the same year, and afterwards ratified by the Senate, and an act passed both Houses on 6th May, 1796, appropriating a large sum, twenty-five thousand dollars annually, for carrying it into effect."[461]

The precedent afforded by Humphreys' appointment without reference to the Senate has since been multiplied many times,[462] as witness the mission of A. Dudley Mann to Hanover and other German states in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, of J. H. Blount to Hawaii in 1893. The last named case is perhaps the most extreme of all. Blount, who was appointed while the Senate was in session but without its advice and consent, was given "paramount authority" over the American resident minister at Hawaii and was further empowered to employ the military and naval forces of the United States, if necessary to protect American lives and interests. His mission raised a vigorous storm of protest in the Senate, but the majority report of the committee which was created to investigate the constitutional question vindicated the President in the following terms: "A question has been made

[461] 11 T. BENTON, ABRIDGEMENT OF THE DEBATES OF CONGRESS 221 (1860).
[462] S. Misc. Doc, 109, 50th Congress, 1st Sess. (1888), 104.

as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions, without dissent on the part of Congress or the people of the United States. . . . These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, ..."[463] The continued vitality of the practice is attested by such names as Colonel House, the late Norman H. Davis, who filled the role of "ambassador at large" for a succession of administrations of both parties, Professor Philip Jessup, Mr. Averell Harriman, and other "ambassadors at large" of the Truman Administration, and Professor Henry Kissinger of the Nixon Administration.

How is the practice to be squared with the express words of the Constitution? Apparently, by stressing the fact that such appointments or designations are ordinarily merely temporary and for special tasks, and hence do not fulfill the tests of "office" in the strict sense. In the same way the not infrequent practice of Presidents of appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments may be regularized, notwithstanding the provision of Article I, § 6, clause 2 of the Constitution, which provides that "no Senator or Representative shall . . . be appointed to any civil Office under the Authority of the United States, which shall have been created," during his term; and no officer of the United States, "shall be a Member of either House during his Continuance in Office."[464] The Treaty of Peace with Spain, the treaty to settle the Bering Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotated by commissions containing Senators and Representatives.

Appointments and Congressional Regulation of Offices

That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is *by law* and takes place by virtue of Congress' power to pass all laws necessary and proper

[463] S. Rep. No. 227, 53d Congress, 2d Sess. (1894), 25. At the outset of our entrance into World War I President Wilson dispatched a mission to "Petrograd," as it was then called, without nominating the Members of it to the Senate. It was headed by Mr. Elihu Root, with "the rank of ambassador," while some of his associates bore "the rank of envoy extraordinary."

[464] *See* 2 G. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 48-51 (1903).

for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers.[465] As an incident to the establishment of an office, Congress has also the power to determine the qualifications of the officer and in so doing necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representative of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by others.[466] Indeed, it has contrived at times to designate a definite eligibility, thereby virtually usurping the appointing power.[467] De-

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[465] However, "Congress' power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" Buckley v. Valeo, 424 U.S. 1, 138-139 (1976) (quoted in Freytag v. Commissioner, 501 U.S. 868, 883 (1991)). The designation or appointment of military judges, who are "officers of the United States," does not violate the appointments clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review was impermissible and their actions were not salvageable under the *de facto* officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[466] *See* Myers v. United States, 272 U.S. 52, 264-274 (1926) (Justice Brandeis dissenting). Chief Justice Taft in the opinion of the Court in *Myers* readily recognized the legislative power of Congress to establish offices, determine their functions and jurisdiction, fix the terms of office, and prescribe reasonable and relevant qualifications and rules of eligibility of appointees, always provided "that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." Id. at 128-29. For reiteration of Congress' general powers, *see* Buckley v. Valeo, 424 U.S. 1, 134-35 (1976); Morrison v. Olson, 487 U.S. 654, 673-77 (1988). *And see* United States v. Ferriera, 54 U.S. (13 How.) 40, 51 (1851).

[467] *See* data in E. Corwin, supra at 363-65. Congress has repeatedly designated individuals, sometimes by name, more frequently by reference to a particular office, for the performance of specified acts or for posts of a nongovernmental character; e.g., to paint a picture (Johnathan Trumbull), to lay out a town, to act as Regents of Smithsonian Institution, to be managers of Howard Institute, to select a site for a post office or a prison, to restore the manuscript of the Declaration of Independence, to erect a monument at Yorktown, to erect a statue of Hamilton, and so on and so forth. Note, *Power of Appointment to Public Office under the Federal Constitution*, 42 HARV. L. REV. 426, 430-31 (1929). In his message of April 13, 1822, President Monroe stated the thesis that, "as a general principle, . . . Congress have no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow-citizens." 2 J. Richardson supra at 698, 701. The statement is ambiguous, but its apparent intention is to claim for the President unrestricted power in determining who are proper persons to fill newly created offices. *See* the distinction drawn in Myers v. United

spite the record of the past, however, it is not at all clear that Congress may cabin the President's discretion, at least for offices that he considers important, by, for example, requiring him to choose from lists compiled by others. To be sure, there are examples, but they are not free of ambiguity.[468]

But when Congress contrived actually to participate in the appointment and administrative process and provided for selection of the members of the Federal Election Commission, two by the President, two by the Senate, and two by the House, with confirmation of all six members vested in both the House and the Senate, the Court unanimously held the scheme to violate the appointments clause and the principle of separation of powers. The term "officers of the United States" is a substantive one requiring that any appointee exercising significant authority pursuant to the laws of the United States be appointed in the manner prescribed by the appointments clause.[469] The Court did hold, however, that the Commission so appointed and confirmed could be delegated the powers Congress itself could exercise, that is, those investigative and informative functions that congressional committees carry out were properly vested in this body.

Congress is authorized by the appointments clause to vest the appointment of "inferior Officers," at its discretion, "in the President alone, in the Courts of Law, or in the Heads of Departments." Principal questions arising under this portion of the clause are "Who are 'inferior officers,'" and "what are the 'Departments'"

States, 272 U.S. 52, 128-29 (1926), quoted supra. And note that in Public Citizen v. Department of Justice, 491 U.S. 440, 482-89 (1989) (concurring), Justice Kennedy suggested the President has *sole* and unconfined discretion in appointing).

[468] The Sentencing Commission, upheld in Mistretta v. United States, 488 U.S. 361 (1989), numbered among its members three federal judges; the President was to select them "after considering a list of six judges recommended to the President by the Judicial Conference of the United States." Id. at 397 (quoting 28 U.S.C. § 991(a)). The Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. Bowsher v. Synar, 478 U.S. 714, 727 (1986) (citing 31 U.S.C. § 703(a)(2)). In Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 268-269 (1991), the Court carefully distinguished these examples from the particular situation before it that it condemned, *but see* id. at 288 (Justice White dissenting), and in any event it never actually passed on the list devices in Mistretta and Synar. The fault in Airports Authority was not the validity of lists generally, the Court condemning the device there as giving Congress control of the process, in violation of Buckley v. Valeo.

[469] Buckley v. Valeo, 424 U.S. 1, 109-143 (1976). The Court took pains to observe that the clause was violated not only by the appointing process but by the confirming process, inclusion of the House of Representatives, as well. Id. at 137. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).

whose heads may be given appointing power?[470] "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]."[471] "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."[472] The Court, in *Edmond v. United States*,[473] reviewed its pronouncements regarding the definition of "inferior officer" and, disregarding some implications of its prior decisions, seemingly settled, unanimously, on a pragmatic characterization. Thus, the importance of the responsibilities assigned an officer, the fact that duties were limited, that jurisdiction was narrow, and that tenure was limited, are only factors but are not definitive.[474] "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution

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[470] Concurrently, of course, although it may seem odd, the question of what is a "Court[] of Law" for purposes of the appointments clause is unsettled. *See* Freytag v. CIR, 501 U.S. 868 (1991) (Court divides 5-to-4 whether an Article I court is a court of law under the clause).

[471] Freytag v. Commissioner, 501 U.S.868, 881 (1991) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

[472] United States v. Germaine, 99 U.S. 508, 509-510 (1879) (quoted in Buckley v. Valeo, 424 U.S. 1, 125 (1976)). The constitutional definition of an "inferior" officer is wondrously imprecise. *See* Freytag v. Commissioner, 501 U.S. 868, 880-882 (1991); Morrison v. Olson, 487 U.S. 654, 670-73 (1988). *And see* United States v. Eaton, 169 U.S. 331 (1898). There is another category, of course, employees, but these are lesser functionaries subordinate to officers of the United States. Ordinarily, the term "employee" denotes one who stands in a contractual relationship to her employer, but here it signifies all subordinate officials of the Federal Government receiving their appointments at the hands of officials who are not specifically recognized by the Constitution as capable of being vested by Congress with the appointing power. Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 352-53 (1931); Burnap v. United States, 252 U.S. 512, 516-17 (1920); Germaine, 99 U.S. at 511-12.

[473] 520 U.S. 651 (1997).

[474] 520 U.S. at 661-62.

might have used the phrase 'lesser officer.' Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[475]

Thus, officers who are not "inferior Officers" are principal officers who must be appointed by the President with the advice and consent of the Senate in order to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval.[476] Further, the Framers intended to limit the "diffusion" of the appointing power with respect to inferior officers in order to promote accountability. "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. . . . The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the executive Branch is a department would multiply the number of actors eligible to appoint."[477]

Yet, even agreed on the principle, the *Freytag* Court split 5-to-4 on the reason for the permissibility of the Chief Judge of the Tax Court to appoint special trial judges. The entire Court agreed that the Tax Court had to be either a "department" or a "court of law" in order for the authority to be exercised by the Chief Judge, and it unanimously agreed that the statutory provision was constitu-

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[475] 520 U.S. at 662-63. The case concerned whether the Secretary of Transportation, a presidential appointee with the advice and consent of the Senate, could appoint judges of the Coast Guard Court of Military Appeals; necessarily, the judges had to be "inferior" officers. In related cases, the Court held that designation or appointment of military judges, who are "officers of the United States," does not violate the appointments clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review by the same method was impermissible; they had either to be appointed by an officer who could exercise appointment-clause authority or by the President, and their actions were not salvageable under the de facto officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[476] Freytag v. Commissioner, 501 U.S. 868, 919 (1991) (Justice Scalia concurring).

[477] Freytag v. Commissioner, 501 U.S. 868, 884-85 (1991).

tional. But there agreement ended. The majority was of the opinion that the Tax Court could not be a department, but it was unclear what those Justices thought a department comprehended. Seemingly, it started from the premise that departments were those parts of the executive establishment called departments and headed by a cabinet officer.[478] Yet, the Court continued immediately to say: "Confining the term 'Heads of Departments' in the Appointments Clause to executive divisions *like* the Cabinet-level departments constrains the distribution of the appointment power just as the [IRS] Commissioner's interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. The heads are subject to the exercise of political oversight and share the President's accountability to the people".[479] The use of the word "like" in this passage suggests that it is not just Cabinet-headed departments that are departments but also entities that are similar to them in some way, and its reservation of the validity of investing appointing power in the heads of some unnamed entities, as well as its observation that the term "Heads of Departments" does not embrace "inferior commissioners and bureau officers" all contribute to an amorphous conception of the term.[480] In the end, the Court sustained the challenged provision by holding that the Tax Court as an Article I court was a "Court of Law" within the meaning of the appointments clause.[481] The other four Justices concluded that the Tax Court, as an independent establishment in the executive branch, was a "department" for purposes of the appointments clause. In their view, in the context of text and practice, the term meant, not Cabinet-level departments, but "all independent executive establishments," so that "'Heads of Departments' includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch."[482]

The *Freytag* decision must be considered a tentative rather than a settled construction.[483] The close division of the Court

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[478] 501 U.S. at 886 (citing Germaine and Burnap, the opinion clause, Article II, §2, and the 25th Amendment, which, in its § 4, referred to "executive departments" in a manner that reached only cabinet-level entities). *But compare* id. at 915-22 (Justice Scalia concurring).

[479] 501U.S. at 886 (emphasis supplied).

[480] 501 U.S. at 886-88. *Compare* id. at 915-19 (Justice Scalia concurring).

[481] 501 U.S. at 888-92. This holding was vigorously controverted by the other four Justices. Id. at 901-14 (Justice Scalia concurring).

[482] 501 U.S. at 918, 919 (Justice Scalia concurring).

[483] As the text suggested, Freytag seemed to be a tentative decision, and Edmond v. United States, 520 U.S. 651 (1997), a unanimous decision written by Justice Scalia, whose concurring opinion in Freytag challenged the Court's analysis, may easily be read as retreating considerably from it.

means that new Court appointments, some of which have already occurred, could change the construction.

As noted, the appointments clause also authorizes Congress to vest the power in "Courts of Law." Must the power to appoint when lodged in courts be limited to those officers acting in the judicial branch, as the Court first suggested?[484] No, the Court has said more recently. In *Ex parte Siebold*,[485] the Court sustained Congress' decision to vest in courts the appointment of federal election supervisors, charged with preventing fraud and rights violations in congressional elections in the South, and disavowed any thought that interbranch appointments could not be authorized under the clause. A special judicial division was authorized to appoint independent counsels to investigate and, if necessary, prosecute charges of corruption in the executive, and the Court, in near unanimity, sustained the law, denying that interbranch appointments, in and of themselves, and leaving aside more precise separation-of-powers claims, were improper under the clause.[486]

Congressional Regulation of Conduct in Office.—Congress has very broad powers in regulating the conduct in office of officers and employees of the United States, and this authority extends to regulation of political activities. By an act passed in 1876, it prohibited "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, . . . from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes."[487] The validity of this measure having been sustained,[488] the substance of it, with some elaborations, was incorporated in the Civil Service Act of 1883.[489] The Lloyd-La Follette Act in 1912 began the process of protecting civil servants from unwarranted or abusive removal by codifying "just cause" standards previously embodied in presidential orders, defin-

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[484] In re Hennen, 38 U.S. (13 Pet.) 230 (1839). The suggestion was that inferior officers are intended to be subordinate to those in whom their appointment is vested. Id. at 257-58; United States v. Germaine, 99 U.S. 508, 509 (1879).

[485] 100 U.S. 371 (1880).

[486] Morrison v. Olson, 487 U.S. 654, 673-77 (1988). *See also* Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987) (appointment of private attorneys to act as prosecutors for judicial contempt judgments); Freytag v. Commissioner, 501 U.S. 868, 888-92 (1991) (appointment of special judges by Chief Judge of Tax Court).

[487] 19 Stat. 143, 169 (1876).

[488] Ex parte Curtis, 106 U.S. 371 (1882). Chief Justice Waite's opinion extensively reviews early congressional legislation regulative of conduct in office. Id. at 372-73.

[489] 22 Stat. 403 (the Pendeleton Act). On this law and subsequent enactments that created the civil service as a professional cadre of bureaucrats insulated from politics, *see Developments in the Law - Public Employment*, 97 HARV. L. REV. 1611, 1619-1676 (1984).

ing "just causes" as those that would promote the "efficiency of the service."[490] Substantial changes in the civil service system were instituted by the Civil Service Reform Act of 1978, which abolished the Civil Service Commission, and divided its responsibilities, its management and administrative duties to the Office of Personnel Management and its review and protective functions to the Merit Systems Protection Board.[491]

By the Hatch Act,[492] all persons in the executive branch of the Government, or any department or agency thereof, except the President and Vice President and certain "policy determining" officers, were forbidden to "take an active part in political management or political campaigns," although they were still permitted to "express their opinions on all political subjects and candidates." In *United Public Workers v. Mitchell*,[493] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments.

The Loyalty Issue.—By section 9A of the Hatch Act of 1939, federal employees were disqualified from accepting or holding any position in the Government or the District of Columbia if they belonged to an organization that they knew advocated the overthrow of our constitutional form of government.[494] The 79th Congress followed up this provision with a rider to its appropriation acts forbidding the use of any appropriated funds to pay the salary of any person who advocated, or belonged to an organization which advocated the overthrow of the Government by force, or of any person who engaged in a strike or who belonged to an organization which

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[490] Act of Aug. 24, 1912, § 6, 37 Stat. 539, 555, codified as amended at 5 U.S.C. § 7513. The protection was circumscribed by the limited enforcement mechanisms under the Civil Service Commission, which were gradually strengthened. *See Developments*, supra, 97 HARV. L. REV., 1630-31.

[491] 92 Stat. 1111 (codified in scattered sections of titles 5, 10, 15, 28, 31, 38, 39, and 42 U.S.C.). For the long development, *see* Developments, supra, 97 HARV. L. REV., 1632-1650.

[492] 54 Stat. 767 (1940), then 5 U.S.C. § 7324(a). By P. L. 103-94, §§ 2(a), 12, 107 Stat. 1001, 1011, to be codified at 5 U.S.C. §§ 7321-7325, Congress liberalized the restrictions of the Act, allowing employees to take an active part in political management or in political campaigns, subject to specific exceptions. The 1940 law, § 12(a), 54 Stat. 767-768, also applied the same broad ban to employees of federally funded state and local agencies, but this provision was amended in 1974 to bar state and local government employees only from running for public office in partisan elections. Act of Oct. 15, 1974, P. L. 93-443, § 401(a), 88 Stat. 1290, 5 U.S.C. § 1502.

[493] 330 U.S. 75 (1947). *See also* Civil Serv. Corp. v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court's expanding jurisprudence of First Amendment speech, but the Act was again sustained. A "little Hatch Act" of a State, applying to its employees, was sustained in Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[494] 53 Stat. 1147, 5 U.S.C. § 7311.

asserted the right to strike against the Government.[495] These provisos ultimately wound up in permanent law requiring all government employees to take oaths disclaiming either disloyalty or strikes as a device for dealing with the Government as an employer.[496] Along with the loyalty-security programs initiated by President Truman[497] and carried forward by President Eisenhower,[498] these measures reflected the Cold War era and the fear of subversion and espionage following the disclosures of several such instances here and abroad.[499]

Financial Disclosure and Limitations.—By the Ethics in Government Act of 1978,[500] Congress required high-level federal personnel to make detailed, annual disclosures of their personal financial affairs.[501] The aims of the legislation are to enhance public confidence in government, to demonstrate the high level of integrity of government employees, to deter and detect conflicts of interest, to discourage individuals with questionable sources of income from entering government, and to facilitate public appraisal of government employees' performance in light of their personal financial interests.[502] Despite the assertions of some that employee privacy interests are needlessly invaded by the breadth of disclosures, to date judicial challenges have been unsuccessful, absent even a Supreme Court review.[503] One provision, however, generated much opposition, and was invalidated. Under § 501(b) of the Ethics in

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[495] *See* Report of the Special Committee on The Federal Loyalty-Security Program, The Association of the Bar of the City of New York (New York: 1956), 60.

[496] 5 U.S.C. § 3333. The loyalty disclaimer oath was declared unconstitutional in Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969), and the Government elected not to appeal. The strike disclaimer oath was voided in National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969); after noting probable jurisdiction, 397 U.S. 1062 (1970), the Court dismissed the appeal on the Government's motion. 400 U.S. 801 (1970). The actual prohibition on strikes, however, has been sustained. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971), aff'd per curiam, 404 U.S. 802 (1971).

[497] E.O. 9835, 12 Fed. Reg. 1935 (1947).

[498] E.O. 10450, 18 Fed. Reg. 2489 (1953).

[499] *See generally*, Report of the Special Committee on The Federal Loyalty-Security Program, The Association of the Bar of the City of New York (New York: 1956).

[500] P. L. 95-521, tits. I-III, 92 Stat. 1824-1861. The Act was originally codified in three different titles, 2, 5, and 28, corresponding to legislative, executive, and judicial branch personel, but by P. L. 101-194, title II, 103 Stat. 1725 (1989), one comprehensive title, as amended, applying to all covered federal personnel was enacted. 5 U.S.C.App. §§ 101-111.

[501] *See* Developments, supra, 97 HARV. L. REV., 1660-1669.

[502] Id. at 1661 (citing S. Rep. 170, 95th Cong., 2d sess. (1978), 21-22.

[503] Id. at 1664-69. The Ethics Act also expanded restrictions on postemployment by imposing bans on employment, varying from a brief period to an out-and-out lifetime ban in certain cases. Id. at 1669-76. The 1989 revision enlarged and expanded on these provisions. 103 Stat. 1716-1724, amending 18 U.S.C. § 207.

Government Act,[504] there is imposed a ban on Members of Congress or any officer or employee of the Government, regardless of salary level, taking any "honorarium," which is defined as "a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) . . . ."[505] The statute, even interpreted in accordance with the standards applicable to speech restrictions on government employees, has been held to be overbroad and not sufficiently tailored to serve the governmental interest to be promoted by it.[506]

Legislation Increasing Duties of an Officer.—Finally, Congress may "increase the powers and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." Such legislation does not constitute an attempt by Congress to seize the appointing power.[507]

Stages of Appointment Process

Nomination.—The Constitution appears to distinguish three stages in appointments by the President with the advice and consent of the Senate. The first is the "nomination" of the candidate by the President alone; the second is the assent of the Senate to the candidate's "appointment;" and the third is the final appointment and commissioning of the appointee, by the President.[508]

Senate Approval.—The fact that the power of nomination belongs to the President alone prevents the Senate from attaching conditions to its approval of an appointment, such as it may do to its approval of a treaty. In the words of an early opinion of the Attorney General: "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and

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[504] 92 Stat. 1864 (1978), as amended, 103 Stat. 1760 (1989), as amended, 5 U.S.C.App. §§ 501-505.

[505] 5 U.S.C.App. § 505(3).

[506] NTEU v. United States, 990 F.2d 1271 (D.C. Cir.), *pet. for reh. en banc den.*, 3 F.3d 1555 (D.C. Cir. 1993). The Supreme Court held this provision unconstitutional in United States v. NTEU, 513 U.S. 454 (1995).

[507] Shoemaker v. United States, 147 U.S. 282, 301 (1893). The Court noted that the additional duties at issue were "germane" to the offices. Id.

[508] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 155-156 (1803) (Chief Justice Marshall). Marshall's statement that the appointment "is the act of the President," conflicts with the more generally held and sensible view that when an appointment is made with its consent, the Senate shares the appointing power. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1525 (1833); In re Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration."[509] This view is borne out by early opinion,[510] as well as by the record of practice under the Constitution.

When Senate Consent Is Complete.—Early in January, 1931, the Senate requested President Hoover to return its resolution notifying him that it advised and consented to certain nominations to the Federal Power Commission. In support of its action the Senate invoked a long-standing rule permitting a motion to reconsider a resolution confirming a nomination within "the next two days of actual executive session of the Senate" and the recall of the notification to the President of the confirmation. The nominees involved having meantime taken the oath of office and entered upon the discharge of their duties, the President responded with a refusal, saying: "I cannot admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." The Senate thereupon voted to reconsider the nominations in question, again approving two of the nominees, but rejecting the third, against whom it instructed the District Attorney of the District of Columbia to institute *quo warranto* proceedings in the Supreme Court of the District. In *United States v. Smith*,[511] the Supreme Court overruled the proceedings on the ground that the Senate had never before attempted to apply its rule in the case of an appointee who had already been installed in office on the faith of the Senate's initial consent and notification to the President. In 1939, President Roosevelt rejected a similar demand by the Senate, an action that went unchallenged.[512]

The Removal Power

The Myers Case.—Save for the provision which it makes for a power of impeachment of "civil officers of the United States," the Constitution contains no reference to a power to remove from office, and until its decision in *Myers v. United States*,[513] on October 25, 1926, the Supreme Court had contrived to sidestep every occasion for a decisive pronouncement regarding the removal power, its extent, and location. The point immediately at issue in the *Myers* case was the effectiveness of an order of the Postmaster General,

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[509] 3 Ops. Atty. Gen. 188 (1837).

[510] 3 J. Story, supra at 1525-26; 5 WORKS OF THOMAS JEFFERSON 161-62 (P. Ford ed., 1904); 9 WRITINGS OF JAMES MADISON 111-13 (G. Hunt ed., 1910).

[511] 286 U.S. 6 (1932).

[512] E. Corwin, supra at 77.

[513] 272 U.S. 52 (1926).

acting by direction of the President, to remove from office a first-class postmaster, in the face of the following provision of an act of Congress passed in 1876: "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." [514]

A divided Court, speaking through Chief Justice Taft, held the order of removal valid and the statutory provision just quoted void. The Chief Justice's main reliance was on the so-called "decision of 1789," the reference being to Congress' course that year in inserting in the act establishing the Department of State a proviso which was meant to imply recognition that the Secretary would be removable by the President at will. The proviso was especially urged by Madison, who invoked in support of it the opening words of Article II and the President's duty to "take care that the laws be faithfully executed." Succeeding passages of the Chief Justice's opinion erected on this basis a highly selective account of doctrine and practice regarding the removal power down to the Civil War, which was held to yield the following results: "That article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed." [515]

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[514] 19 Stat. 78, 80.
[515] 272 U.S. at 163-64.

The holding in the *Myers* case boils down to the proposition that the Constitution endows the President with an illimitable power to remove all officers in whose appointment he has participated with the exception of judges of the United States. The motivation of the holding was not, it may be assumed, any ambition on the Chief Justice's part to set history aright—or awry.[516] Rather, it was the concern that he voiced in the following passage in his opinion: "There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him."[517] Thus spoke the former President Taft, and the result of his prepossession was a rule which, as was immediately pointed out, exposed the so-called "independent agencies," the Interstate Commerce Commission, the Federal Trade Commission, and the like, to presidential domination. Unfortunately, the Chief Justice,

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[516] The reticence of the Constitution respecting removal left room for four possibilities: first, the one suggested by the common law doctrine of "estate in office," from which the conclusion followed that the impeachment power was the only power of removal intended by the Constitution; second, that the power of removal was an incident of the power of appointment and hence belonged, at any rate in the absence of legal or other provision to the contrary, to the appointing authority; third, that Congress could, by virtue of its power "to make all laws which shall be necessary and proper," etc., determine the location of the removal power; fourth, that the President by virtue of his "executive power" and his duty "to take care that the laws be faithfully executed," possesses the power of removal over all officers of the United States except judges. In the course of the debate on the act to establish a Department of Foreign Affairs (later changed to Department of State) all of these views were put forward, with the final result that a clause was incorporated in the measure that implied, as pointed out above, that the head of the department would be removable by the President at his discretion. Contemporaneously, and indeed until after the Civil War, this action by Congress, in other words "the decision of 1789," was interpreted as establishing "a practical construction of the Constitution" with respect to executive officers appointed without stated terms. However, in the dominant opinion of those best authorized to speak on the subject, the "correct interpretation" of the Constitution was that the power of removal was always an incident of the power of appointment, and that therefore in the case of officers appointed by the President with the advice and consent of the Senate the removal power was exercisable by the President only with the advice and consent of the Senate. For an extensive review of the issue at the time of Myers, *see* Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467 (1938).

[517] 272 U.S. at 134. Note the parallelism of the arguments from separation-of-powers and the President's ability to enforce the laws in the decision rendered on Congress' effort to obtain a role in the actual appointment of executive officers in Buckley v. Valeo, 424 U.S. 1, 109-43 (1976), and in many of the subsequent separation-of-powers decisions.

while professing to follow Madison's leadership, had omitted to weigh properly the very important observation which the latter had made at the time regarding the office of Comptroller of the Treasury. "The Committee," said Madison, "has gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office. I think it is a point worthy of consideration, and shall, therefore, submit a few observations upon it. It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are of a judiciary quality as well as the executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government."[518] In *Humphrey's Executor v. United States*,[519] the Court seized upon "the nature of the office" concept and applied it as a corrective to the overbroad *Myers* holding.

The Humphrey Case.—The material element of *Humphrey's Executor* was that Humphrey, a member of the Federal Trade Commission, was on October 7, 1933, notified by President Roosevelt that he was "removed" from office, the reason being their divergent views of public policy. In due course, Humphrey sued for salary. Distinguishing the *Myers* case, Justice Sutherland, speaking for the unanimous Court, said: "A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an office is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is. . . . It goes no farther; much less does it include an officer who occupies no place in the executive department and

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[518] ANNALS OF CONGRESS 611-612 (1789).

[519] 295 U.S. 602 (1935). The case is also styled *Rathbun, Executor v. United States*, Humphrey having, like Myers before him, died in the course of his suit for salary. Proponents of strong presidential powers long argued that Humphrey's Executor, like A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), both cases argued and decided contemporaneously, reflected the anti-New Deal views of a conservative Court and wrongfully departed from *Myers*. *See* Scalia, *Historical Anomalies in Administrative Law*, 1985 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 103, 106-10. Now-Justice Scalia continues to adhere to his views and to *Myers*. Morrison v. Olson, 487 U.S. 654, 697, 707-11, 723-27 (1988) (dissenting).

who exercises no part of the executive power vested by the Constitution in the President."

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute.... Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.... We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named, [the Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will...."

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute." [520]

The Wiener Case.—Curtailment of the President's power of removal, so liberally delineated in the *Myers* decision, was not to end with the *Humphrey* case. Unresolved by the latter was the question whether the President, absent a provision expressly delimiting his authority in the statute creating an agency endowed

[520] 295 U.S. at 627-29, 631-32. Justice Sutherland's statement, quoted above, that a Federal Trade Commissioner "occupies no place in the executive department" was not necessary to the decision of the case, was altogether out of line with the same Justice's reasoning in Springer v. Philippine Islands, 277 U.S. 189, 201-202 (1928), and seems later to have caused the author of it much perplexity. *See* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 447-48 (1941). As Professor Cushman adds: "Every officer and agency created by Congress to carry laws into effect is an arm of Congress.... The term may be a synonym; it is not an argument." Id. at 451.

with quasi-judicial functions, remained competent to remove members serving thereon. To this query the Court supplied a negative answer in *Wiener v. United States*.[521] Emphasizing therein that the duties of the War Claims Commission were wholly adjudicatory and its determinations, final and exempt from review by any other official or judicial body, the Court unanimously concluded that inasmuch as the President was unable to supervise its activities, he lacked the power, independently of statutory authorization, to remove a commissioner serving thereon whose term expired with the life of that agency.

The Watergate Controversy.—A dispute arose regarding the discharge of the Special Prosecutor appointed to investigate and prosecute violations of law in the Watergate matter. Congress vested in the Attorney General the power to conduct the criminal litigation of the Federal Government,[522] and it further authorized him to appoint subordinate officers to assist him in the discharge of his duties.[523] Pursuant to presidential direction, the Attorney General designated a Watergate Special Prosecutor with broad power to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself, and the regulations provided that the Special Prosecutor "will not be removed from his duties except for extraordinary improprieties on his part."[524] On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor[525] and three days later rescinded the regulation establishing the office.[526] In subsequent litigation, a federal district court held that the firing by the Acting Attorney General had violated the regulations, which were in force at the time and which had to be fol-

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[521] 357 U.S. 349 (1958).

[522] 28 U.S.C. § 516.

[523] 28 U.S.C. §§ 509, 510, 515, 533.

[524] 38 Fed. Reg. 14688 (1973). The Special Prosecutor's status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. Nomination of Elliot L. Richardson to be Attorney General: Hearings Before the Senate Judiciary Committee, 93d Congress, 1st Sess. (1973), 143 *passim*.

[525] The formal documents effectuating the result are set out in 9 Weekly Comp. Pres. Doc. 1271-1272 (1973).

[526] 38 Fed. Reg. 29466 (1973). The Office was shortly recreated and a new Special Prosecutor appointed. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. *See* Nomination of William B. Saxbe to be Attorney General: Hearings Before the Senate Judiciary Committee, 93d Congress, 1st Sess. (1973).

lowed until they were rescinded.[527] The Supreme Court in *United States v. Nixon*[528] seemed to confirm this analysis by the district court in upholding the authority of the new Special Prosecutor to take the President to court to obtain evidence in the President's possession. Left unsettled were two questions, the power of the President himself to go over the heads of his subordinates and to fire the Special Prosecutor himself, whatever the regulations said, and the power of Congress to enact legislation establishing an Office of Special Prosecutor free from direction and control of the President.[529] When Congress acted to create an office, first called the Special Prosecutor and then the Independent Counsel, resolution of the question became necessary.

The Removal Power Rationalized.—The tension that had long been noticed between *Myers* and *Humphrey's Executor*, at least in terms of the language used in those cases but also to some extent in their holdings, appears to have been ameliorated by two decisions, which purport to reconcile the cases but, more important, purport to establish, in the latter case, a mode of analysis for resolving separation-of-powers disputes respecting the removal of persons appointed under the Appointments Clause.[530] *Myers* actually struck down only a law involving the Senate in the removal of postmasters, but the broad-ranging opinion had long stood for the proposition that inherent in the President's obligation to see to the faithful execution of the laws was his right to remove any executive officer as a means of discipline. *Humphrey's Executor* had qualified this proposition by upholding "for cause" removal restrictions for members of independent regulatory agencies, at least in part on the assertion that they exercised "quasi-" legislative and adjudicative functions as well as some form of executive function. Maintaining the holding of the latter case was essential to retaining the independent agencies, but the emphasis upon the execution of the laws as a core executive function in recent cases had cast considerable doubt on the continuing validity of *Humphrey's Executor*.

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[527] Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

[528] 418 U.S. 683, 692-97 (1974).

[529] The first question remained unstated, but the second issue was extensively debated in Special Prosecutor: Hearings Before the Senate Judiciary Committee, 93d Congress, 1st Sess. (1973); Special Prosecutor and Watergate Grand Jury Legislation: Hearings Before the House Judiciary Subcommittee on Criminal Justice, 93d Congress, 1st Sess. (1973).

[530] Bowsher v. Synar, 478 U.S. 714 (1986); Morrison v. Olson, 487 U.S. 654 (1988). This is not to say that the language and analytical approach of Synar are not in conflict with that of Morrison; it is to say that the results are consistent and the analytical basis of the latter case does resolve the ambiguity present in some of the reservations in Synar.

In *Bowsher v. Synar*,[531] the Court held that when Congress itself retains the power to remove an official it could not vest him with the exercise of executive power. Invalidated in *Synar* were provisions of the l985 "Gramm-Rudman-Hollings" Deficit Control Act[532] vesting in the Comptroller General authority to prepare a detailed report on projected federal revenue and expenditures and to determine mandatory across-the-board cuts in federal expenditures necessary to reduce the projected budget deficit by statutory targets. By a l921 statute, the Comptroller General was removable by joint congressional resolution for, *inter alia*, "inefficiency," "neglect of duty," or "malfeasance." "These terms are very broad," the Court noted, and "could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." Consequently, the Court determined, "the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."[533]

Relying expressly upon *Myers*, the Court concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[534] But *Humphrey's Executor* was also cited with approval, and to the contention that invalidation of this law would cast doubt on the status of the independent agencies the Court rejoined that the statutory measure of the independence of those agencies was the assurance of "for cause" removal by the President rather than congressional involvement as in the instance of the Comptroller General.[535] This reconciliation of *Myers* and *Humphrey's Executor* was made clear and express in *Morrison v. Olson*.[536]

That case sustained the independent counsel statute.[537] Under that law, the independent counsel, appointed by a special court upon application by the Attorney General, may be removed by the Attorney General "only for good cause, physical disability, mental

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[531] 478 U.S. 714 (1986).

[532] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038.

[533] 478 U.S. at 729, 730. "By placing the responsibility for execution of the ... Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function." Id. at 734. Because the Act contained contingency procedures for implementing the budget reductions in the event that the primary mechanism was invalidated, the Court rejected the suggestion that it should invalidate the l921 removal provision rather than the Deficit Act's conferral of executive power in the Comptroller General. To do so would frustrate congressional intention and significantly alter the Comptroller General's office. Id. at 734-36.

[534] 478 U.S. at 726.

[535] 478 U.S. at 725 n. 4.

[536] 487 U.S. 654 (1988).

[537] Pub. L. 95-521, title VI, 92 Stat. 1867, as amended by Pub. L. 97-409, 96 Stat. 2039, and Pub. L. 100-191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 *et seq*.

incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." Inasmuch as the counsel was clearly exercising "purely" executive duties, in the sense that term was used in *Myers*, it was urged that *Myers* governed and required the invalidation of the statute. But, said the Court, *Myers* stood only for the proposition that Congress could not involve itself in the removal of executive officers. Its broad dicta that the President must be able to remove at will officers performing "purely" executive functions had not survived *Humphrey's Executor*. It was true, the Court admitted, that, in the latter case, it had distinguished between "purely" executive officers and officers who exercise "quasi-legislative" and "quasi-judicial" powers in marking the line between officials who may be presidentially removed at will and officials who can be protected through some form of good cause removal limits. "[B]ut our present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.' The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. . . . At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wiener* as 'quasi-legislative' or 'quasi-judicial' in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." [538]

The Court discerned no compelling reason to find the good cause limit to interfere with the President's performance of his duties. The independent counsel did exercise executive, law-enforce-

[538] 487 U.S. at 685-93.

ment functions, but the jurisdiction and tenure of each counsel were limited in scope and policymaking, or significant administrative authority was lacking. On the other hand, the removal authority did afford the President through the Attorney General power to ensure the "faithful execution" of the laws by assuring that the counsel is competently performing the statutory duties of the office.

It is now thus reaffirmed that Congress may not involve itself in the removal of officials performing executive functions. It is also established that, in creating offices in the executive branch and in creating independent agencies, Congress has considerable discretion in statutorily limiting the power to remove of the President or another appointing authority. It is evident on the face of the opinion that the discretion is not unbounded, that there are offices which may be essential to the President's performance of his constitutionally assigned powers and duties, so that limits on removal would be impermissible. There are no bright lines marking off one office from the other, but decision requires close analysis.[539]

As a result of these cases, the long-running controversy with respect to the legitimacy of the independent agencies appears to have been settled,[540] although it appears likely that the controversies with respect to congressional-presidential assertions of power in executive agency matters are only beginning.

Other Phases of Presidential Removal Power.—Congress may "limit and restrict the power of removal as it deems best for the public interest" in the case of inferior officers.[541] However, in the absence of specific legislative provision to the contrary, the President may remove at his discretion an inferior officer whose term is limited by statute,[542] or one appointed with the consent of the Senate.[543] He may remove an officer of the army or navy at any time by nominating to the Senate the officer's successor, pro-

[539] But notice the analysis followed by three Justices in Public Citizen v. Department of Justice, 491 U.S. 440, 467, 482-89 (1989) (concurring), and consider the possible meaning of the recurrence to formalist reasoning in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, (1989). *And see* Justice Scalia's utilization of the "take care" clause in pronouncing limits on Congress' constitutional power to confer citizen standing in Lujan v. Defenders of Wildlife, 505 U.S. 555, 576-78 (1992), although it is not clear that he had a majority of the Court with him.

[540] Indeed, the Court explicitly analogized the civil enforcement powers of the independent agencies to the prosecutorial powers wielded by the independent counsel. Morrison v. Olson, 487 U.S. 654, 692 n.31 (1988).

[541] United States v. Perkins, 116 U.S. 483 (1886), cited with approval in Myers v. United States, 272 U.S. 52, 161-163, 164 (1926), and Morrison v. Olson, 487 U.S. 654, 689 n. 27 (1988).

[542] Parsons v. United States, 167 U.S. 324 (1897).

[543] Shurtleff v. United States, 189 U.S. 311 (1903).

vided the Senate approves the nomination.[544] In 1940, the President was sustained in removing Dr. E. A. Morgan from the chairmanship of TVA for refusal to produce evidence in substantiation of charges which he had levelled at his fellow directors.[545] Although no such cause of removal by the President was stated in the act creating TVA, the President's action, being reasonably required to promote the smooth functioning of TVA, was within his duty to "take care that the laws be faithfully executed." So interpreted, the removal did not violate the principle of administrative independence.

The Presidential Aegis: Demands for Papers

Presidents have more than once had occasion to stand in a protective relation to their subordinates, assuming their defense in litigation brought against them[546] or pressing litigation in their behalf,[547] refusing a congressional call for papers which might be used, in their absence from the seat of government, to their disadvantage,[548] challenging the constitutional validity of legislation deemed detrimental to their interests.[549] Presidents throughout our history have attempted to spread their own official immunity to their subordinates by resisting actions of the courts or of congressional committees to require subordinates to divulge communications from or to the President that Presidents choose to regard as confidential. Only recently, however, has the focus of the controversy shifted from protection of presidential or executive interests to protection of the President himself, and the locus of the dispute shifted to the courts.

Following years in which claims of executive privilege were resolved in primarily interbranch disputes on the basis of the political strengths of the parties, the issue finally became subject to judicial elaboration. The doctrine of executive privilege was at once recognized as existing and having a constitutional foundation while at the same time it was definitely bounded in its assertion by the principle of judicial review. Because of these cases, because of the intensified congressional-presidential dispute, and especially because of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for.

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[544] Blake v. United States, 103 U.S. 227 (1881); Quackenbush v. United States, 177 U.S. 20 (1900); Wallace v. United States, 257 U.S. 541 (1922).

[545] Morgan v. TVA, 28 F. Supp. 732 (E.D. Tenn. 1939), *aff'd*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

[546] *E.g.*, 6 Ops. Atty. Gen. 220 (1853); In re Neagle, 135 U.S. 1 (1890).

[547] United States v. Lovett, 328 U.S. 303 (1946).

[548] *E.g.*, 2 J. Richardson, supra at 847.

[549] United States v. Lovett, 328 U.S. 303, 313 (1946).

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may over-balance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meager yet that it is not possible so to state, however.

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions.[550] During the Nixon Administra-

[550] For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, *see* Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st Sess. (1971), 420-43, (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) information relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. *The Power of the President To Withhold Information from the Congress*, Memorandum of the Attorney General, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d Sess. (Comm. Print) (1958), reprinted as Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindeinst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. Executive Privilege, Secrecy in Government, Freedom of Information: Hearings Before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st Sess. (1973), I:18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, *see* R. BERGER, EXECUTIVE PRIVILEGE:

tion, the litigation involved, of course, the claim of confidentiality of conversations between the President and his aides.

Private Access to Government Information.—Private parties may seek to obtain information from the Government either to assist in defense to criminal charges brought by the Government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the Government or between private parties.[551] In criminal cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the prosecution.[552] Generally speaking, when the prosecution is confronted with a judicial order to turn over information to a defendant that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure,[553] but that alternative may not always be available; in the Watergate prosecution, only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibility have been realized.[554]

The civil type of case is illustrated in *United States v. Reynolds*,[555] a tort claim brought against the United States for compensation for the deaths of civilians in the crash of an Air Force plane testing secret electronics equipment. Plaintiffs sought discovery of the Air Force's investigation report on the accident, and the Government resisted on a claim of privilege as to the nondisclo-

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A CONSTITUTIONAL MYTH (1974). The book, however, precedes the Court decision in *Nixon*.

[551] There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In 522(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973); FTC v. Grolier, Inc., 462 U.S. 19 (1983); CIA v. Sims, 471 U.S. 159 (1985); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[552] *See* Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in United States v. Burr, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.

[553] *E.g.*, Alderman v. United States, 394 U.S. 165 (1968).

[554] Thus, defendant in United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), was held entitled to access to material in the custody of the President wherein the President's decision to dismiss the prosecution would probably have been unavailing.

[555] 345 U.S. 1 (1953).

sure of military secrets. The Court accepted the Government's claim, holding that courts must determine whether under the circumstances the claim of privilege was appropriate without going so far as to force disclosure of the thing the privilege is designed to protect. The showing of necessity of the private litigant for the information should govern in each case how far the trial court should probe; where the necessity is strong, the court should require a strong showing of the appropriateness of the privilege claim but once satisfied of the appropriateness no matter how compelling the need the privilege prevails.[556]

Prosecutorial and Grand Jury Access to Presidential Documents.—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President, since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for tape recordings of presidential conversations and other documents relating to the commission of criminal actions.[557] While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have "a presumptive privilege." "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." The operation of government is furthered by the protection accorded communications between high govern-

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[556] 345 U.S. at 7-8, 9-10, 11. Withholding of information relating to governmental employees' clearances, disciplines, or discharges often raise claims of such privilege. *E.g.*, Webster v. Doe, 486 U.S. 592 (1988); Department of the Navy v. Egan, 484 U.S. 518 (1988). After the Court approved and implemented a governmental secrecy agreement with some of its employees, Snepp v. United States, 444 U.S. 507 (1980), the Government expanded its secrecy program with respect to classified and "classifiable" information. When Congress sought to curb this policy, the Reagan Administration convinced a federal district judge to declare the restrictions void as invasive of the President's constitutional power to manage the executive. National Fed'n of Fed. Employees v. United States, 688 F. Supp. 671 (D.D.C. 1988), *vacated and remanded sub nom.*, American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153 (1989). For similar assertions in the context of plaintiffs suing the Government for interference with their civil and political rights during the protests against the Vietnam War, in which the plaintiffs were generally denied the information in the possession of the Government under the state-secrets privilege, *see* Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983). For review and analysis, *see* Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 875-80 (1984). *And see* Totten v. United States, 92 U.S. 105 (1875).

[557] United States v. Nixon, 418 U.S. 683, 692-97 (1974).

ment officials and those who advise and assist them in the performance of their duties. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The separation of powers basis derives from the conferral upon each of the branches of the Federal Government of powers to be exercised by each of them in great measure independent of the other branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.[558]

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other branches, but it is the function of the courts to exercise the judicial power, "to say what the law is." The Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly privileged, are to be made available. Thus, while the President's claim of privilege is entitled to deference, the courts must balance two sets of interests when the claim depends solely on a broad, undifferentiated claim of confidentiality.

"In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."

"On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need

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[558] 418 U.S.at 707-708. Presumably, the opinion recognizes a similar power existent in the federal courts to preserve the confidentiality of judicial deliberations, *cf.* New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Chief Justice Burger dissenting), and in each House of Congress to treat many of its papers and documents as privileged. *Cf.* Soucie v. David, 448 F.2d 1067, 1080, 1081-1982 (C.A.D.C. 1971) (Judge Wilkey concurring); Military Cold War Escalation and Speech Review Policies: Hearings Before the Senate Committee on Armed Services, 87th Congress, 2d Sess. (1962), 512 (Senator Stennis). *See* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 911 (1976); United States v. Ehrlichman, 389 F. Supp. 95 (D.D.C. 1974).

for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. ...''

''We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.'' [559]

Obviously, this decision leaves much unresolved. It does recognize the constitutional status of executive privilege as a doctrine. It does affirm the power of the courts to resolve disputes over claims of the privilege. But it leaves unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets. It does not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases; nor does it touch upon denial of information to Congress.

Neither does the Court's decision in *Nixon v. Administrator of General Services* [560] elucidate any of these or other questions that may be raised to any great degree. In upholding the Presidential Recordings and Materials Preservation Act, which directed the Government to take custody of former President Nixon's records to be screened, catalogued, and processed by professional archivists in GSA, the Court viewed the assertion of privilege as directed only to the facial validity of the requirement of screening by executive branch professionals and not at all related to the possible public disclosure of some of the records. The decision does go beyond the first decision's recognition of the overbalancing force of the necessity for disclosure in criminal trials to find ''comparable'' ''adequate justifications'' for congressional enactment of the law, including the preservation of the materials for legitimate historical and governmental purposes, the rationalization of preservation and access to public needs as well as each President's wishes, the preservation of the materials as a source for facilitating a full airing of the

[559] 418 U.S. 683, 711-13. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

[560] 433 U.S. 425, 446-55 (1977). *See* id. at 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting). The decision does resolve one outstanding question: assertion of the privilege is not limited to incumbent Presidents. Id. at 447-49. Subsequently, a court held that former-President Nixon had had such a property expectancy in his papers that he was entitled to compensation for their seizure under the Act. Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).

events leading to the former President's resignation for public and congressional understanding, and preservation for the light shed upon issues in civil or criminal litigation. While interestingly instructive, the decision may be so attuned to the narrow factual circumstances that led to the Act's passage as to leave the case of little value as precedent.

Congressional Access to Executive Branch Information.—Presidents and Congresses have engaged in protracted disputes over provision of information from the former to the latter, but the basic thing to know is that most congressional requests for information are complied with. The disputes, however, have been colorful and varied.[561] The basic premise of the concept of executive privilege, as it is applied to resist requests for information from Congress as from private parties with or without the assistance of the courts, is found in the doctrine of separation of powers, the prerogative of each coequal branch to operate within its own sphere independent of control or direction of the other branches. In this context, the President then asserts that phase of the claim of privilege relevant to the moment, such as confidentiality of communications, protection of diplomatic and military secrets, or preservation of investigative records. Counterposed against this assertion of presidential privilege is the power of Congress to obtain information upon which to legislate, to oversee the carrying out of its legislation, to check and root out corruption and wrongdoing in the Executive Branch, involving both the legislating and appropriating function of Congress, and in the final analysis to impeach the President, the Vice President, and all civil officers of the Federal Government.

Until quite recently, all disputes between the President and Congress with regard to requests for information were settled in the political arena, with the result that few if any lasting precedents were created and only disputed claims were left to future argument. The Senate Select Committee on Presidential Campaign Activities, however, elected to seek a declaratory judgment in the courts with respect to the President's obligations to obey its subpoenas. The Committee lost its case, but the courts based their rulings upon prudential considerations rather than upon questions of basic power, inasmuch as by the time the case was considered impeachment proceedings were pending in the House of Representa-

[561] *See* the extensive discussion in Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987).

tives.[562] The House Judiciary Committee subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement, the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas.[563] Congress has considered bills by which Congress would authorize congressional committees to go to court to enforce their subpoenas; the bills did not purport to define executive privilege, although some indicate a standard by which the federal court is to determine whether the material sought is lawfully being withheld from Congress.[564] The controversy gives little indication at the present time of abating, and it may be assumed that whenever the Executive and Congress are controlled by different political parties there will be persistent conflicts. One may similarly assume that the alteration of this situation would only reduce but not remove the disagreements.

Clause 3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

RECESS APPOINTMENTS

Setting out from the proposition that the very nature of the executive power requires that it shall always be "in capacity for action," Attorneys General early came to interpret the word "happen" in the phrase "all vacancies that may happen" to mean "happen to exist," and long continued practice securely establishes this construction. It results that whenever a vacancy may have occurred in the first instance, or for whatever reason, if it still continues after the Senate has ceased to sit and so cannot be consulted, the Presi-

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[562] Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

[563] President Nixon's position was set out in a June 9, 1974, letter to the Chairman of the House Judiciary Committee. 10 Wkly. Comp. Pres. Docs. 592 (1974). The impeachment article and supporting material are set out in H. Rep. No. 93-1305, 93d Cong., 2d Sess. (1974).

[564] For consideration of various proposals by which Congress might proceed, *see* Hamilton & Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. LEGIS. 145 (1984); Brand & Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986); Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L. J. 1333.

dent may fill it in the way described.[565] But a Senate "recess" does not include holidays, or very brief temporary adjournments,[566] while by an act of Congress, if the vacancy existed when the Senate was in session, the *ad interim* appointee, subject to certain exemptions, may receive no salary until he has been confirmed by the Senate.[567]

Judicial Appointments

Federal judges clearly fall within the terms of the recess-appointments clause. But, unlike with other offices, a problem exists. Article III judges are appointed "during good behavior," subject only to removal through impeachment. A judge, however, who is given a recess appointment may be "removed" by the Senate's failure to advise and consent to his appointment; moreover, on the bench, prior to Senate confirmation, she may be subject to influence not felt by other judges. Nonetheless, a constitutional attack upon the status of a federal district judge, given a recess appointment and then withdrawn as a nominee, was rejected by a federal court.[568]

Ad Interim Designations

To be distinguished from the power to make recess appointments is the power of the President to make temporary or *ad interim* designations of officials to perform the duties of other absent officials. Usually such a situation is provided for in advance by a

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[565] *See* the following Ops. Atty. Gen.: 1:631 (1823); 2:525 (1832); 3:673 (1841); 4:523 (1846); 10:356 (1862); 11:179 (1865); 12:32 (1866); 12:455 (1868); 14:563 (1875); 15:207 (1877); 16:523 (1880); 18:28 (1884); 19:261 (1889); 26:234 (1907); 30:314 (1914); 33:20 (1921). In 4 Ops. Atty. Gen. 361, 363 (1845), the general doctrine was held not to apply to a yet unfilled office which was created during the previous session of Congress, but this distinction was rejected in the following Ops. Atty. Gen.: 12:455 (1868); 18:28 (1884); and 19:261 (1889). In harmony with the opinions is United States v. Allocco, 305 F.2d 704 (2d Cir. 1962). For the early practice with reference to recess appointments, *see* 2 G. HAYNES, THE SENATE OF THE UNITED STATES 772-78 (1938).

[566] 23 Ops. Atty. Gen. 599 (1901); 22 Ops. Atty. Gen. 82 (1898). How long a "recess" must be to be actually a recess, a question here as in the pocket veto area, is uncertain. 3 O. L. C. 311, 314 (1979). A "recess," however, may be merely "constructive," as when a regular session succeeds immediately upon a special session. It was this kind of situation that gave rise to the once famous *Crum* incident. *See* 3 W. Willoughby, supra at 1508-1509.

[567] 5 U.S.C. § 5503. The provision has been on the books, in somewhat stricter form, since 12 Stat. 646 (1863).

[568] United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1048 (1986). The opinions in the court of appeals provide a wealth of data on the historical practice of giving recess appointments to judges, including the developments in the Eisenhower Administration, when three Justices, Warren, Brennan, and Stewart, were so appointed and later confirmed after participation on the Court. The Senate in 1960 adopted a "sense-of-the-Senate" resolution suggesting the practice was not a good idea. 106 CONG. REC. 18130-18145 (1960).

statute which designates the inferior officer who is to act in place of his immediate superior. But in the lack of such provision, both theory and practice concede the President the power to make the designation.[569]

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

LEGISLATIVE ROLE OF THE PRESIDENT

The clause directing the President to report to the Congress on the state of the union imposes a duty rather than confers a power, and is the formal basis of the President's legislative leadership. The President's legislative role has attained great proportions since 1900. This development, however, represents the play of political and social forces rather than any pronounced change in constitutional interpretation. Especially is it the result of the rise of parties and the accompanying recognition of the President as party leader, of the appearance of the National Nominating Convention and the Party Platform, and of the introduction of the Spoils System, an ever present help to Presidents in times of troubled relations with Congress.[570] It is true that certain pre-Civil War Presidents, mostly of Whig extraction, professed to entertain nice scruples on the score of "usurping" legislative powers,[571] but still earlier ones, Washington, Jefferson, and Jackson among them, took a very different line, albeit less boldly and persistently than their later imi-

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[569] *See* the following Ops. Atty. Gen.: 6:358 (1854); 12:32, 41 (1866); 25:258 (1904); 28:95 (1909); 38:298 (1935).

[570] N. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY (1932); W. BINKLEY, THE PRESIDENT AND CONGRESS (2d ed. 1962); E. Corwin, supra, chs. 1, 7.

[571] The first Harrison, Polk, Taylor, and Fillmore all fathered sentiments to this general effect. *See* 4 J. Richardson, supra at 1860, 1864; 6 id. at 2513-19, 2561-62, 2608, 2615.

tators.[572] Today, there is no subject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obliged by this clause to impart information which, in his judgment, should in the public interest be withheld.[573] The President has frequently summoned both Houses into "extra" or "special sessions" for legislative purposes, and the Senate alone for the consideration of nominations and treaties. His power to adjourn the Houses has never been exercised.

THE CONDUCT OF FOREIGN RELATIONS

The Right of Reception: Scope of the Power

"Ambassadors and other public ministers" embraces not only "all possible diplomatic agents which any foreign power may accredit to the United States,"[574] but also, as a practical construction of the Constitution, all foreign consular agents, who therefore may not exercise their functions in the United States without an *exequatur* from the President.[575] The power to "receive" ambassadors, *et cetera*, includes, moreover, the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.[576] Furthermore, this power makes the President the sole mouthpiece of the nation in its dealing with other nations.

The Presidential Monopoly

Wrote Jefferson in 1790: "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."[577] So when Citizen Genet, envoy to the United States from the first French Republic, sought an *exequatur* for a consul whose commission was addressed to the Congress of the United States, Jefferson informed him that "as the President was the only channel of communication between the United States and foreign nations, it was from him alone 'that foreign nations or their agents are to learn what is or has been the will of the nation'; that whatever he

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[572] *See* sources cited supra.

[573] Warren, *Presidential Declarations of Independence*, 10 B.U.L. REV. 1 (1930); 3 W. Willoughby, supra at 1488-1492.

[574] 7 Ops. Atty. Gen. 186, 209 (1855).

[575] 5 J. MOORE, INTERNATIONAL LAW DIGEST 15-19 (1906).

[576] Id. at 4:473-548; 5:19-32.

[577] *Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions*, April 24, 1790, 5 WRITINGS OF THOMAS JEFFERSON 161, 162 (P. Ford ed., 1895).

communicated as such, they had a right and were bound to consider 'as the expression of the nation'; and that no foreign agent could be 'allowed to question it,' or 'to interpose between him and any other branch of government, under the pretext of either's transgressing their functions.' Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. 'I inform you of the fact,' he said, 'by authority from the President.' Mr. Jefferson returned the consul's commission and declared that the President would issue no *exequatur* to a consul except upon a commission correctly addressed." [578]

The Logan Act.—When in 1798 a Philadelphia Quaker named Logan went to Paris on his own to undertake a negotiation with the French Government with a view to averting war between France and the United States, his enterprise stimulated Congress to pass "An Act to Prevent Usurpation of Executive Functions," [579] which, "more honored in the breach than the observance," still survives on the statute books. [580] The year following, John Marshall, then a Member of the House of Representatives, defended President John Adams for delivering a fugitive from justice to Great Britain under the 27th article of the Jay Treaty, instead of leaving the business to the courts. He said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him." [581] Ninety-nine years later, a Senate Foreign Relations Committee took occasion to reiterate Marshall's doctrine with elaboration. [582]

A Formal or a Formative Power.—In his attack, instigated by Jefferson, upon Washington's Proclamation of Neutrality in

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[578] 4 J. Moore, supra at 680-81.

[579] This measure is now contained in 18 U.S.C. § 953.

[580] *See Memorandum on the History and Scope of the Law Prohibiting Correspondence with a Foreign Government*, S. Doc. No. 696, 64th Congress, 2d Sess. (1917). The author was Mr. Charles Warren, then Assistant Attorney General. Further details concerning the observance of the "Logan Act" are given in E. Corwin, supra at 183-84, 430-31.

[581] 10 ANNALS OF CONGRESS 596, 613-14 (1800). Marshall's statement is often cited, *e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 319 (1936), as if he were claiming sole or inherent executive power in foreign relations, but Marshall carefully propounded the view that Congress could provide the rules underlying the President's duty to extradite. When, in 1848, Congress did enact such a statute, the Court sustained it. Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893).

[582] S. Doc. No. 56, 54th Congress, 2d Sess. (1897).

Sec. 3—Legislative and Other Duties of the President

1793 at the outbreak of war between France and Great Britain, Madison advanced the argument that all large questions of foreign policy fell within the ambit of Congress, by virtue of its power "to declare war," and in support of this proposition he disparaged the presidential function of reception: "I shall not undertake to examine, what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe, in general, and every candid reader will second the observation, that little, if anything, more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the constitution, it would be highly improper to magnify the function into an important prerogative, even when no rights of other departments could be affected by it."[583]

The President's Diplomatic Role.—Hamilton, although he had expressed substantially the same view in *The Federalist* regarding the power of reception,[584] adopted a very different conception of it in defense of Washington's proclamation. Writing under the pseudonym, "Pacificus," he said: "The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is acknowledged, the treaties between the nations, so far at least as regards public rights, are of course suspended. This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there had been a treaty of alliance, offensive and defensive, between the United States and that country, the unqualified acknowledgment of the new government would have put the United States in a condition to become as an associate in the war with France, and would have laid the legislature under

[583] 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611 (1865).
[584] No. 69 (J. Cooke ed. 1961), 468.

an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war. This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision. The division of the executive power in the Constitution, creates a concurrent authority in the cases to which it relates."[585]

Jefferson's Real Position.—Nor did Jefferson himself officially support Madison's point of view, as the following extract from his "minutes of a Conversation," which took place July 10, 1793, between himself and Citizen Genet, show: "He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, Congress are bound to see that the treaties are observed.' I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea."[586]

The Power of Recognition

In his endeavor in 1793 to minimize the importance of the President's power of reception, Madison denied that it involved cognizance of the question, whether those exercising the government of the accrediting State had the right along with the possession. He said: "This belongs to the nation, and to the nation alone, on whom the government operates.... It is evident, therefore, that if the executive has a right to reject a public minister, it must be founded on some other consideration than a change in the government, or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right

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[585] Letter of Pacificus, No. 1, 7 WORKS OF ALEXANDER HAMILTON 76, 82-83 (J. Hamilton ed., 1851).

[586] 4 J. Moore, supra at 680-81.

to refuse a public minister. It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors."[587]

Hamilton, with the case of Genet before him, had taken the contrary position, which history has ratified. In consequence of his power to receive and dispatch diplomatic agents, but more especially the former, the President possesses the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states; also, by the same token, the power to decline recognition, and thereby decline diplomatic relations with such new states or governments. The affirmative precedents down to 1906 are succinctly summarized by John Bassett Moore in his famous Digest, as follows: "In the preceding review of the recognition, respectively, of the new states, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility."[588]

The Case of Cuba.—The question of Congress' right also to recognize new states was prominently raised in connection with Cuba's successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the President, the Senate Foreign Relations Committee, in 1897, made an elaborate investigation of the whole subject and came to the following conclusions as to this power: "The 'recognition' of independence or belligerency of a foreign power,

[587] Letters of Helvidius, 5 WRITINGS OF JAMES MADISON 133 (G. Hunt ed., 1905).
[588] 1 J. Moore, supra, 243-44. *See* Restatement, Foreign Relations §§ 204, 205.

technically speaking, is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the Government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course. Diplomatic relations with a new power are properly, and customarily inaugurated at the request of that power, expressed through an envoy sent for the purpose. The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take no part in it at all, until the President has sent in a nomination. Then it acts in its executive capacity, and, customarily, in 'executive session.' The legislative branch of the Government can exercise no influence over this step except, very indirectly, by withholding appropriations. . . . Nor can the legislative branch of the Government hold any communications with foreign nations. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties."

"Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legislation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct . . . [is] shown by the opinions of jurists and statesmen of the past."[589] Congress was able ultimately to bundle a clause recognizing the independence of Cuba, as distinguished from its government, into the declaration of war of April 11, 1898, against Spain. For the most part, the sponsors of the clause defended it by the following line of reasoning. Diplomacy, they said, was now at an end, and the President himself had appealed to Congress to provide a solution for the Cuban situation. In response, Congress was about to exercise its constitutional power of declaring war, and it has consequently the right to state the purpose of the war which it was about to declare.[590] The recognition of the Union of Soviet Socialist Republics in 1933 was an exclusively presidential act.

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[589] S. Doc. No. 56, 54th Congress, 2d Sess. (1897), 20-22.

[590] Said Senator Nelson of Minnesota: "The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised." 31 CONG. REC. 3984 (1898).

Sec. 3—Legislative and Other Duties of the President

The Power of Nonrecognition.—The potentialities of nonrecognition were conspicuously illustrated by President Woodrow Wilson when he refused, early in 1913, to recognize Provisional President Huerta as the *de facto* government of Mexico, thereby contributing materially to Huerta's downfall the year following. At the same time, Wilson announced a general policy of nonrecognition in the case of any government founded on acts of violence, and while he observed this rule with considerable discretion, he consistently refused to recognize the Union of Soviet Socialist Republics, and his successors prior to President Franklin D. Roosevelt did the same. The refusal of the Hoover administration to recognize the independence of the Japanese puppet state of Manchukuo early in 1932 was based on kindred grounds. Similarly, the nonrecognition of the Chinese Communist Government from the Truman Administration to President Nixon's *de facto* recognition through a visit in 1972—not long after the People's Republic of China was admitted to the United Nations and Taiwan excluded—proved to be an important part of American foreign policy during the Cold War.[591]

Congressional Implementation of Presidential Policies

No President was ever more jealous of his prerogative in the realm of foreign relations than Woodrow Wilson. When, however, strong pressure was brought to bear upon him by Great Britain respecting his Mexican Policy, he was constrained to go before Congress and ask for a modification of the Panama Tolls Act of 1911, which had also aroused British ire. Addressing Congress, he said, "I ask this of you in support of the foreign policy of the Administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure."[592]

The fact is, of course, that Congress has enormous powers, the support of which is indispensable to any foreign policy. In the long run, Congress is the body that lays and collects taxes for the common defense, that creates armies and maintains navies, although it does not direct them, that pledges the public credit, that declares war, that defines offenses against the law of nations, that regulates foreign commerce; and it has the further power "to make all laws which shall be necessary and proper"—that is, which it deems to be such—for carrying into execution not only its own powers but

[591] President Carter's termination of the Mutual Defense Treaty with Taiwan, which precipitated a constitutional and political debate, was perhaps an example of nonrecognition or more appropriately derecognition. On recognition and nonrecognition policies in the post-World War II era, *see* Restatement, Foreign Relations, §§ 202, 203.

[592] 1 MESSAGES AND PAPERS OF WOODROW WILSON 58 (A. Shaw ed., 1924).

all the powers "of the government of the United States and of any department or officer thereof." Moreover, its laws made "in pursuance" of these powers are "supreme law of the land," and the President is bound constitutionally to "take care that" they "be faithfully executed." In point of fact, congressional legislation has operated to augment presidential powers in the foreign field much more frequently than it has to curtail them. The Lend-Lease Act of March 11, 1941[593] is the classic example, although it only brought to culmination a whole series of enactments with which Congress had aided and abetted the administration's foreign policy in the years between 1934 and 1941.[594] Disillusionment with presidential policies in the context of the Vietnamese conflict led Congress to legislate restrictions, not only with respect to the discretion of the President to use troops abroad in the absence of a declaration of war, but also limiting his economic and political powers through curbs on his authority to declare national emergencies.[595] The lesson of history, however, appears to be that congressional efforts to regain what is deemed to have been lost to the President are intermittent, whereas the presidential exercise of power in today's world is unremitting.[596]

The Doctrine of Political Questions

It is not within the province of the courts to inquire into the policy underlying action taken by the "political departments"—Congress and the President—in the exercise of their conceded powers. This commonplace maxim is, however, sometimes given an enlarged application, so as to embrace questions as to the existence of facts and even questions of law, which the Court would normally regard as falling within its jurisdiction. Such questions are termed

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[593] 55 Stat. 31 (1941).

[594] E. Corwin, supra at 184-93, 423-25, 435-36.

[595] Legislation includes the War Powers Resolution, P.L. 93-148, 87 Stat. 555 (1953), 50 U.S.C. §§ 1541-1548; the National Emergencies Act, P.L. 94-412, 90 Stat. 1255 (1976), 50 U.S.C. §§ 1601-1651 (establishing procedures for presidential declaration and continuation of national emergencies and providing for a bicameral congressional veto); the International Emergency Economic Powers Act, P.L. 95-223, 91 Stat. 1626 (1977), 50 U.S.C. §§ 1701-1706 (limiting the great economic powers conferred on the President by the Trading with the Enemy Act of 1917, 40 Stat. 415, 50 U.S.C. App.§ 5(b), to times of declared war, and providing new and more limited powers, with procedural restraints, for nonwartime emergencies); *and see* the Foreign Sovereign Immunities Act of 1976, P.L. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602-1611 (removing from executive control decisions concerning the liability of foreign sovereigns to suit).

[596] "We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Justice Jackson concurring). For an account of how the President usually prevails, *see* H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIRS (1990).

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"political questions," and are especially common in the field of foreign relations. The leading case is *Foster v. Neilson*,[597] where the matter in dispute was the validity of a grant made by the Spanish Government in 1804 of land lying to the east of the Mississippi River, and in which there was also raised the question whether the region between the Perdido and Mississippi Rivers belonged in 1804 to Spain or the United States.

Chief Justice Marshall's opinion of the Court held that the Court was bound by the action of the political departments, the President and Congress, in claiming the land for the United States. He said: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature."[598] The doctrine thus clearly stated is further exemplified, with particular reference to presidential action, by *Williams v. Suffolk Ins. Co.*[599] In this case the underwriters of a vessel which had been confiscated by the Argentine Government for catching seals off the Falkland Islands, contrary to that Government's orders, sought to escape liability by showing that the Argentinian Government was the sovereign over these islands and that, accordingly, the vessel had been condemned for willful disregard of legitimate authority. The Court decided against the company on the ground that the President had taken the position that the Falkland Islands were not a part of Argentina. "[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union."

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[597] 27 U. S. (2 Pet.) 253 (1829).
[598] 27 U.S. at 308.
[599] 38 U.S. (13 Pet.) 415 (1839).

"If this were not the rule, cases might often arise, in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character."[600] Thus, the right to determine the boundaries of the country is a political function,[601] as is also the right to determine what country is sovereign of a particular region,[602] to determine whether a community is entitled under international law to be considered a belligerent or an independent state,[603] to determine whether the other party has duly ratified a treaty,[604] to determine who is the *de jure* or *de facto* ruler of a country,[605] to determine whether a particular person is a duly accredited diplomatic agent to the United States,[606] to determine how long a military occupation shall continue in fulfillment of the terms of a treaty,[607] to determine whether a treaty is in effect or not, although doubtless an extinguished treaty could be constitutionally renewed by tacit consent.[608]

Recent Statements of the Doctrine.—The assumption underlying the refusal of courts to intervene in such cases is well stated in the case of *Chicago & S. Airlines v. Waterman S.S. Corp.*[609] Here, the Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation, which by the terms of the Civil Aeronautics Act were subject to approval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders. Elaborating on the necessity of judicial abstinence in the conduct of foreign relations, Justice Jackson declared for the Court: "The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify ac-

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[600] 38 U.S. at 420.
[601] Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).
[602] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839).
[603] United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).
[604] Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).
[605] Jones v. United States, 137 U.S. 202 (1890); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
[606] In re Baiz, 135 U.S. 403 (1890).
[607] Neely v. Henkel, 180 U.S. 109 (1901).
[608] Terlinden v. Ames, 184 U.S. 270 (1902); Charlton v. Kelly, 229 U.S. 447 (1913).
[609] 333 U.S. 103 (1948).

tions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[610]

To the same effect are the Court's holding and opinion in *Ludecke v. Watkins*,[611] where the question at issue was the power of the President to order the deportation under the Alien Enemy Act of 1798 of a German alien enemy after the cessation of hostilities with Germany. Said Justice Frankfurter for the Court: "War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.... The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the dis-

[610] 333 U.S. at 111. *See also* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U. S. 304 (1918). Analogous to and arising out of the same considerations as the political question doctrine is the "act of state" doctrine under which United States courts will not examine the validity of the public acts of foreign governments done within their own territory, typically, but not always, in disputes arising out of nationalizations. *E.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). For succinct analysis of this amorphous doctrine, *see* Restatement, Foreign Relations, §§ 443-44. Congress has limited the reach of the doctrine in foreign expropriation cases by the Hickenlooper Amendments. 22 U.S.C. § 2370(e)(2). Consider, also, Dames & Moore v. Regan, 453 U.S. 654 (1981). Similar, also, is the doctrine of sovereign immunity of foreign states in United States courts, under which jurisdiction over the foreign state, at least after 1952, turned upon the suggestion of the Department of State as to the applicability of the doctrine. *See* Alfred Dunhill of London v. Republic of Cuba, 425 U.S. at 698-706 (plurality opinion), *but see* id. at 725-28 (Justice Marshall dissenting). For the period prior to 1952, *see* Z. & F. Assets Corp. v. Hull, 311 U.S. 470, 487 (1941). Congress in the Foreign Sovereign Immunities Act of 1976, P.L. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602-1611, provided for judicial determination of applicability of the doctrine but did adopt the executive position with respect to no applicability for commercial actions of a foreign state. *E.g.*, Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). *See* Restatement, Foreign Relations, §§ 451-63 (including Introductory Note, pp. 390-396).

[611] 335 U.S. 160 (1948).

integration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subject for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility."[612]

A Court review of the political question doctrine is found in *Baker v. Carr*.[613] There, Justice Brennan noted and elaborated the factors which go into making a question political and inappropriate for judicial decision.[614] On the matter at hand, he said: "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management

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[612] 335 U.S. at 167, 170. Four Justices dissented, by Justice Black, who said: "The Court . . . holds, as I understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General's deportation order. . . . I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported." Id. at 174-75. *See also* Woods v. Miller Co., 333 U.S. 138 (1948), where the continuation of rent control under the Housing and Rent Act of 1947, enacted after the termination of hostilities, was unanimously held to be a valid exercise of the war power, but the constitutional question raised was asserted to be a proper one for the Court. Said Justice Jackson, in a concurring opinion: "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care." Id. at 146-47.

[613] 369 U.S. 186 (1962).

[614] 369 U.S. at 217.

by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[615] However, the Court came within one vote of creating a broad application of the political question doctrine in foreign relations disputes, at least in the context of a dispute between Congress and the President with respect to a proper allocation of constitutional powers.[616] In any event, the Court, in adjudicating on the merits disputes in which the foreign relations powers are called into question, follows a policy of such deference to executive and congressional expertise that the result may not be dissimilar to a broad application of the political question doctrine.[617]

THE PRESIDENT AS LAW ENFORCER

Powers Derived From This Duty

The Constitution does not say that the President shall execute the laws, but that "he shall take care that the laws be faithfully executed," i.e., by others, who are commonly, but not always with strict accuracy, termed his subordinates. What powers are implied from this duty? In this connection, five categories of executive power should be distinguished: first, there is that executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary

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[615] 369 U.S. at 211-12. A case involving "a purely legal question of statutory interpretation" is not a political question simply because the issues have significant political and foreign relations overtones. Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229-230 (1986) (Fisherman's Protective Act does not completely remove Secretary of Commerce's discretion in certifying that foreign nationals are "diminishing the effectiveness of" an international agreement by taking whales in violation of quotas set pursuant to the agreement).

[616] Goldwater v.Carter, 444 U.S. 996, 1002-06 (Justices Rehnquist, Stewart, and Stevens and Chief Justice Burger). The doctrine was applied in just such a dispute in Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977).

[617] "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981). *See also* Dames & Moore v. Regan, 453 U.S. 654, 688 (1981); Rostker v. Goldberg, 453 U.S. 57, 64-68 (1981); Greer v. Spock, 424 U.S. 828, 837-838 (1976); Parker v. Levy, 417 U.S. 733, 756, 758 (1974); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952). Neither may private claimants seek judicial review of executive actions denying constitutional rights "in such sensitive areas as national security and foreign policy" in suits for damages against offending officials, inasmuch as the President is absolutely immune, Nixon v. Fitzgerald, 457 U.S. 731 (1982), and the Court has strongly hinted that in these areas the immunity of presidential aides and other executive officials "entrusted with discretionary authority" will be held to be absolute rather than qualified. Harlow v. Fitzgerald, 457 U.S. 800, 812-13 (1982).

powers which acts of Congress at any particular time confer upon heads of departments and other executive ("administrative") agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally, there are so-called "ministerial duties" which admit of no discretion as to the occasion or the manner of their discharge. Three principal questions arise: first, how does the President exercise the powers which the Constitution or the statutes confer upon him; second, in what relation does he stand by virtue of the "take care" clause to the powers of other executive or administrative agencies; third, in what relation does he stand to the enforcement of the criminal laws of the United States?[618]

Whereas the British monarch is constitutionally under the necessity of acting always through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In the words of an opinion by Attorney General Cushing in 1855: "It may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States. . . . So he, and he alone, is the supreme commander in chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President."[619] Moreover, the obligation to act personally may be sometimes enlarged by statute, as, for example, by the act organizing the President with other designated officials into "an Establishment by name of the Smithsonian Institute." Here, says the Attorney General, "the President's name of office is *designatio personae*." He was also of opinion that expenditures from the "secret service" fund, in order to be valid, must be vouched for by the President personally.[620] On like grounds the Supreme Court once held void a decree of a court martial, because, though it has been confirmed by the Secretary of War, it was not specifically stated to have received the sanction of the President as

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[618] Notice that in Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992), the Court purported to draw from the "take care" clause the principle that Congress could not authorize citizens with only generalized grievances to sue to compel governmental compliance with the law, inasmuch as permitting that would be "to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" Id. at 577.

[619] 7 Ops. Atty. Gen. 453, 464-65 (1855).

[620] *Cf.* 2 Stat. 78. The provision has long since dropped out of the statute book.

required by the 65th Article of War.[621] This case has, however, been virtually overruled, and at any rate such cases are exceptional.[622]

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus become the President's acts.[623] *Williams v. United States*[624] involved an act of Congress which prohibited the advance of public money in any case whatever to disbursing officers of the United States, except under special direction by the President.[625] The Supreme Court held that the act did not require the personal performance by the President of this duty. Such a practice, said the Court, if it were possible, would absorb the duties of the various departments of the government in the personal acts of one chief executive officer, and be fraught with mischief to the public service. The President's duty in general requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.[626] As a matter of administrative practice, in fact, most orders and instructions emanating from the heads of the departments, even though in pursuance of powers conferred by statute on the President, do not even refer to the President.[627]

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[621] Runkle v. United States, 122 U.S. 543 (1887).

[622] *Cf.* In re Chapman, 166 U.S. 661, 670-671 (1897), where it was held that presumptions in favor of official action "preclude collateral attack on the sentences of courts-martial." *See also* United States v. Fletcher, 148 U.S. 84, 88-89 (1893); Bishop v. United States, 197 U.S. 334, 341-342 (1905), both of which in effect repudiate Runkle.

[623] The President, in the exercise of his executive power under the Constitution, "speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." The heads of the departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 513 (1839). *See also* United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843); United States v. Jones, 59 U.S. (18 How.) 92, 95 (1856); The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874); United States v. Farden, 99 U.S. 10 (1879); Wolsey v. Chapman, 101 U.S. 755 (1880).

[624] 42 U.S. (1 How.) 290 (1843).

[625] 3 Stat. 723 (1823), now covered in 31 U.S.C. § 3324.

[626] 42 U.S. (1 How.) at 297-98.

[627] 38 Ops. Atty. Gen. 457, 458 (1936). And, of course, if the President exercises his duty through subordinates, he must appoint them or appoint the officers who appoint them, Buckley v. Valeo, 424 U. S. 1, 109-143 (1976), and he must have the power to discharge those officers in the Executive Branch, Myers v. United States, 272 U.S. 52 (1926), although the Court has now greatly qualified *Myers* to permit

Sec. 3—Legislative and Other Duties of the President

Impoundment of Appropriated Funds

In his Third Annual Message to Congress, President Jefferson established the first faint outline of what years later became a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary. . . ." But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gunboats were being obtained.[628] A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries, but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the purposes appropriated. Succeeding Presidents expanded upon these precedents, and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.[629]

Impoundment[630] was defended by Administration spokesmen as being a power derived from the President's executive powers and particularly from his obligation to see to the faithful execution of the laws, i.e., his discretion in the manner of execution. The President, the argument went, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when, for example, congressional desire to spend certain moneys must yield to congressional wishes to see price and wage

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congressional limits on the removal of some officers. Morrison v. Olson, 487 U.S. 654 (1988).

[628] 1 J. Richardson, supra at 348, 360.

[629] History and law is much discussed in Executive Impoundment of Appropriated Funds: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971); Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973). The most thorough study of the legal and constitutional issues, informed through historical analysis, is Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L. J. 1549 (1974); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Response*, 63, id. at 149 (1974). *See generally* L. FISHER, PRESIDENTIAL SPENDING POWER (1975).

[630] There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase "deferral of budget authority" which is defined to include: "(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law." 2 U.S.C. § 682(1).

stability. In some respects, impoundment was said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support was sought; certain laws were said to confer discretion to withhold spending, and it was argued that congressional spending programs are discretionary rather than mandatory.[631]

On the other hand, it was argued that Congress' powers under Article I, § 8, were fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allowed him the power of item veto, which he does not have, and denied Congress the opportunity to override his veto of bills enacted by Congress. In particular, the power of Congress to compel the President to spend appropriated moneys was said to derive from Congress' power "to make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers of Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."[632]

The President's decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations, with a reasonable expectation of receipt of the impounded funds upon their release, brought large numbers of suits; with a few exceptions, these suits resulted in decisions denying the President either constitutional or statutory power to decline to spend or obligate funds, and the Supreme Court, presented with only statutory arguments by the Administration, held that no discretion existed under the particular statute to withhold allotments of funds to the States.[633] Second, Congress in the course of revising its own manner of appropriating funds in accordance with budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval

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[631] Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973), 358 (then-Deputy Attorney General Sneed).

[632] Id. at 1-6 (Senator Ervin). Of course, it was long ago established that Congress could direct the expenditure of at least some moneys from the Treasury, even over the opposition of the President. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[633] Train v. City of New York, 420 U.S. 35 (1975); Train v. Campaign Clean Water, 420 U.S. 136 (1975). *See also* State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) (the latter case finding statutory discretion not to spend).

of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds.[634]

Generally speaking, the law recognized two types of impoundments: "routine" or "programmatic" reservations of budget authority to provide for the inevitable contingencies that arise in administering congressionally-funded programs and "policy" decisions that are ordinarily intended to advance the broader fiscal or other policy objectives of the executive branch contrary to congressional wishes in appropriating funds in the first place.

Routine reservations were to come under the terms of a revised Anti-Deficiency Act.[635] Prior to its amendment, this law had permitted the President to "apportion" funds "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available." President Nixon had relied on this "other developments" language as authorization to impound, for what in essence were policy reasons.[636] Congress deleted the controverted clause and retained the other language to authorize reservations to maintain funds for contingencies and to effect savings made possible in carrying out the program; it added a clause permitting reserves "as specifically provided by law."[637]

"Policy" impoundments were to be reported to Congress by the President as permanent rescissions and, perhaps, as temporary deferrals.[638] Rescissions are merely recommendations or proposals of the President and must be authorized by a bill or joint resolution, or, after 45 days from the presidential message, the funds must be made available for obligation.[639] Temporary deferrals of budget authority for less than a full fiscal year, as provided in the 1974 law, were to be effective unless either the House of Representatives or the Senate passed a resolution of disapproval.[640] With the decision

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[634] Congressional Budget and Impoundment Control Act, P.L. 93-344, title X, §§ 1001-1017, 88 Stat. 332 (1974), as amended, 2 U.S.C. §§ 681-88.

[635] Originally passed as the Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48. The provisions as described in the text were added in the General Appropriations Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 595, 765. The amendments made by the Impoundment Control Act, were § 1002, 88 Stat. 332, 31 U.S.C. §§ 1341, 1512. On the Anti-Deficiency Act generally, *see* Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343, 1370-1377 (1988).

[636] L. Fisher, supra at 154-57.

[637] 31 U.S.C. § 1512(c)(1) (present version). Congressional intent was to prohibit the use of apportionment as an instrument of policymaking. 120 CONG. REC. 7658 (1974) (Senator Muskie); id. at 20472-20473 (Senators Ervin and McClellan).

[638] §§ 1011(1), 1012, 1013, 88 Stat. 333-34, 2 U.S.C. §§ 628(1), 683, 684.

[639] 2 U.S.C. § 683.

[640] § 1013, 88 Stat. 334. Because the Act was a compromise between the House of Representatives and the Senate, numerous questions were left unresolved; one

in *INS v. Chadha*,[641] voiding as unconstitutional the one-House legislative veto, it was evident that the veto provision in the deferral section of the Impoundment Control Act was no longer viable. An Administration effort to utilize the section, minus the veto device, was thwarted by court action, in which, applying established severability analysis, the court held that Congress would not have enacted the deferral provision in the absence of power to police its exercise through the veto.[642] Thus, the entire deferral section was inoperative. Congress, in 1987, enacted a more restricted authority, limited to deferrals only for those purposes set out in the Anti-Deficiency Act.[643]

With passage of the Act, the constitutional issues faded into the background; Presidents regularly reported rescission proposals, and Congress responded by enacting its own rescissions, usually topping the Presidents'. The entire field was, of course, confounded by the application of the other part of the 1974 law, the Budget Act, which restructured how budgets were received and acted on in Congress, and by the Balanced Budget and Emergency Deficit Control Act of 1985.[644] This latter law was designed as a deficit-reduction forcing mechanism, so that unless President and Congress cooperate each year to reduce the deficit by prescribed amounts, a "sequestration" order would reduce funds down to a mandated figure.[645] Dissatisfaction with the amount of deficit reduction continues to stimulate discussion of other means, such as "expedited" rescission and the line-item veto, many of which may raise some constitutional issues.

Power and Duty of the President in Relation to Subordinate Executive Officers

If the law casts a duty upon a head of department *eo nomine*, does the President thereupon become entitled by virtue of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the principal officer regarding the discharge of such duty? In the debate in the House in 1789 on the location of the removal power, Madison argued that it ought to be attributed to the President alone because it was "the intention

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important one was whether the President could use the deferral avenue as a means of effectuating policy impoundments or whether rescission proposals were the sole means. The subsequent events described in the text mooted that argument.

[641] 462 U.S. 919 (1983).

[642] City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

[643] P. L. 100-119, title II, § 206(a), 101 Stat. 785, 2 U.S.C. § 684.

[644] P. L. 99-177, 99 Stat. 1037, codified as amended in titles 2, 31, and 42 U.S.C., with the relevant portions to this discussion at 2 U.S.C. § 901 *et seq.*

[645] *See* Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593 (1988).

of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department," and this responsibility, he held, carried with it the power to "inspect and control" the conduct of subordinate executive officers. "Vest," said he, "the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good."[646]

But this was said with respect to the office of the Secretary of State, and when shortly afterward the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different attitude, conceding in effect that this office was to be an arm of certain of Congress' own powers and should therefore be protected against the removal power.[647] And in *Marbury v. Madison*,[648] Chief Justice Marshall traced a parallel distinction between the duties of the Secretary of State under the original act which had created a "Department of Foreign Affairs" and those which had been added by the later act changing the designation of the department to its present one. The former were, he pointed out, entirely in the "political field," and hence for their discharge the Secretary was left responsible absolutely to the President. The latter, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. For these, therefore, the Secretary was "an officer of the law" and "amenable to the law for his conduct."[649]

Administrative Decentralization Versus Jacksonian Centralism.—An opinion rendered by Attorney General Wirt in 1823 asserted the proposition that the President's duty under the "take care" clause required of him scarcely more than that he should bring a criminally negligent official to book for his derelictions, either by removing him or by setting in motion against him the processes of impeachment or of criminal prosecutions.[650] The opinion entirely overlooked the important question of the location of the power to interpret the law, which is inevitably involved in any effort to enforce it. The diametrically opposed theory that Congress is unable to vest any head of an executive department, even within the field of Congress' specifically delegated powers, with any legal discretion which the President is not entitled to control was first asserted in unambiguous terms in President Jack-

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[646] 1 ANNALS OF CONG. 495, 499 (1789).
[647] Id. at 611-612.
[648] 5 U.S. (1 Cr.) 137 (1803).
[649] 5 U.S. (1 Cr.) at 165-66.
[650] 1 Ops. Atty. Gen. 624 (1823).

son's Protest Message of April 15, 1834,[651] defending his removal of Duane as Secretary of the Treasury, because of the latter's refusal to remove the deposits from the Bank of the United States. Here it is asserted "that the entire executive power is vested in the President;" that the power to remove those officers who are to aid him in the execution of the laws is an incident of that power; that the Secretary of the Treasury was such an officer; that the custody of the public property and money was an executive function exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties the Secretary was subject to the supervision and control of the President; and finally that the act establishing the Bank of the United States "did not, as it could not change the relation between the President and Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control."[652] In short, the President's removal power, in this case unqualified, was the sanction provided by the Constitution for his power and duty to control his "subordinates" in all their official actions of public consequence.

Congressional Power Versus Presidential Duty to the Law.—The Court's 1838 decision in *Kendall v. United States ex rel. Stokes*,[653] shed more light on congressional power to mandate actions by executive branch officials. The United States owed one Stokes money, and when Postmaster General Kendall, at Jackson's instigation, refused to pay it, Congress passed a special act ordering payment. Kendall, however, still proved noncompliant, whereupon Stokes sought and obtained a mandamus in the United States circuit court for the District of Columbia, and on appeal this decision was affirmed by the Supreme Court. While *Kendall*, like *Marbury v. Madison*, involved the question of the responsibility of a head of a department for the performance of a ministerial duty, the discussion by counsel before the Court and the Court's own opinion covered the entire subject of the relation of the President to his subordinates in the performance by them of statutory duties. The lower court had asserted that the duty of the President under the faithful execution clause gave him no other control over the officer than to see that he acts honestly, with proper motives, but no power to construe the law and see that the executive action conforms to it. Counsel for Kendall attacked this position vigorously, relying largely upon statements by Hamilton, Marshall, James Wil-

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[651] 3 J. Richardson, supra at 1288.
[652] Id. at 1304.
[653] 37 U.S. (12 Pet.) 524 (1838).

son, and Story having to do with the President's power in the field of foreign relations.

The Court rejected the implication with emphasis. There are, it pointed out, "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."[654] In short, the Court recognized the underlying question of the case to be whether the President's duty to "take care that the laws be faithfully executed" made it constitutionally impossible for Congress ever to entrust the construction of its statutes to anybody but the President, and it answered this in the negative.

Myers Versus Morrison.—How does this issue stand today? The answer to this question, so far as there is one, is to be sought in a comparison of the Court's decision in the *Myers* case, on the one hand, and its decision in the *Morrison* case, on the other.[655] The first decision is still valid to support the President's right to remove, and hence to control the decisions of, all officials through whom he exercises the great political powers which he derives from the Constitution, and also to remove many but not all officials—usually heads of departments – through whom he exercises powers conferred upon him by statute. *Morrison*, however, recasts *Myers* to be about the constitutional inability of Congress to participate in removal decisions. It permits Congress to limit the removal power of the President, and those acting for him, by imposition of a "good cause" standard, subject to a balancing test. That is, the Court now regards the critical issue not as what officials do, whether they perform "purely executive" functions or "quasi" legislative or judicial functions, though the duties and functions must be considered. Rather, the Courts must "ensure that Congress does not interfere with the President's exercise of the 'executive power'" and his constitutionally appointed duty under Article II to take care that the laws be faithfully executed.[656] Thus, the Court continued, *Myers* was correct in its holding and in its suggestion that there are some executive officials who must be removable by the President if he is

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[654] 37 U.S. (12 Pet.) at 610.

[655] Myers v. United States, 272 U.S. 52 (1926); Morrison v. Olson, 487 U.S. 654 (1988).

[656] Morrison v. Olson, 487 U.S. at 689-90.

to perform his duties.[657] On the other hand, Congress may believe that it is necessary to protect the tenure of some officials, and if it has good reasons not limited to invasion of presidential prerogatives, it will be sustained, provided the removal restrictions are not of such a nature as to impede the President's ability to perform his constitutional duties.[658] The officer in *Morrison*, the independent counsel, had investigative and prosecutorial functions, purely executive ones, but there were good reasons for Congress to secure her tenure and no showing that the restriction "unduly trammels" presidential powers.[659]

The "bright-line" rule previously observed no longer holds. Now, Congress has a great deal more leeway in regulating executive officials, but it must articulate its reasons carefully and observe the fuzzy lines set by the Court.

Power of the President to Guide Enforcement of the Penal Law.—This matter also came to a head in "the reign of Andrew Jackson," preceding, and indeed foreshadowing, the Duane episode by some months. "At that epoch," Wyman relates in his Principles of Administrative Law, "the first amendment of the doctrine of centralism in its entirety was set forth in an obscure opinion upon an unimportant matter—The Jewels of the Princess of Orange, 2 Opin. 482 (1831). These jewels . . . were stolen from the Princess by one Polari and were seized by the officers of the United States Customs in the hands of the thief. Representations were made to the President of the United States by the Minister of the Netherlands of the facts in the matter, which were followed by a request for return of the jewels. In the meantime the District Attorney was prosecuting condemnation proceedings in behalf of the United States which he showed no disposition to abandon. The President felt himself in a dilemma, whether if it was by statute the duty of the District Attorney to prosecute or not, the President could interfere and direct whether to proceed or not. The opinion was written by Taney, then Attorney General; it is full of pertinent illustrations as to the necessity in an administration of full power in the chief executive as the concomitant of his full responsibility. It concludes: If it should be said that, the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it—I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and

[657] 487 U.S. at 690-91.
[658] 487 U.S. at 691.
[659] 487 U.S. at 691-92.

proper measure may often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could only act through his subordinate officer, the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continues a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President."[660]

The President as Law Interpreter

The power accruing to the President from his function of law interpretation preparatory to law enforcement is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, the Internal Security Act, and many lesser statutes. Nor is this the whole story. Not only do all presidential regulations and orders based on statutes that vest power in him or on his own constitutional powers have the force of law, provided they do not transgress the Court's reading of such statutes or of the Constitution,[661] but he sometimes makes law in a more special sense. In the famous *Neagle* case,[662] an order of the Attorney General to a United States marshal to protect a Justice of the Supreme Court whose life has been threatened by a suitor was attributed to the President and held to be "a law of the United States" in the sense of section 753 of the Revised Statutes, and as such to afford basis for a writ of *habeas corpus* transferring the marshal, who had killed the attacker, from state to national custody. Speaking for the Court, Justice Miller inquired: "Is this duty [the duty of the President to take care that the laws be faithfully executed] limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself,

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[660] B. WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 231-32 (1903).

[661] United States v. Eliason, 41 U.S. (16 Pet.) 291, 301-02 (1842); Kurtz v. Moffitt, 115 U.S. 487, 503 (1885); Smith v. Whitney, 116 U.S. 167, 180-181 (1886). For a recent analysis of the approach to determining the validity of presidential, or other executive, regulations and orders under purported congressional delegations or implied executive power, *see* Chrysler Corp. v. Brown, 441 U.S. 281, 301-16 (1979).

[662] In re Neagle, 135 U.S. 1 (1890).

our international relations, and all the protection implied by the nature of the government under the Constitution?"[663] Obviously, an affirmative answer is assumed to the second branch of this inquiry, an assumption which is borne out by numerous precedents. And in *United States v. Midwest Oil Company*,[664] it was ruled that the President had, by dint of repeated assertion of it from an early date, acquired the right to withdraw, via the Land Department, public lands, both mineral and non-mineral, from private acquisition, Congress having never repudiated the practice.

Military Power in Law Enforcement: The Posse Comitatus

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

"The President, by using the militia or the armed forces, or both . . . shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law . . . ."[665]

These quoted provisions of the United States Code consolidate a course of legislation which began at the time of the Whiskey Re-

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[663] 135 U.S. at 64. The phrase, "a law of the United States," came from the Act of March 2, 1833 (4 Stat. 632). However, in the Act of June 25, 1948, 62 Stat. 965, 28 U.S.C. § 2241(c)(2), the phrase is replaced by the term, "an act of Congress," thereby eliminating the basis of the holding in Neagle.

[664] 236 U.S. 459 (1915). *See also* Mason v. United States, 260 U.S. 545 (1923).

[665] 10 U.S.C. §§ 332, 333. The provisions were invoked by President Eisenhower when he dispatched troops to Little Rock, Arkansas, in 1957 to counter resistance to Federal District Court orders pertaining to desegregation of certain public schools in the Little Rock School District. Although the validity of his action was never expressly reviewed, the Court, in Cooper v. Aaron, 358 U.S. 1, 4, 18-19 (1958), rejected a contention advanced by critics of the legality of his conduct, namely, that the President's constitutional duty to see to the faithful execution of the laws as implemented by the provisions quoted above, does not afford a sanction for the use of troops to enforce decrees of federal courts, inasmuch as the latter are not statutory enactments which alone are comprehended within the phrase, "laws of the United States." According to the Court, a judicial decision interpreting a constitutional provision, specifically the Court's interpretation of the Fourteenth Amendment enunciated ". . . in the Brown Case [Brown v. Board of Education, 347 U.S. 483 (1954)] is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect . . . ."

bellion of 1792.[666] In *Martin v. Mott*,[667] which arose out of the War of 1812, it was held that the authority to decide whether the exigency had arisen belonged exclusively to the President.[668] Even before that time, Jefferson had, in 1808, in the course of his efforts to enforce the Embargo Acts, issued a proclamation ordering "all officers having authority, civil or military, who shall be found in the vicinity" of an unruly combination, to aid and assist "by all means in their power, by force of arms or otherwise" the suppression of such combination.[669] Forty-six years later, Attorney General Cushing advised President Pierce that in enforcing the Fugitive Slave Act of 1850, marshals of the United States had authority when opposed by unlawful combinations to summon to their aid not only bystanders and citizens generally, but armed forces within their precincts, both state militia and United States officers, soldiers, sailors, and marines,[670] a doctrine that Pierce himself improved upon two years later by asserting, with reference to the civil war then raging in Kansas, that it lay within his obligation to take care that the laws be faithfully executed to place the forces of the United States in Kansas at the disposal of the marshal there, to be used as a portion of the *posse comitatus*. Lincoln's call of April 15, 1861, for 75,000 volunteers was, on the other hand, a fresh invocation, though of course on a vastly magnified scale, of Jefferson's conception of a *posse comitatus* subject to presidential call.[671] The provisions above extracted from the United States Code ratified this conception as regards the state militias and the national forces.

Suspension of Habeas Corpus by the President

See Article I, § 9.

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[666] 1 Stat. 264 (1792); 1 Stat. 424 (1794); 2 Stat. 443 (1807); 12 Stat. 281 (1861); now covered by 10 U.S.C. §§ 332-334.

[667] 25 U.S. (12 Wheat.) 19 (1827).

[668] 25 U.S. at 31-32.

[669] Wilson, *Federal Aid in Domestic Disturbances*, S. DOC. NO. 209, 57th Congress, 2d Sess. (1907), 51.

[670] 6 Ops. Atty. Gen. 446 (1854). By the Posse Comitatus Act of 1878, 20 Stat. 152, 18 U.S.C. § 1385, it was provided that "it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress. . . ." The effect of this prohibition, however, was largely nullified by a ruling of the Attorney General "that by Revised Statutes 5298 and 5300 [10 U.S.C. §§ 332, 334] the military forces, under the direction of the President, could be used to assist a marshal. 16 Ops. Atty. Gen. 162." B. RICH, THE PRESIDENTS AND CIVIL DISORDER 196 n.21 (1941).

[671] 12 Stat. (app.) 1258.

Sec. 3—Legislative and Other Duties of the President

Preventive Martial Law

The question of executive power in the presence of civil disorder is dealt with in modern terms in *Moyer v. Peabody*,[672] to which the *Debs* case[673] may be regarded as an addendum. Moyer, a labor leader, brought suit against Peabody for having ordered his arrest during a labor dispute which occurred while Peabody was governor of Colorado. Speaking for a unanimous Court, one Justice being absent, Justice Holmes said: "Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation.... The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him."

"... In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State.... That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground for his belief."

"... When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[674]

The Debs Case.—The *Debs* case of 1895 arose out of a railway strike which had caused the President to dispatch troops to Chicago the previous year. Coincidentally with this move, the United States district attorney stationed there, acting upon orders from Washington, obtained an injunction from the United States circuit

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[672] 212 U.S. 78 (1909).

[673] In re Debs, 158 U.S. 564 (1895).

[674] 212 U.S. at 84-85. *See also* Sterling v. Constantin, 287 U.S. 378 (1932), which endorses *Moyer v. Peabody*, while emphasizing the fact that it applies only to a condition of disorder.

court forbidding the strike because of its interference with the mails and with interstate commerce. The question before the Supreme Court was whether this injunction, for violation of which Debs had been jailed for contempt of court, had been granted with jurisdiction. Conceding, in effect, that there was no statutory warrant for the injunction, the Court nevertheless validated it on the ground that the Government was entitled thus to protect its property in the mails, and on a much broader ground which is stated in the following passage of Justice Brewer's opinion for the Court: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . . While it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its granted powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."[675]

Present Status of the Debs Case.—Insofar as the use of injunctive relief in labor disputes is concerned, enactment of the Norris-LaGuardia Act[676] placed substantial restrictions on the power of federal courts to issue injunctions in such situations. Though, in *United States v. UMW*,[677] the Court held that the Norris-LaGuardia Act did not apply where the Government brought suit as operator of mines, language in the opinion appeared to go a good way toward repudiating the present viability of *Debs*, though more

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[675] 158 U.S., 584, 586. Some years earlier, in United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888), the Court sustained the right of the Attorney General and his assistants to institute suits simply by virtue of their general official powers. "If," the Court said, "the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief . . . the question of appealing to them must primarily be decided by the Attorney General . . . and if restrictions are to be placed upon the exercise of this authority it is for Congress to enact them." *Cf.* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), in which the Court rejected Attorney General Randolph's contention that he had the right *ex officio* to move for a writ of mandamus ordering the United States circuit court for Pennsylvania to put the Invalid Pension Act into effect.

[676] 47 Stat. 170 (1932), 29 U.S.C. §§ 101-115.

[677] 330 U.S. 258 (1947). In reaching the result, Chief Justice Vinson invoked the "rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." Id. at 272.

in terms of congressional limitations than of revised judicial opinion.[678] It should be noted that in 1947 Congress authorized the President to seek injunctive relief in "national emergency" labor disputes, which would seem to imply absence of authority to act in situations not meeting the statutory definition.[679]

With regard to the power of the President to seek injunctive relief in other situations without statutory authority, there is no clear precedent. In *New York Times Co. v. United States*,[680] the Government sought to enjoin two newspapers from publishing classified material given to them by a dissident former governmental employee. Though the Supreme Court rejected the Government's claim, five of the six majority Justices relied on First Amendment grounds, apparently assuming basic power to bring the action in the first place, and three dissenters were willing to uphold the constitutionality of the Government's action and its basic power on the premise that the President was authorized to protect the secrecy of governmental documents. Only one Justice denied expressly that power was lacking altogether to sue.[681]

The President's Duty in Cases of Domestic Violence in the States

See Article IV, § 4, Guarantee of Republican Form of Government, and discussion of ″Martial Law and Domestic Disorder″ under Article II, § 2, cl. 1.

The President as Executor of the Law of Nations

Illustrative of the President's duty to discharge the responsibilities of the United States in international law with a view to avoiding difficulties with other governments was the action of President Wilson in closing the Marconi Wireless Station at Siasconset, Massachusetts, on the outbreak of the European War in 1914, the company having refused assurance that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Gregory said: "The President of the

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[678] Thus, the Chief Justice noted that "we agree" that the debates on Norris-LaGuardia "indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes." Of course, he continued, "whether Congress so intended or not is a question different from the one before us now." 330 U.S. at 278.

[679] 61 Stat. 136, 155 (1947), 29 U.S.C. §§ 176-180. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), with regard to the exclusivity of proceeding.

[680] 403 U.S. 713 (1971).

[681] On Justice Marshall's view on the lack of authorization, *see* 403 U.S. at 740-48 (concurring opinion); for the dissenters on this issue, *see* id. at 752, 755-59 (Justice Harlan, with whom Chief Justice Burger and Justice Blackmun joined); *and see* id. at 727, 729-30 (Justice Stewart, joined by Justice White, concurring).

United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. . . . If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be endangered by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best adapted to effectuate the desired end. . . . I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any appropriate department, close down, or take charge of and operate, the plant . . . should he deem it necessary in securing obedience to his proclamation of neutrality."[682]

PROTECTION OF AMERICAN RIGHTS OF PERSON AND PROPERTY ABROAD

In 1854, one Lieutenant Hollins, in command of a United States warship, bombarded the town of Greytown, Nicaragua because of the refusal of local authorities to pay reparations for an attack by a mob on the United States consul.[683] Upon his return to the United States, Hollins was sued in a federal court by Durand for the value of certain property which was alleged to have been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of the Navy and was sustained by Justice Nelson, on circuit.[684] "As the Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy."

"Now, as it respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of

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[682] 30 Ops. Atty. Gen. 291 (1914).

[683] 7 J. MOORE, DIGEST OF INTERNATIONAL LAW 346-54 (1906).

[684] Durand v. Hollins, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving."[685]

This incident and this case were but two items in the 19th century advance of the concept that the President had the duty and the responsibility to protect American lives and property abroad through the use of armed forces if deemed necessary.[686] The duty could be said to grow out of the inherent powers of the Chief Executive[687] or perhaps out of his obligation to "take Care that the Laws be faithfully executed."[688] Although there were efforts made at times to limit this presidential power narrowly to the protection of persons and property rather than to the promotion of broader national interests,[689] no such distinction was observed in practice and so grew the concepts which have become the source of serious national controversy in the 1960s and 1970s, the power of the President to use troops abroad to observe national commitments and protect the national interest without seeking prior approval from Congress.

Congress and the President versus Foreign Expropriation

Congress has asserted itself in one area of protection of United States property abroad, making provision against uncompensated expropriation of property belonging to United States citizens and corporations. The problem of expropriation of foreign property and the compensation to be paid therefor remains an unsettled area of international law, of increasing importance because of the changes and unsettled conditions following World War II.[690] It has been the position of the Executive Branch that just compensation is owed all

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[685] 8 Fed. Cas. at 112.

[686] *See* UNITED STATES SOLICITOR OF THE DEPARTMENT OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d rev. ed. 1934); M. OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928).

[687] Durand v. Hollins, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

[688] M. Offutt, supra at 5.

[689] E. Corwin, supra at 198-201.

[690] *Cf.* Metzger, *Property in International Law*, 50 VA. L. REV. 594 (1964); Vaughn, *Finding the Law of Expropriation: Traditional v. Quantitative Research*, 2 TEXAS INTL. L. FORUM 189 (1966).

United States property owners dispossessed in foreign countries and the many pre-World War II disputes were carried on between the President and the Department of State and the nation involved. But commencing with the Marshall Plan in 1948, Congress has enacted programs of guaranties to American investors in specified foreign countries.[691] More relevant to discussion here is that Congress has attached to United States foreign assistance programs various amendments requiring the termination of assistance and imposing other economic inducements where uncompensated expropriations have been instituted.[692] And when the Supreme Court in 1964 applied the "act of state" doctrine so as not to examine the validity of a taking of property by a foreign government recognized by the United States but to defer to the decision of the foreign government,[693] Congress reacted by attaching another amendment to the foreign assistance act reversing the Court's application of the doctrine, except in certain circumstances, a reversal which was applied on remand of the case.[694]

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

To avert a nationwide strike of steel workers which he believed would jeopardize the national defense, President Truman, on April 8, 1952, issued an executive order directing the Secretary of Commerce to seize and operate most of the steel industry of the country.[695] The order cited no specific statutory authorization but invoked generally the powers vested in the President by the Constitution and laws of the United States. The Secretary issued the appropriate orders to steel executives. The President promptly reported his action to Congress, conceding Congress' power to supercede his order, but Congress did not do so, either then or a few days later when the President sent up a special message.[696] On suit by the steel companies, a federal district court enjoined the seizure,[697] and the Supreme Court brought the case up prior to de-

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[691] 62 Stat. 143 (1948), as amended, 22 U.S.C. § 2191 et seq. *See also* 22 U.S.C. § 1621 et seq.

[692] 76 Stat. 260 (1962), 22 U.S.C. § 2370(e)(1).

[693] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[694] 78 Stat. 1013 (1964), as amended, 22 U.S.C. § 2370(e)(2), applied on remand in Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

[695] E.O. 10340, 17 Fed. Reg. 3139 (1952).

[696] H. Doc. No. 422, 82d Congress, 2d sess. (1952), 98 CONG. REC. 3912 (1952); H. Doc. No. 496, 82d Congress, 2d sess. (1952), 98 CONG. REC. 6929 (1952).

[697] 103 F. Supp. 569 (D.D.C. 1952).

cision by the court of appeals.[698] Six-to-three, the Court affirmed the district court order, each member of the majority, however, contributing an individual opinion as well as joining in some degree the opinion of the Court by Justice Black.[699] The holding and the multiple opinions represent a setback for the adherents of "inherent" executive powers,[700] but they raise difficult conceptual and practical problems with regard to presidential powers.

The Doctrine of the Opinion of the Court

The chief points urged in the Black opinion are the following: There was no statute that expressly or impliedly authorized the President to take possession of the property involved. On the contrary, in its consideration of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. Authority to issue such an order in the circumstances of the case was not deducible from the aggregate of the President's executive powers under Article II of the Constitution; nor was the order maintainable as an exercise of the President's powers as Commander-in-Chief of the Armed Forces. The power sought to be exercised was the lawmaking power, which the Constitution vests in the Congress alone. Even if it were true that other Presidents have taken possession of private business enterprises without congressional authority in order to settle labor disputes, Congress was not thereby divested of its exclusive constitutional authority to make the laws necessary and proper to carry out all powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."[701]

The Doctrine Considered

The pivotal proposition of the opinion of the Court is that, inasmuch as Congress could have directed the seizure of the steel

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[698] The court of appeals had stayed the district court's injunction pending appeal. 197 F.2d 582 (D.C. Cir. 1952). The Supreme Court decision bringing the action up is at 343 U.S. 937 (1952). Justices Frankfurter and Burton dissented.

[699] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In the majority with Justice Black were Justices Frankfurter, Douglas, Jackson, Burton, and Clark. Dissenting were Chief Justice Vinson and Justices Reed and Minton. For critical consideration of the case, *see* Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 WEST. POL. Q. 592 (1952). For a comprehensive account, *see* M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

[700] Indeed, the breadth of the Government's arguments in the district court may well have contributed to the defeat, despite the much more measured contentions set out in the Supreme Court. *See* A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 56-65 (1958) (argument in district court).

[701] 343 U.S. at 585-89.

mills, the President had no power to do so without prior congressional authorization. To this reasoning, not only the dissenters but Justice Clark would not concur, and in fact they stated baldly that the reasoning was contradicted by precedent, both judicial and presidential and congressional practice. One of the earliest pronouncements on presidential power in this area was that of Chief Justice Marshall in *Little v. Barreme.*[702] There, a United States vessel under orders from the President had seized a United States merchant ship bound *from* a French port allegedly carrying contraband material; Congress had, however, provided for seizure only of such vessels bound *to* French ports.[703] Said the Chief Justice: "It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port."[704]

Other examples are at hand. In 1799, President Adams, in order to execute the extradition provisions of the Jay Treaty, issued a warrant for the arrest of one Robbins and the action was challenged in Congress on the ground that no statutory authority existed by which the President could act; John Marshall defended the action in the House of Representatives, the practice continued, and it was not until 1848 that Congress enacted a statute governing this subject.[705] Again, in 1793, President Washington issued a neutrality proclamation; the following year, Congress enacted the first neutrality statute and since then proclamations of neutrality have

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[702] 6 U.S. (2 Cr.) 170 (1804).

[703] 1 Stat. 613 (1799).

[704] Little v. Barreme, 6 U.S. (2 Cr.) 170, 177-78 (1804).

[705] 10 ANNALS OF CONG. 596, 613-14 (1800). The argument was endorsed in Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893). The presence of a treaty, of which this provision was self-executing, is sufficient to distinguish this example from the steel seizure situation.

been based on acts of Congress.[706] Repeatedly, acts of the President have been in areas in which Congress could act as well.[707]

Justice Frankfurter's concurring opinion[708] listed 18 statutory authorizations for seizures of industrial property, all but one of which were enacted between 1916 and 1951, and summaries of seizures of industrial plants and facilities by Presidents without definite statutory warrant, eight of which occurred during World War I, justified in the presidential orders as being done pursuant to "the Constitution and laws" generally, and eleven of which occurred in World War II.[709] The first such seizure in this period had been justified by then Attorney General Jackson as being based upon an "aggregate" of presidential powers stemming from his duty to see the laws faithfully executed, his commander-in-chiefship, and his general executive powers.[710] Chief Justice Vinson's dissent dwelt liberally upon this opinion,[711] which reliance drew a disclaimer from Justice Jackson, concurring.[712]

The dissent was also fortunate in that the steel companies' chief counsel, John W. Davis, a former Solicitor General of the United States, had filed a brief in 1914 in defense of Presidential action, which had taken precisely the view that the dissent now presented.[713] "Ours," the brief read, "is a self-sufficient Government within its sphere. (*Ex parte Siebold*, 100 U.S. 371, 395; *In re Debs*, 158 U.S. 564, 578.) 'Its means are adequate to its ends' (*McCulloch v. Maryland*, 4 Wheat., 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the Government

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[706] *Cf.* E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS ch. 1 (1916).

[707] E. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 58-59 (1953).

[708] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952).

[709] 343 U.S. at 611-13, 620.

[710] 89 CONG. REC. 3992 (1943).

[711] 343 U.S. at 695-96 (dissenting opinion).

[712] Thus, Justice Jackson noted of the earlier seizure, that "[i]ts superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure." 343 U.S. at 648-49 (concurring opinion). His opinion opens with the sentence: "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety." Id. at 634.

[713] Brief for the United States at 11, 75-77, United States v. Midwest Oil Co., 236 U.S. 459 (1915).

and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking powers may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress, but because Congress is enthroned in authority over him, not because the Constitution directs him to do so."

"Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts."[714]

Power Denied by Congress

Justice Black's opinion of the Court in *Youngstown Sheet and Tube Co. v. Sawyer* notes that Congress had refused to give the President seizure authority and had authorized other actions, which had not been taken.[715] This statement led him to conclude merely that, since the power claimed did not stem from Congress, it had to be found in the Constitution. But four of the concurring

[714] Quoted in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 667, 689-91 (1952) (dissenting opinion).

[715] 343 U.S. at 585-87.

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Justices made considerably more of the fact that Congress had considered seizure and had refused to authorize it. Justice Frankfurter stated: "We must . . . put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given."[716] He then reviewed the proceedings of Congress that attended the enactment of the Taft-Hartley Act and concluded that "Congress has expressed its will to withhold this power [of seizure] from the President as though it had said so in so many words."[717]

Justice Jackson attempted a schematic representation of presidential powers, which "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Thus, there are essentially three possibilities. "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate. . . . 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[718] The seizure in question was placed in the third category "because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure." Therefore, "we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."[719] That holding was not possible.

Justice Burton, referring to the Taft-Hartley Act, said that "the most significant feature of that Act is its omission of authority to seize," citing debate on the measure to show that the omission was a conscious decision.[720] Justice Clark placed his reliance on *Little v. Barreme*,[721] inasmuch as Congress had laid down specific proce-

[716] 343 U.S. at 597.
[717] 343 U.S. at 602.
[718] 343 U.S. at 635-38.
[719] 343 U.S. at 639, 640.
[720] 343 U.S. at 657.
[721] 6 U.S. (2 Cr.) 170 (1804).

dures for the President to follow, which he had declined to follow.[722]

Despite the opinion of the Court, therefore, it seems clear that four of the six Justices in the majority were more moved by the fact that the President had acted in a manner considered and rejected by Congress in a field in which Congress was empowered to establish the rules, rules the President is to see faithfully executed, than with the fact that the President's action was a form of "lawmaking" in a field committed to the province of Congress. The opinion of the Court, therefore, and its doctrinal implications must be considered with care, inasmuch as it is doubtful that that opinion does lay down a constitutional rule. Whatever the implications of the opinions of the individual Justices for the doctrine of "inherent" presidential powers—and they are significant—the implications for the area here under consideration are cloudy and have remained so from the time of the decision.[723]

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

By the decision of the Court in *Mississippi v. Johnson*,[724] in 1867, the President was placed beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise, save perhaps for what must be a small class of powers that are purely ministerial.[725] An application for an injunction to forbid President Johnson to enforce the Reconstruction Acts, on the ground of their unconstitutionality, was answered by Attorney General Stanberg, who argued, *inter alia*, the absolute immunity of the President from judicial process.[726] The Court refused to permit the filing, using language construable as meaning that the President was not

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[722] 343 U.S. at 662, 663.

[723] In Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981), the Court recurred to the Youngstown analysis for resolution of the presented questions, but one must observe that it did so saying that "the parties and the lower courts . . . have all agreed that much relevant analysis is contained in" Youngstown. *See also* id. at 661-62, quoting Justice Jackson's Youngstown concurrence, "which both parties agree brings together as much combination of analysis and common sense as there is in this area".

[724] 71 U.S. (4 Wall.) 475 (1867).

[725] The Court declined to express an opinion "whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." 71 U.S. at 498. *See* Franklin v. Massachusetts, 505 U.S. 788, 825-28 (1992) (Justice Scalia concurring). In NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), the court held that a writ of mandamus could issue to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run it should be applied to him.

[726] Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 484-85 (1867) (argument of counsel).

reachable by judicial process but which more fully paraded the horrible consequences were the Court to act. First noting the limited meaning of the term "ministerial," the Court observed that "[v]ery different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. . . . The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political."

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'"

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion."

. . . . .

"The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences."

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?" [727]

[727] 71 U.S. at 499, 500-01. One must be aware that the case was decided in the context of congressional predominance following the Civil War. The Court's restraint was pronounced when it denied an effort to file a bill of injunction to enjoin enforce-

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Rare has been the opportunity for the Court to elucidate its opinion in *Mississippi v. Johnson*, and, in the Watergate tapes case,[728] it held the President amenable to subpoena to produce evidence for use in a criminal case without dealing, except obliquely, with its prior opinion. The President's counsel had argued the President was immune to judicial process, claiming "that the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications."[729] However, the Court held, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[730] The primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity, and to accept the President's argument would disturb the separation-of-powers function of achieving "a workable government" as well as "gravely impair the role of the courts under Art. III."[731]

Present throughout the Watergate crisis, and unresolved by it, was the question of the amenability of the President to criminal prosecution prior to conviction upon impeachment.[732] It was ar-

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ment of the same acts directed to cabinet officers. Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867). Before and since, however, the device to obtain review of the President's actions has been to bring suit against the subordinate officer charged with carrying out the President's wishes. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Congress has not provided process against the President. In Franklin v. Massachusetts, 505 U.S. 788 (1992), resolving a long-running dispute, the Court held that the President is not subject to the Administrative Procedure Act and his actions, therefore, are not reviewable in suits under the Act. Inasmuch as some agency action, the acts of the Secretary of Commerce in this case, is preliminary to presidential action, the agency action is not "final" for purposes of APA review. Constitutional claims would still be brought, however. *See also*, following *Franklin*, Dalton v. Specter, 511 U.S. 462 (1994).

[728] United States v. Nixon, 418 U.S. 683 (1974).

[729] 418 U.S. at 706.

[730] Id.

[731] 418 U.S. at 706-07. The issue was considered more fully by the lower courts. In re Grand Jury Subpoena to Richard M. Nixon, 360 F. Supp. 1, 6-10 (D.D.C. 1973) (Judge Sirica), *aff'd sub nom.*, Nixon v. Sirica, 487 F.2d 700, 708-712 (D.C. Cir. 1973) (*en banc*) (refusing to find President immune from process). Present throughout was the conflicting assessment of the result of the subpoena of President Jefferson in the Burr trial. United States v. Burr, 25 Fed. Cas. 187 (No. 14,694) (C.C.D.Va. 1807). For the history, *see* Freund, *Foreword: On Presidential Privilege, The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 23-30 (1974).

[732] The impeachment clause, Article I, § 3, cl. 7, provides that the party convicted upon impeachment shall nonetheless be liable to criminal proceedings. Morris in the Convention, 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (rev. ed. 1937), and Hamilton in THE FEDERALIST, Nos. 65, 69 (J. Cooke

gued that the impeachment clause necessarily required indictment and trial in a criminal proceeding to follow a successful impeachment and that a President in any event was uniquely immune from indictment, and these arguments were advanced as one ground to deny enforcement of the subpoenas running to the President.[733] Assertion of the same argument by Vice President Agnew was controverted by the Government, through the Solicitor General, but, as to the President, it was argued that for a number of constitutional and practical reasons he was not subject to ordinary criminal process.[734]

Finally, most recently, the Court has definitively resolved one of the intertwined issues of presidential accountability. The President is absolutely immune in actions for civil damages for all acts within the "outer perimeter" of his official duties.[735] The Court's close decision was premised on the President's "unique position in the constitutional scheme," that is, it was derived from the Court's inquiry of a "kind of 'public policy' analysis" of the "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."[736] While the Constitution expressly afforded Members of Congress immunity in matters arising from "speech or debate," and while it was silent with respect to presidential immunity, the Court nonetheless considered such immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[737] Although the Court relied in part upon its previous practice of finding immunity for officers, such as judges, as to whom the Constitution is silent, although a long common-law history exists, and in part upon historical evidence, which it admitted was fragmentary and ambiguous,[738] the Court's principal focus was upon the fact that the President was distinguishable from all other executive officials. He is charged with a long list of "supervisory and

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ed. 1961), 442, 463, asserted that criminal trial would follow a successful impeachment.

[733] Brief for the Respondent, United States v. Nixon, 418 U.S. 683 (1974), 95-122; Nixon v. Sirica, 487 F.2d 700, 756-58 (D.C. Cir. 1973) (*en banc*) (Judge MacKinnon dissenting). The Court had accepted the President's petition to review the propriety of the grand jury's naming him as an unindicted coconspirator, but it dismissed that petition without reaching the question. United States v. Nixon, 418 U.S. at 687 n.2.

[734] Memorandum for the United States, Application of Spiro T. Agnew, Civil No. 73-965 (D.Md., filed October 5, 1973).

[735] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[736] 457 U.S. at 748.

[737] 457 U.S. at 749.

[738] 457 U.S. at 750-52 n.31.

policy responsibilities of utmost discretion and sensitivity,"[739] and diversion of his energies by concerns with private lawsuits would "raise unique risks to the effective functioning of government."[740] Moreover, the presidential privilege is rooted in the separation-of-powers doctrine, counseling courts to tread carefully before intruding. Some interests are important enough to require judicial action; "merely private suit[s] for damages based on a President's official acts" do not serve this "broad public interest" necessitating the courts to act.[741] Finally, qualified immunity would not adequately protect the President, because judicial inquiry into a functional analysis of his actions would bring with it the evil immunity was to prevent; absolute immunity was required.[742]

Unofficial Conduct

In *Clinton v. Jones*,[743] the Court, in a case of first impression, held that the President did not have qualified immunity from suit for conduct alleged to have taken place prior to his election to the Presidency, which would entitle him to delay of both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct — primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability — were inapplicable in this kind of case. Moreover, the separation-of-powers doctrine did not require a stay of all private actions against the President. Separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the Government at the expense of another. However, a federal trial court tending to a civil suit in which the President is a party performs only its judicial function, not a function of another branch. No decision by a trial court could curtail the scope of the President's powers. The trial court, the Supreme Court observed, had sufficient powers to accommodate the President's schedule and his workload, so as not to impede the President's performance of his duties. Finally, the Court stated its belief that allowing such suits to proceed would not generate a large vol-

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[739] 457 U.S. at 750.

[740] 457 U.S. at 751.

[741] 457 U.S. at 754.

[742] 457 U.S. at 755-57. Justices White, Brennan, Marshall, and Blackmun dissented. The Court reserved decision whether Congress could expressly create a damages action against the President and abrogate the immunity, id. at 748-49 n.27, thus appearing to disclaim that the decision is mandated by the Constitution; Chief Justice Burger disagreed with the implication of this footnote, id. at 763-64 n.7 (concurring opinion), and the dissenters noted their agreement on this point with the Chief Justice. Id. at 770 & n.4.

[743] 520 U.S. 681 (1997).

ume of politically motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary to legislate, to afford the President protection.[744]

The President's Subordinates

While the courts may be unable to compel the President to act or to prevent him from acting, his acts, when performed, are in proper cases subject to judicial review and disallowance. Typically, the subordinates through whom he acts may be sued, in a form of legal fiction, to enjoin the commission of acts which might lead to irreparable damage[745] or to compel by writ of mandamus the performance of a duty definitely required by law,[746] such suits being usually brought in the United States District Court for the District of Columbia.[747] In suits under the common law, a subordinate executive officer may be held personally liable in damages for any act done in excess of authority,[748] although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.[749]

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[744] The Court observed at one point that it doubted that defending the suit would much preoccupy the President, that his time and energy would not be much taken up by it. "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." 520 U.S. at 702.

[745] *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President's order); Dames & Moore v. Regan, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). *See also* Noble v. Union River Logging Railroad, 147 U.S. 165 (1893); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

[746] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) (suit against Secretary of State to compel delivery of commissions of office); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

[747] This was originally on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 614, 620-21 (1838). Congress has now authorized federal district courts outside the District of Columbia also to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. § 1361.

[748] *E.g.*, Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804); Bates v. Clark, 95 U.S. 204 (1877); United States v. Lee, 106 U.S. 196 (1882); Virginia Coupon Cases, 114 U.S. 269 (1885); Belknap v. Schild, 161 U.S. 10 (1896).

[749] Spalding v. Vilas, 161 U.S. 483 (1896); Barr v. Mateo, 360 U.S. 564 (1959). *See* Westfall v. Erwin, 484 U.S. 292 (1988) (action must be discretionary in nature as well as being within the scope of employment, before federal official is entitled to absolute immunity). Following the *Westfall* decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the

Different rules prevail when such an official is sued for a "constitutional tort" for wrongs allegedly in violation of our basic charter,[750] although the Court has hinted that in some "sensitive" areas officials acting in the "outer perimeter" of their duties may be accorded an absolute immunity from liability.[751] Jurisdiction to reach such officers for acts for which they can be held responsible must be under the general "federal question" jurisdictional statute, which, as recently amended, requires no jurisdictional amount.[752]

COMMISSIONING OFFICERS

The power to commission officers, as applied in practice, does not mean that the President is under constitutional obligation to commission those whose appointments have reached that stage, but merely that it is he and no one else who has the power to commission them, and that he may do so at his discretion. Under the doctrine of *Marbury v. Madison*, the sealing and delivery of the commission is a purely ministerial act which has been lodged by statute with the Secretary of State, and which may be compelled by mandamus unless the appointee has been in the meantime validly removed.[753] By an opinion of the Attorney General many years later, however, the President, even after he has signed a commis-

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Government because the FTCA has not waived sovereign immunity. Cognizant of the temptation set before the Government to immunize both itself and its employee, the Court in Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), held that the Attorney General's certification is subject to judicial review.

[750] An implied cause of action against officers accused of constitutional violations was recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Butz v. Economou, 438 U.S. 478 (1978), a *Bivens* action, the Court distinguished between common-law torts and constitutional torts and denied high federal officials, including cabinet secretaries, absolute immunity, in favor of the qualified immunity previously accorded high state officials under 42 U.S.C. § 1983. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court denied presidential aides derivative absolute presidential immunity, but it modified the rules of qualified immunity, making it more difficult to hold such aides, other federal officials, and indeed state and local officials, liable for constitutional torts. In Mitchell v. Forsyth, 472 U.S. 511 (1985), the Court extended qualified immunity to the Attorney General for authorizing a warrantless wiretap in a ccase involving domestic national security. Although the Court later held such warrantless wiretaps violated the Fourth Amendment, at the time of the Attorney General's authorization this interpretation was not "clearly established," and the *Harlow* immunity protected officials exercising discretion on such open questions. *See also* Anderson v. Creighton, 483 U.S. 635 (1987) (in an exceedingly opaque opinion, the Court extended similar qualified immunity to FBI agents who conducted a warrantless search).

[751] Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).

[752] *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, *see* P.L. 94-574, 90 Stat. 2721 (1976), and P.L. 96-486, 94 Stat. 2369 (1980). If such suits are brought in state courts, they can be removed to federal district courts. 28 U.S.C. § 1442(a).

[753] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 157-58, 173 (1803). The doctrine applies to presidential appointments regardless of whether Senate confirmation is required.

sion, still has a *locus poenitentiae* and may withhold it; nor is the appointee in office till he has this commission.[754] This is probably the correct doctrine.[755]

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

IMPEACHMENT

The impeachment provisions of the Constitution[756] were derived from English practice, but there are important differences. In England, impeachment had a far broader scope. While impeachment was a device to remove from office one who abused his office or misbehaved but who was protected by the Crown, it could be used against anyone—office holder or not —and was penal in nature, with possible penalties of fines, imprisonment, or even death.[757] By contrast, the American impeachment process is remedial, not penal: it is limited to office holders, and judgments are limited to no more than removal from office and disqualification to hold future office.

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[754] 12 Ops. Atty. Gen. 306 (1867).

[755] It should be remembered that, for various reasons, Marbury got neither commission nor office. The case assumes, in fact, the necessity of possession of his commission by the appointee.

[756] Impeachment is the subject of several other provisions of the Constitution. Article I, § 2, cl. 5, gives to the House of Representatives "the sole power of impeachment." Article I, § 3, cl. 6, gives to the Senate "the sole power to try all impeachments," requires that Senators be under oath or affirmation when sitting for that purpose, stipulates that the Chief Justice of the United States is to preside when the President of the United States is tried, and provides for conviction on the vote of two-thirds of the members present. Article I, § 3, cl. 7, limits the judgment after impeachment to removal from office and disqualification from future federal office holding, but it allows criminal trial following conviction upon impeachment. Article II, § 2, cl. 1, deprives the President of the power to grant pardons or reprieves in cases of impeachment. Article III,§ 2, cl. 3, excepts impeachment cases from the jury trial requirement.

Although the word "impeachment" is sometimes used to refer to the process by which any member of the House may "impeach" an officer of the United States under a question of constitutional privilege (see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2398 (impeachment of President John Tyler by a member) and 2469 (impeachment of Judge John Swayne by a member) (1907), the word as used in Article II, § 4 refers to impeachment by vote of the House, the consequence of which is that the Senate may then try the impeached officer.

[757] 1 W. HOLDSWORTH, HISTORY OF ENGLISH COURTS 379-85 (7th ed. 1956); Clarke, *The Origin of Impeachment*, in OXFORD ESSAYS IN MEDIEVAL HISTORY, PRESENTED TO HERBERT EDWARD SALTER 164 (1934); Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651 (1916).

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Impeachment was a device that figured from the first in the plans proposed to the Convention; discussion addressed such questions as what body was to try impeachments and what grounds were to be stated as warranting impeachment.[758] The attention of the Framers was for the most part fixed on the President and his removal, and the results of this narrow frame of reference are reflected in the questions unresolved by the language of the Constitution.

Persons Subject to Impeachment

During the debate in the First Congress on the "removal" controversy, it was contended by some members that impeachment was the exclusive way to remove any officer of the Government from his post,[759] but Madison and others contended that this position was destructive of sound governmental practice,[760] and the view did not prevail. Impeachment, said Madison, was to be used to reach a bad officer sheltered by the President and to remove him "even against the will of the President; so that the declaration in the Constitution was intended as a supplementary security for the good behavior of the public officers."[761] While the language of section 4 covers any "civil officer" in the executive branch,[762] and covers judges as well,[763] it excludes military officers,[764] and the precedent was early established that it does not apply to members of Congress.[765]

Judges.—Article III, § 1, specifically provides judges with "good behavior" tenure, but the Constitution nowhere expressly vests the power to remove upon bad behavior, and it has been assumed that judges are made subject to the impeachment power

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[758] Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV.at 653-67 (1916).
[759] 1 ANNALS OF CONG. 457, 473, 536 (1789).
[760] Id. at 375, 480, 496-97, 562.
[761] Id. at 372.
[762] The term "civil officers of the United States" is not defined in the Constitution, although there may be a parallel with "officers of the United States" under the Appointments Clause, Art. II, § 2, cl. 2, and it may be assumed that not all executive branch employees are "officers." For precedents relating to the definition, see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1785, 2022, 2486, 2493, and 2515 (1907). *See also* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L. REV. 707, 715-18 (1988).
[763] See the following section on Judges.
[764] 3 W. Willoughby, supra at 1448.
[765] This point was established by a vote of the Senate holding a plea to this effect good in the impeachment trial of Senator William Blount in 1797. 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2294-2318 (1907); F. WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 200-321 (1849); BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT (1998).

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through being labeled "civil officers."[766] The records in the Convention make this a plausible though not necessary interpretation.[767] And, in fact, eleven of the fifteen impeachments reaching trial in the Senate have been directed at federal judges, and all seven of those convicted in impeachment trials have been judges.[768] So set-

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[766] *See* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL 9-11 (1993). The Commission was charged by Congress with investigating and studying problems and issues relating to discipline and removal of federal judges, to evaluate the advisability of developing alternatives to impeachment, and to report to the three Government Branches. Pub. L. 101-650, 104 Stat. 5124. The report and the research papers produced for it contain a wealth of information on the subject.

[767] For practically the entire Convention, the plans presented and adopted provided that the Supreme Court was to try impeachments. 1 M. Farrand, supra at 22, 244, 223-24, 231; 2 id. at 186. On August 27, it was successfully moved that the provision in the draft of the Committee on Detail giving the Supreme Court jurisdiction of trials of impeachment be postponed, id. at 430, 431, which was one of the issues committed to the Committee of Eleven. Id. at 481. That Committee reported the provision giving the Senate power to try all impeachments, id. at 497, which the Convention thereafter approved. Id. at 551. It may be assumed that so long as trial was in the Supreme Court, the Framers did not intend that the Justices, at least, were to be subject to the process.

The Committee of Five on August 20 was directed to report "a mode for trying the supreme Judges in cases of impeachment," id. at 337, and it returned a provision making Supreme Court Justices triable by the Senate on impeachment by the House. Id. at 367. Consideration of this report was postponed. On August 27, it was proposed that all federal judges should be removable by the executive upon the application of both houses of Congress, but the motion was rejected. Id. at 428-29. The matter was not resolved by the report of the Committee on Style, which left in the "good behavior" tenure but contained nothing about removal. Id. at 575. Therefore, unless judges were included in the term "civil officers," which had been added without comment on September 8 to the impeachment clause, id. at 552, they were not made removable.

[768] The following judges faced impeachment trials in the Senate: John Pickering, District Judge, 1803 (convicted), 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2319-2341 (1907); Justice Samuel Chase, 1804 (acquitted), id. at §§ 2342-2363; James H. Peck, District Judge, 1830 (acquitted), id. at 2364-2384; West H. Humphreys, District Judge, 1862 (convicted), id. at §§ 2385-2397; Charles Swayne, District Judge, 1904 (acquitted), id. at §§ 2469-2485; Robert W. Archbald, Judge of Commerce Court, 1912 (convicted), 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 498-512 (1936); Harold Louderback, District Judge, 1932 (acquitted), id. at §§ 513-524; Halsted L. Ritter, District Judge, 1936 (convicted), *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter*, S. Doc. No. 200, 74th Congress, 2d Sess. (1936); Harry Claiborne, District Judge, 1986 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne*, S. Doc. 99-48, 99th Cong., 2d Sess. (1986); Alcee Hastings, District Judge, 1989 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings*, S. Doc. 101-18, 101st Cong., 1st Sess. (1989); Walter Nixon, District Judge, 1989 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr.*, S. Doc. 101-22, 101st Cong., 1st Sess. (1989). In addition, impeachment proceedings against district judge George W. English were dismissed in 1926 following his resignation six days prior to the scheduled start of his Senate trial. 68 CONG. REC. 344, 348 (1926). *See also* ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 MINN. L. REV. 185, 194-96 (1939). The others who have faced impeachment trials in the Sen-

tled apparently is this interpretation that the major arguments, scholarly and political, have concerned the question of whether judges, as well as others, are subject to impeachment for conduct that does not constitute an indictable offense, and the question of whether impeachment is the exclusive removal device for judges.[769]

Judgment—Removal and Disqualification

Article II, section 4 provides that officers impeached and convicted "shall be removed from office"; Article I, section 3, cl. 7 provides further that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States." These restrictions on judgment, both of which relate to capacity to hold public office, emphasize the non-penal nature of impeachment, and help to distinguish American impeachment from the open-ended English practice under which criminal penalties could be imposed.[770]

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ate are Senator William Blount (acquitted); Secretary of War William Belknap (acquitted); President Andrew Johnson (acquitted); and President William J. Clinton (acquitted). For summary and discussion of the earlier cases, *see* CONSTITUTIONAL ASPECTS OF WATERGATE: DOCUMENTS AND MATERIALS (A. Boyan ed., 1976); and Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719 (1970) (appendix), *reprinted in* Staff of the House Committee on the Judiciary, 105th Cong., Impeachment: Selected Materials 1818 (Comm. Print. 1998).

[769] It has been argued that the impeachment clause of Article II is a limitation on the power of Congress to remove judges and that Article III is a limitation on the executive power of removal, but that it is open to Congress to define "good behavior" and establish a mechanism by which judges may be judicially removed. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 723, 870 (1930). Proposals to this effect were considered in Congress in the 1930s and 1940s and revived in the late 1960s, stimulating much controversy in scholarly circles. *E.g.*, Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior,"* 35 GEO. WASH. L. REV. 455 (1967); Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135; Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L. J. 1475 (1970). Congress did in the Judicial Conduct and Disability Act of 1980, P. L. 96-458, 94 Stat. 2035, 28 U.S.C. § 1 note, 331, 332, 372, 604, provide for disciplinary powers over federal judges, but it specifically denied any removal power. The National Commission, supra at 17-26, found impeachment to be the exclusive means of removal and recommended against adoption of an alternative. Congress repealed 28 U.S.C. § 372 in the Judicial Improvements Act of 2002, Pub. L. No. 107-273 and created a new chapter (28 U.S.C. §§ 351-64) dealing with judicial discipline short of removal for Article III judges, and authorizing discipline including removal for magistrate judges. The issue was obliquely before the Court as a result of a judicial conference action disciplining a district judge, but it was not reached, Chandler v. Judicial Council, 382 U.S. 1003 (1966); 398 U.S. 74 (1970), except by Justices Black and Douglas in dissent, who argued that impeachment was the exclusive power.

[770] *See* discussion supra of the differences between English and American impeachment.

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The plain language of section four seems to require removal from office upon conviction, and in fact the Senate has removed those persons whom it has convicted. In the 1936 trial of Judge Ritter, the Senate determined that removal is automatic upon conviction, and does not require a separate vote.[771] This practice has continued. Because conviction requires a two-thirds vote, this means that removal can occur only as a result of a two-thirds vote. Unlike removal, disqualification from office is a discretionary judgment, and there is no explicit constitutional linkage to the two-thirds vote on conviction. Although an argument can be made that disqualification should nonetheless require a two-thirds vote,[772] the Senate has determined that disqualification may be accomplished by a simple majority vote.[773]

Impeachable Offenses

The Convention came to its choice of words describing the grounds for impeachment after much deliberation, but the phrasing derived directly from the English practice. The framers early adopted, on June 2, a provision that the Executive should be removable by impeachment and conviction "of mal-practice or neglect of duty."[774] The Committee of Detail reported as grounds "Treason (or) Bribery or Corruption."[775] And the Committee of Eleven reduced the phrase to "Treason, or bribery."[776] On September 8, Mason objected to this limitation, observing that the term did not encompass all the conduct which should be grounds for removal; he therefore proposed to add "or maladministration" following "bribery." Upon Madison's objection that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate," Mason suggested "other high crimes and misdemeanors," which was adopted without further recorded debate.[777]

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[771] 3 DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES ch. 14, § 13.9.

[772] *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 77-79 (2d ed. 2000).

[773] The Senate imposed disqualification twice, on Judges Humphreys and Archbald. In the Humphreys trial the Senate determined that the issues of removal and disqualification are divisible, 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2397 (1907), and in the Archbald trial the Senate imposed judgment of disqualification by vote of 39 to 35. 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 512 (1936). During the 1936 trial of Judge Ritter, a parliamentary inquiry as to whether a two-thirds vote or a simple majority vote is required for disqualification was answered by reference to the simple majority vote in the Archbald trial. 3 DESCHLER'S PRECEDENTS ch. 14, §13.10. The Senate then rejected disqualification of Judge Ritter by vote of 76-0. 80 CONG. REC. 5607 (1936).

[774] 1 M. Farrand, supra.

[775] 2 M. Farrand at 172, 186.

[776] Id. at 499.

[777] Id. at 550.

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The phrase "high crimes and misdemeanors" in the context of impeachments has an ancient English history, first turning up in the impeachment of the Earl of Suffolk in 1388.[778] Treason is defined in the Constitution.[779] Bribery is not, but it had a clear common-law meaning and is now well covered by statute.[780] "High crimes and misdemeanors," however, is an undefined and indefinite phrase, which, in England, had comprehended conduct not constituting indictable offenses.[781] Use of the word "other" to link "high crimes and misdemeanors" with "treason" and "bribery" is arguably indicative of the types and seriousness of conduct encompassed by "high crimes and misdemeanors." Similarly, the word "high" apparently carried with it a restrictive meaning.[782]

Debate prior to adoption of the phrase[783] and comments thereafter in the ratifying conventions[784] were to the effect that the President (all the debate was in terms of the President) should be removable by impeachment for commissions or omissions in office which were not criminally cognizable. And in the First Congress' "removal" debate, Madison maintained that the wanton dismissal of meritorious officers would be an act of maladministration which would render the President subject to impeachment.[785] Other comments, especially in the ratifying conventions, tend toward a limitation of the term to criminal, perhaps gross criminal, behavior.[786]

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[778] 1 T. HOWELL, STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIMES 90, 91 (1809); A. SIMPSON, TREATISE ON FEDERAL IMPEACHMENTS 86 (1916).

[779] Article III, § 3.

[780] The use of a technical term known in the common law would require resort to the common law for its meaning, United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1818) (per Chief Justice Marshall); United States v. Jones, 26 Fed. Cas. 653, 655 (No. 15,494) (C.C.Pa. 1813) (per Justice Washington), leaving aside the issue of the cognizability of common law crimes in federal courts. *See* Act of April 30, 1790, § 21, 1 Stat. 117.

[781] Berger, *Impeachment for "High Crimes and Misdemeanors"*, 44 S. CAL. L. REV. 395, 400-415 (1971).

[782] The extradition provision reported by the Committee on Detail had provided for the delivering up of persons charged with "Treason, Felony or high Misdemeanors." 2 M. Farrand, supra at 174. But the phrase "high Misdemeanors" was replaced with "other crimes" "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." Id. at 443.

[783] *See* id. at 64-69, 550-51.

[784] *E.g.*, 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE CONSTITUTION 341, 498, 500, 528 (1836) (Madison); 4 id. at 276, 281 (C. C. Pinckney: Rutledge): 3 id. at 516 (Corbin): 4 id. at 263 (Pendleton). *Cf.* THE FEDERALIST, No. 65 (J. Cooke ed. 1961), 439-45 (Hamilton).

[785] 1 ANNALS OF CONG. 372-73 (1789).

[786] 4 J. Elliot, supra at 126 (Iredell); 2 id. at 478 (Wilson). For a good account of the debate at the Constitutional Convention and in the ratifying conventions, see Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651, 676-95 (1916)

The scope of the power has been the subject of continuing debate.[787]

The Chase Impeachment

The issue of the scope of impeachable offenses was early joined as a consequence of the Jefferson Administration's efforts to rid itself of some of the Federalist judges who were propagandizing the country through grand jury charges and other means. The theory of extreme latitude was enunciated by Senator Giles of Virginia during the impeachment trial of Justice Chase. "The power of impeachment was given without limitation to the House of Representatives; and the power of trying impeachments was given equally without limitation to the Senate. . . . A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him . . . [but] nothing more than a declaration of Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them better."[788] Chase's counsel responded that to be impeachable, conduct must constitute an indictable offense.[789] The issue was left unresolved, Chase's acquittal owing more to the political divisions in the Senate than to the merits of the arguments.[790]

Other Impeachments of Judges

The 1803 impeachment and conviction of Judge Pickering as well as several successful 20th century impeachments of judges appear to establish that judges may be removed for seriously ques-

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[787] *See generally* CHARLES L. BLACK, IMPEACHMENT: A HANDBOOK (1974); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2d ed. 2000); PETER CHARLES HOFFER AND N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805 (1984); JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT (1978); 3 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, ch. 14, § 3 "Grounds for Impeachments," H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977); Charles Doyle, Impeachment Grounds: A Collection of Selected Materials, CRS Report for Congress 98-882A (1998); and Elizabeth B. Bazan, Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice, CRS Report for Congress 98-186A (1998).

[788] 1 J. Q. ADAMS, MEMOIRS 322 (1874). *See also* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES§§ 2356-2362 (1907).

[789] 3 HINDS' PRECEDENTS at § 2361.

[790] The full record is TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (S. Smith & T. Lloyd eds., 1805). For analysis of the trial and acquittal, *see* Lillich, *The Chase Impeachment*, 4 AMER. J. LEGAL HIST. 49 (1960); and WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992). The proceedings against Presidents Tyler and Johnson and the investigation of Justice Douglas are also generally viewed as precedents that restrict the use of impeachment as a political weapon.

tionable conduct that does not violate a criminal statute.[791] The articles on which Judge Pickering was impeached and convicted focused on allegations of mishandling a case before him and appearing on the bench in an intemperate and intoxicated state.[792] Both Judge Archbald and Judge Ritter were convicted on articles of impeachment that charged questionable conduct probably not amounting to indictable offenses.[793]

Of the three most recent judicial impeachments, Judges Claiborne and Nixon had previously been convicted of criminal offenses, and Judge Hastings had been acquitted of criminal charges after trial. The impeachment articles against Judge Hastings charged both the conduct for which he had been indicted and trial conduct. A separate question was what effect the court acquittal should have had.[794]

Although the language of the Constitution makes no such distinction, some argue that, because of the different nature of their responsibilities and because of different tenure, different standards should govern impeachment of judges and impeachment of executive officers.[795]

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[791] Some have argued that the constitutional requirement of "good behavior" and "high crimes and misdemeanors" conjoin to allow the removal of judges who have engaged in non-criminal conduct inconsistent with their responsibilities, or that the standard of "good behavior"—not that of "high crimes and misdemeanors"—should govern impeachment of judges. See 3 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, ch. 14, §§ 3.10 and 3.13, H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977) (summarizing arguments made during the impeachment investigation of Justice William O. Douglas in 1970). For a critique of these views, see Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV.719 (1970), *reprinted in* Staff of the House Committee on the Judiciary, 105th Cong., Impeachment: Selected Materials 1801-03 (Comm. Print. 1998).

[792] *See* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 2319-2341 (1907)

[793] Ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 MINN. L. REV. 185 (1939). Judge Ritter was acquitted on six of the seven articles brought against him, but convicted on a seventh charge that summarized the first six articles and charged that the consequence of that conduct was "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge." This seventh charge was challenged unsuccessfully on a point of order, but was ruled to be a separate charge of "general misbehavior."

[794] Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1229-1233 (1991).

[795] *See, e.g.*, Frank O. Bowman, III and Stephen L. Sepinuck, *"High Crimes and Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1534-38 (1999). Congressional practice may reflect this view. Judges Ritter and Claiborne were convicted on charges of income tax evasion, while the House Judiciary Committee voted not to press such charges against President Nixon. So too, the convictions of Judges Hastings and Nixon on perjury charges may be contrasted with President Clinton's acquittal on a perjury charge.

The Johnson Impeachment

President Andrew Johnson was impeached by the House on the ground that he had violated the "Tenure of Office" Act[796] by dismissing a Cabinet chief. The theory of the proponents of impeachment was succinctly put by Representative Butler, one of the managers of the impeachment in the Senate trial. "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."[797] Former Justice Benjamin Curtis controverted this argument, saying: "My first position is, that when the Constitution speaks of 'treason, bribery, and other high crimes and misdemeanors,' it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment."[798] The President's acquittal by a single vote was no doubt not the result of a choice between the two theories, but the result may be said to have placed a gloss on the impeachment language approximating the theory of the defense.[799]

The Nixon Impeachment Proceedings

For the first time in over a hundred years,[800] Congress moved to impeach the President of the United States, a move forestalled only by the resignation of President Nixon on August 9, 1974.[801]

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[796] Act of March 2, 1867, ch. 154, 14 Stat. 430.

[797] 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES ON IMPEACHMENT 88, 147 (1868).

[798] Id. at 409.

[799] For an account of the Johnson proceedings, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).

[800] The only occasion before the Johnson impeachment when impeachment of a President had come to a House vote was the House's rejection in 1843 of an impeachment resolution against President John Tyler. The resolution, which listed nine separate counts and which was proposed by a member rather than by a committee, was defeated by vote of 127 to 84. *See* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2398 (1907); CONG. GLOBE, 27th Cong. 3d Sess. 144-46 (1843).

[801] The President's resignation did not necessarily require dismissal of the impeachment charges. Judgment upon conviction can include disqualification as well as removal. Art. I, § 3, cl. 7. Precedent from the 1876 impeachment of Secretary of War William Belknap, who had resigned prior to his impeachment by the House, suggests that impeachment can proceed even after a resignation. *See* 3 HINDS'

Three articles of impeachment were approved by the House Judiciary Committee, charging obstruction of the investigation of the "Watergate" burglary inquiry, misuse of law enforcement and intelligence agencies for political purposes, and refusal to comply with the Judiciary Committee's subpoenas.[802] Following President Nixon's resignation, the House adopted a resolution to "accept" the House Judiciary Committee's report recommending impeachment,[803] but there was no vote adopting the articles and thereby impeaching the former President, and consequently there was no Senate trial.

In the course of the proceedings, there was strenuous argument about the nature of an impeachable offense, whether only criminally-indictable actions qualify for that status or whether the definition is broader.[804] The three articles approved by the Judiciary Committee were all premised on abuse of power, although the first article, involving obstruction of justice, also involved a criminal violation.[805] A second issue arose that apparently had not been considered before: whether persons subject to impeachment could be indicted and tried prior to impeachment and conviction or whether indictment could occur only after removal from office. In fact, the argument was really directed only to the status of the President, inasmuch as it was argued that he embodied the Executive Branch itself, while lesser executive officials and judges were not of that calibre.[806] That issue also remained unsettled, the Su-

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PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 2445 (1907). The Belknap precedent may be somewhat weakened, however, by the fact that his acquittal was based in part on the views of some Senators that impeachment should not be applied to someone no longer in office, id. at § 2467, although the Senate had earlier rejected (by majority vote of 37-29) a resolution disclaiming jurisdiction, and had adopted by vote of 35-22 a resolution affirming that result See id. at § 2007 for an extensive summary of the Senate's consideration of the issue. *See also* id, § 2317 (it had been conceded during the 1797 proceedings against Senator William Blount, who had been sequestered from his seat in the Senate, that an impeached officer could not escape punishment by resignation).

[802] H.R. Rep. No. 93-1305.

[803] 120 CONG. REC. 29361-62 (1974).

[804] Analyses of the issue from different points of view are contained in Impeachment Inquiry Staff, House Judiciary Committee, 93d Cong., *Constitutional Grounds for Presidential Impeachments*, (Comm. Print 1974); J. St. Clair, et al., Legal Staff of the President, *Analysis of the Constitutional Standard for Presidential Impeachment* (Washington: 1974); Office of Legal Counsel, Department of Justice, *Legal Aspects of Impeachment: An Overview, and Appendix I* (Washington: 1974). *And see* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973), which preceded the instant controversy; and MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 103-06 (2d ed. 2000).

[805] Indeed, the Committee voted not to recommend impeachment for alleged income tax fraud, an essentially private crime not amounting to an abuse of power.

[806] The question first arose during the grand jury investigation of former Vice President Agnew, during which the United States, through the Solicitor General, argued that the Vice President and all civil officers were not immune from the judicial

preme Court declining to provide guidance in the course of deciding a case on executive privilege.[807]

The Clinton Impeachment

President Clinton was impeached by the House, but acquitted by vote of the Senate. The House approved two articles of impeachment against the President stemming from the President's response to a sexual harassment civil lawsuit and to a subsequent grand jury investigation instigated by an Independent Counsel. The first article charged the President with committing perjury in testifying before the grand jury about his sexual relationship with a White House intern and his efforts to cover it up;[808] the second article charged the President with obstruction of justice relating both to the civil lawsuit and to the grand jury proceedings.[809] Two additional articles of impeachment had been approved by the House Judiciary Committee but were rejected by the full House.[810] The Senate trial resulted in acquittal on both articles.[811]

A number of legal issues surfaced during congressional consideration of the Clinton impeachment.[812] Although the congressional

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process and could be indicted prior to removal, but that the President for a number of constitutional and practical reasons was not subject to the ordinary criminal process. *Memorandum for the United States*, Application of Spiro T. Agnew, Civil No. 73-965 (D.Md., filed October 5, 1973). Courts have held that a federal judge was indictable and could be convicted prior to removal from office. United States v. Claiborne, 727 F.2d 842, 847-848 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 710-711 (11th Cir.), *cert. denied*, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied sub nom.* Kerner v. United States, 417 U.S. 976 (1974).

[807] The grand jury had named the President as an unindicted coconspirator in the case of United States v. Mitchell, *et al.*, No. 74-110 (D.D.C.), apparently in the belief that he was not actually indictable while in office. The Supreme Court agreed to hear the President's claim that the grand jury acted outside its authority, but finding that resolution of the issue was unnecessary to decision of the executive privilege claim it dismissed as improvidently granted the President's petition for *certiorari*. United States v. Nixon, 418 U.S. 683, 687 n.2 (1974).

[808] Approved by a vote of 228-206. 144 CONG. REC. H12,040 (daily ed. Dec. 19, 1998).

[809] Approved by a vote of 221-212. 144 CONG. REC. H12,041 (daily ed. Dec. 19, 1998).

[810] An article charging the President with perjury in the civil sexual harassment suit brought against him was defeated by a vote of 229-205; another article charging him with abuse of office by false responses to the House Judiciary Committee's written request for factual admissions was defeated by vote of 285-148. 144 CONG. REC. H12,042 (daily ed. Dec. 19, 1998).

[811] The vote for acquittal was 55-45 on the grand jury perjury charge, and 50-50 on the obstruction of justice charge. 145 CONG. REC. S1458-59 (daily ed. Feb. 12, 1999).

[812] For analysis and different perspectives on the Clinton impeachment, see Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 2d Sess. (1998); and Staff of the House Comm. on the Judiciary, 105th Cong., Impeachment: Selected Materials (Comm. Print 1998). *See also* MICHAEL J. GERHARDT, THE FEDERAL

votes on the different impeachment articles were not neatly divided between legal and factual matters and therefore cannot be said to have resolved the legal issues,[813] several aspects of the proceedings merit consideration for possible precedential significance. The House's acceptance of the grand jury perjury charge and its rejection of the civil deposition perjury charge may reflect a belief among some members that perjury in the criminal context is more serious than perjury in the civil context. Acceptance of the obstruction of justice charge may also have been based in part on an assessment of the seriousness of the charge. On the other hand, the House's rejection of the article relating to President Clinton's alleged non-cooperation with the Judiciary Committee's interrogatories can be contrasted with the House's 1974 "acceptance" of the Judiciary Committee's report recommending a similar type of charge against President Nixon, and raises the issue of whether the different circumstances (e.g., the relative importance of the information sought, and the nature and extent of the responses) may account for the different approaches.[814] So too, the acquittal of President Clinton on the perjury charge can be contrasted with convictions of Judges Hastings and Nixon on perjury charges, and presents the issue of whether different standards should govern Presidents and judges. The role of the Independent Counsel in complying with a statutory mandate to refer to the House "any substantial and credible information . . . that may constitute grounds for an impeachment" occasioned commentary.[815] The relationship

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IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2d ed. 2000); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999); LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 181-202 (3d ed. 2000); and Michael Stokes Paulsen, Impeachment (Update), 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1340-43 (2d ed. 2000). Much of the documentation can be found in Impeachment of William Jefferson Clinton, President of the United States, H.R. Rep. No. 105-380 (1998); Staff of the House Comm. on the Judiciary, 105th Cong., 2d Sess., Impeachment Inquiry: William Jefferson Clinton, President of the United States; Consideration of Articles of Impeachment (Comm. Print 1998); and Impeachment of President William Jefferson Clinton: The Evidentiary Record Pursuant to S. Res. 16, S. Doc. No. 106-3 (1999) (21-volume set).

[813] Following the trial, a number of Senators placed statements in the record explaining their votes. *See* 145 CONG. REC. S1462-1637 (daily ed. Feb. 12, 1999).

[814] Note that the Judiciary Committee deleted from the article a charge based on President Clinton's allegedly frivolous assertions of executive privilege in response to subpoenas from the Office of Independent Counsel. Similarly, the Committee in 1974 distinguished between President Nixon's refusal to respond to congressional subpoenas and his refusal to respond to those of the special prosecutor; only the refusal to provide information to the impeachment inquiry was cited as an impeachable abuse of power.

[815] The requirement was contained in the Ethics in Government Act, since lapsed, and codified at 28 U.S.C. § 595(c). For commentary, see Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309 (1999).

of censure to impeachment was another issue that arose. Some members advocated censure of President Clinton as an alternative to impeachment, as an alternative to trial, or as a post-trial means for those Senators who voted to acquit to register their disapproval of the President's conduct, but there was no vote on censure.[816]

Finally, the Clinton impeachment raised the issue of what the threshold is for "high crimes and misdemeanors." While the Nixon charges were premised on the assumption that an abuse of power need not be a criminal offense to be an impeachable offense,[817] the Clinton proceedings—or at least the perjury charge—raised the issue of whether criminal offenses that do not rise to the level of an abuse of power may nonetheless be impeachable offenses.[818] The House's vote to impeach President Clinton arguably amounted to an affirmative answer,[819] but the Senate's acquittal leaves the matter somewhat unsettled.[820] There appeared to be broad consensus in the Senate that some private crimes not involving an abuse of power (e.g., murder for personal reasons) are so outrageous as to constitute grounds for removal,[821] but there was no

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[816] For analysis of the issue, see Jack Maskell, *Censure of the President by Congress*, CRS Report for Congress 98-843A (1998).

[817] According to one scholar, the three articles of impeachment against President Nixon epitomized the "paradigm" for presidential impeachment—abuse of power in which there is "not only serious injury to the constitutional order but also a nexus between the misconduct of an impeachable official and the official's formal duties." Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 617 (1999).

[818] Although committing perjury in a judicial proceeding—regardless of purpose or subject matter—impedes the proper functioning of the judiciary both by frustrating the search for truth and by breeding disrespect for courts, and consequently may be viewed as an (impeachable) "offense against the state" (see 145 CONG. REC. S1556 (daily ed. Feb. 12, 1999) (statement of Sen. Thompson)), such perjury arguably constitutes an abuse of power only if the purpose or subject matter of theperjury relates to official duties or to aggrandizement of power. Note that one of the charges against President Clinton recommended by the House Judiciary Committee but rejected by the full House—providing false responses to the Committee's interrogatories—was squarely premised on an abuse of power.

[819] The House vote can be viewed as rejecting the views of a number of law professors, presented in a letter to the Speaker entered into the Congressional Record, arguing that high crimes and misdemeanors must involve "grossly derelict exercise of official power." 144 CONG. REC. H9649 (daily ed. Oct. 6, 1998).

[820] Some Senators who explained their acquittal votes rejected the idea that the particular crimes that President Clinton was alleged to have committed amounted to impeachable offenses (*see, e.g.*, 145 CONG. REC. S1560 (daily ed. Feb. 12, 1999) (statement of Sen. Moynihan); id. at 1601 (statement of Sen. Lieberman)), some alleged failure of proof (*see, e.g.*, id. at 1539 (statement of Sen. Specter); id. at 1581 (statement of Sen. Akaka)), and some cited both grounds (*see., e.g.*, id. at S1578-91 (statement of Sen. Leahy), and id. at S1627 (statement of Sen. Hollings)).

[821] *See, e.g.*, 145 CONG. REC. S1525 (daily ed. Feb. 12, 1999) (statement of Sen. Cleland) (accepting the proposition that murder and other crimes would qualify for impeachment and removal, but contending that "the current case does not reach the necessary high standard"); id. at S1533 (statement of Sen. Kyl) (impeachment cannot be limited to wrongful official conduct, but must include murder); and id. at

consensus on where the threshold for outrageousness lies, and there was no consensus that the perjury and obstruction of justice with which President Clinton was charged were so outrageous as to impair his ability to govern, and hence to justify removal.[822] Similarly, the almost evenly divided Senate vote to acquit meant that there was no consensus that removal was justified on the alternative theory that the alleged perjury and obstruction of justice so damaged the judiciary as to constitute an impeachable "offense against the state."[823]

Judicial Review of Impeachments

It was long assumed that no judicial review of the impeachment process was possible, that impeachment presents a true "political question" case, i.e., that the Constitution's conferral on the Senate of the "sole" power to try impeachments is a textually demonstrable constitutional commitment of trial procedures to the Senate to decide without court review. That assumption was not contested until very recently, when Judges Nixon and Hastings challenged their Senate convictions.[824]

In the Judge Nixon case, the Court held that a claim to judicial review of an issue arising in an impeachment trial in the Senate presents a nonjusticiable "political question."[825] Specifically, the Court rejected a claim that the Senate had departed from the

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S1592 (statement of Sen. Leahy) (acknowledging that "heinous" crimes such as murder would warrant removal). This idea, incidentally, was not new; one Senator in the First Congress apparently assumed that impeachment would be the first recourse if a President were to commit a murder. IX DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-179, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling and Helen E. Veit eds. 1988).

[822] One commentator, analogizing to the impeachment and conviction of Judge Claiborne for income tax evasion, viewed the basic issue in the Clinton case as whether his alleged misconduct was so outrageous as to "effectively rob[ ] him of the requisite moral authority to continue to function as President." Gerhardt, supra n.817, at 619. Under this view, the Claiborne conviction established that income tax evasion by a judge, although unrelated to official duties, reveals the judge as lacking the unquestioned integrity and moral authority necessary to preside over criminal trials, especially those involving tax evasion.

[823] Senator Thompson propounded this theory in arguing that "abuse of power" is too narrow a category to encompass all forms of subversion of government that should be grounds for removal. 145 CONG. REC. S1556 (daily ed. Feb. 12, 1999).

[824] Both judges challenged the use under Rule XI of a trial committee to hear the evidence and report to the full Senate, which would then carry out the trial. The rule was adopted in the aftermath of an embarrassingly sparse attendance at the trial of Judge Louderback in 1935. National Comm. Report, supra at 50-53, 54-57; Grimes, supra at 1233-37. In the Nixon case, the lower courts held the issue to be non-justiciable (Nixon v. United States, 744 F. Supp. 9 (D.D.C. 1990), *aff'd* 938 F.2d 239 (D.C. Cir. 1991), but a year later a district court initially ruled in Judge Hastings' favor. Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992), vacated 988 F.2d 1280 (D.C. Cir. 1993).

[825] Nixon v. United States, 506 U.S. 224 (1993). Nixon at the time of his conviction and removal from office was a federal district judge in Mississippi.

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meaning of the word "try" in the impeachment clause by relying on a special committee to take evidence, including testimony. But the Court's "political question" analysis has broader application, and appears to place the whole impeachment process off limits to judicial review. [826]

[826] The Court listed "reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments," and elsewhere agreed with the appeals court that "opening the door of judicial review to the procedures used by the Senate in trying impeachments would expose the political life of the country to months, or perhaps years, of chaos." 506 U.S. at 234, 236.

ARTICLE III

JUDICIAL DEPARTMENT

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JUDICIAL DEPARTMENT

ARTICLE III

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

ORGANIZATION OF COURTS, TENURE, AND COMPENSATION OF JUDGES

The Constitution is almost completely silent concerning the organization of the federal judiciary. "That there should be a national judiciary was readily accepted by all."[1] But whether it was to consist of one high court at the apex of a federal judicial system or a high court exercising appellate jurisdiction over state courts that would initially hear all but a minor fraction of cases raising national issues was a matter of considerable controversy.[2] The Virginia Plan provided for a "National judiciary [to] be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature . . . ."[3] In the Committee of the Whole, the proposition "that a national judiciary be established" was unanimously adopted,[4] but the clause "to consist of One supreme tribunal, and of one or more inferior tribunals"[5] was first agreed to, then reconsidered, and the provision for inferior tribunals stricken out, it being argued that state courts could adequately adjudicate all necessary matters while the supreme tribunal would protect the national interest and assure uniformity.[6]

[1] M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79 (1913).

[2] The most complete account of the Convention's consideration of the judiciary is J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. 1 ch. 5 (1971).

[3] 1 M. Farrand, supra at 21-22. That this version might not possibly be an accurate copy, *see* 3 id. at 593-94.

[4] 1 id. at 95, 104.

[5] Id. at 95, 105. The words "One or more" were deleted the following day without recorded debate. Id. at 116, 119.

[6] Id. at 124-25.

Wilson and Madison thereupon moved to authorize Congress "to appoint inferior tribunals,"[7] which carried the implication that Congress could in its discretion either designate the state courts to hear federal cases or create federal courts. The word "appoint" was adopted and over the course of the Convention changed into phrasing that suggests something of an obligation on Congress to establish inferior federal courts.[8]

The "good behavior" clause excited no controversy,[9] while the only substantial dispute with regard to denying Congress the power to intimidate judges through actual or threatened reduction of salaries came on Madison's motion to bar increases as well as decreases.[10]

One Supreme Court

The Convention left up to Congress decision on the size and composition of the Supreme Court, the time and place for sitting, its internal organization, save for the reference to the Chief Justice in the impeachment provision,[11] and other matters. These details Congress filled up in the Judiciary act of 1789, one of the seminal statutes of the United States.[12] By the Act, the Court was made to consist of a Chief Justice and five Associate Justices.[13] The number was gradually increased until it reached a total of ten under the act of March 3, 1863.[14] As one of the Reconstruction

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[7] Madison's notes use the word "institute" in place of "appoint", id. at 125, but the latter appears in the Convention Journal, id. at 118, and in Yates' notes, id. at 127, and when the Convention took up the draft reported by the Committee of the Whole "appoint" is used even in Madison's notes. 2 id. at 38, 45.

[8] On offering their motion, Wilson and Madison "observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." 1 id. at 125. The Committee on Detail provided for the vesting of judicial power in one Supreme Court "and in such inferior Courts as shall, when necessary, from time to time, be constituted by the legislature of the United States." 2 id. at 186. Its draft also authorized Congress "[t]o constitute tribunals inferior to the Supreme Court." Id. at 182. No debate is recorded when the Convention approved these two clauses, Id. at 315, 422-23, 428-30. The Committee on Style left the clause empowering Congress to "constitute" inferior tribunals as was, but it deleted "as shall, when necessary" from the Judiciary article, so that the judicial power was vested "in such inferior courts as Congress may from time to time"—and here deleted "constitute" and substituted the more forceful— "ordain and establish." Id. at 600.

[9] The provision was in the Virginia Plan and was approved throughout, 1 id. at 21.

[10] Id. at 121; 2 id. at 44-45, 429-430.

[11] Article I, § 3, cl. 6.

[12] Act of September 24, 1789, 1 Stat. 73. The authoritative works on the Act and its working and amendments are F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1928); Warren, *New Light on the History of the Federal Judicial Act of 1789*, 37 HARV. L. REV. 49 (1923); *see also* J. Goebel, supra at ch. 11.

[13] Act of September 24, 1789, 1 Stat. 73, § 1.

[14] 12 Stat. 794, § 1.

Congress' restrictions on President Andrew Johnson, the number was reduced to seven as vacancies should occur.[15] The number actually never fell below eight before the end of Johnson's term, and Congress thereupon made the number nine.[16]

Proposals have been made at various times for an organization of the Court into sections or divisions. No authoritative judicial expression is available, although Chief Justice Hughes in a letter to Senator Wheeler in 1937 expressed doubts concerning the validity of such a device and stated that "the Constitution does not appear to authorize two or more Supreme Courts functioning in effect as separate courts."[17]

Congress has also determined the time and place of sessions of the Court. It utilized this power once in 1801 to change its terms so that for fourteen months the Court did not convene, so as to forestall a constitutional attack on the repeal of the Judiciary Act of 1801.[18]

Inferior Courts

Congress also acted in the Judiciary Act of 1789 to create inferior courts. Thirteen district courts were constituted to have four sessions annually,[19] and three circuit courts were established. The circuit courts were to consist of two Supreme Court justices each and one of the district judges, and were to meet twice annually in the various districts comprising the circuit.[20] This system had substantial faults in operation, not the least of which was the burden imposed on the Justices, who were required to travel thousands of miles each year under bad conditions.[21] Despite numerous efforts to change this system, it persisted, except for one brief period, until

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[15] Act of July 23, 1866, 14 Stat. 209, § 1.

[16] Act of April 10, 1869, 16 Stat. 44.

[17] Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee, 75th Congress, 1st sess. (1937), pt. 3, 491. For earlier proposals to have the Court sit in divisions, *see* F. Frankfurter & J. Landis, supra at 74-85.

[18] 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222-224 (rev. ed. 1926).

[19] Act of September 24, 1789, 1 Stat. 73, §§ 2-3.

[20] Id. at 74, §§ 4-5

[21] *Cf.* F. Frankfurter & J. Landis, supra at chs. 1-3; J. Goebel, supra at 554-560, 565-569. Upon receipt of a letter from President Washington soliciting suggestions regarding the judicial system, WRITINGS OF GEORGE WASHINGTON, (J. Fitzpatrick ed., 1943), 31, Chief Justice Jay prepared a letter for the approval of the other Justices, declining to comment on the policy questions but raising several issues of constitutionality, that the same man should not be appointed to two offices, that the offices were incompatible, and that the act invaded the prerogatives of the President and Senate. 2 G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 293-296 (1858). The letter was apparently never forwarded to the President. Writings of Washington, supra at 31-32 n. 58. When the constitutional issue was raised in Stuart v. Laird, 5 U.S. (1 Cr.) 299, 309 (1803), it was passed over with the observation that the practice was too established to be questioned.

1891.[22] Since then, the federal judicial system has consisted of district courts with original jurisdiction, intermediate appellate courts, and the Supreme Court.

Abolition of Courts.—That Congress "may from time to time ordain and establish" inferior courts would seem to imply that the system may be reoriented from time to time and that Congress is not restricted to the *status quo* but may expand and contract the units of the system. But if the judges are to have life tenure what is to be done with them when the system is contracted? Unfortunately, the first exercise of the power occurred in a highly politicized situation, and no definite answer emerged. By the Judiciary Act of February 13, 1801,[23] passed in the closing weeks of the Adams Administration, the districts were reorganized, and six circuit courts consisting of three circuit judges each were created. Adams filled the positions with deserving Federalists, and upon coming to power the Jeffersonians set in motion plans to repeal the Act, which were carried out.[24] No provision was made for the displaced judges, apparently under the theory that if there were no courts there could be no judges to sit on them.[25] The validity of the repeal was questioned in *Stuart v. Laird*,[26] where Justice Paterson scarely noticed the argument in rejecting it.

Not until 1913 did Congress again utilize its power to abolish a federal court, this time the unfortunate Commerce Court, which had disappointed the expectations of most of its friends.[27] But this time Congress provided for the redistribution of the Commerce Court judges among the circuit courts as well as a transfer of its jurisdiction to the district courts.

Compensation

Diminution of Salaries.—"The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other

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[22] Act of March 3, 1891, 26 Stat. 826. The temporary relief came in the Act of February 13, 1801, 2 Stat. 89, which was repealed by the Act of March 8, 1802, 2 Stat. 132.

[23] Act of February 13, 1801, 2 Stat. 89.

[24] Act of March 8, 1802, 2 Stat. 132. F. Frankfurter & J. Landis, supra at 25-32; 1 C. Warren, supra at 185-215.

[25] This was the theory of John Taylor of Caroline, upon whom the Jeffersonians in Congress relied. W. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 63-64 (1918). The controversy is recounted fully in id. at 58-78.

[26] 5 U.S. (1 Cr.) 299 (1803).

[27] The Court was created by the Act of June 18, 1910, 36 Stat. 539, and repealed by the Act of October 22, 1913, 38 Stat. 208, 219. *See* F. Frankfurter & J. Landis, supra at 153-174; W. Carpenter, supra at 78-94.

branches of government."[28] Thus, once a salary figure has gone into effect, Congress may not reduce it nor rescind any part of an increase, although prior to the time of its effectiveness Congress may repeal a promised increase. This decision was rendered in the context of a statutory salary plan for all federal officers and employees under which increases went automatically into effect on a specified date. Four years running, Congress interdicted the pay increases, but in two instances the increases had become effective, raising the barrier of this clause.[29]

Also implicating this clause was a Depression-era appropriations act reducing "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)," by a fixed amount. While this provision presented no questions of constitutionality, it did require an interpretation as to which judges were excepted. Judges in the District of Columbia were held protected by Article III,[30] while, on the other hand, salaries of the judges of the Court of Claims, that being a legislative court, were held subject to the reduction.[31]

In *Evans v. Gore*,[32] the Court invalidated the application of the income tax law to a federal judge, over the strong dissent of Justice Holmes, who was joined by Justice Brandeis. This ruling was extended, in *Miles v. Graham*,[33] to exempt the salary of a judge of the Court of Claims appointed subsequent to the enactment of the taxing act. *Evans v. Gore* was disapproved, and *Miles v. Graham* was in effect overruled in *O'Malley v. Woodrough*,[34] where the Court upheld section 22 of the Revenue Act of 1932, which extended the application of the income tax to salaries of judges taking office after June 6, 1932. Such a tax was regarded neither as an unconstitutional diminution of the compensation of judges nor as an encroachment on the independence of the judiciary.[35] To sub-

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[28] United States v. Will, 449 U.S. 200, 217-218 (1980). Hamilton, writing in THE FEDERALIST, No. 79 (J. Cooke ed., 1961), 531, emphasized that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will."

[29] United States v. Will, 449 U.S. 200, 224-230 (1980). In one year, the increase took effect of October 1, while the President signed the bill reducing the amount during the day of October 1. The Court held the increase had gone into effect by the time the reduction was signed. Will is also authority for the proposition that a general, nondiscriminatory reduction, affecting judges but not aimed solely at them, is covered by the clause. Id. at 226.

[30] O'Donoghue v. United States, 289 U.S. 516 (1933).

[31] Williams v. United States, 289 U.S. 553 (1933). *But see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[32] 253 U.S. 245 (1920).

[33] 268 U.S. 501 (1925).

[34] 307 U.S. 277 (1939).

[35] 307 U.S. at 278-82.

ject judges who take office after a stipulated date to a nondiscriminatory tax laid generally on an income, said the Court "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."[36]

Formally overruling *Evans v. Gore*, the Court in *United States v. Hatter* reaffirmed the principle that judges should "share the tax burdens borne by all citizens."[37] "[T]he potential threats to judicial independence that underlie [the Compensation Clause] cannot justify a special judicial exemption from a commonly shared tax."[38] The Medicare tax, extended to all federal employees in 1982, is such a non-discriminatory tax that may be applied to federal judges, the Court held. The 1983 extension of a Social Security tax to then-sitting judges was "a different matter," however, because the judges were required to participate while almost all other federal employees were given a choice about participation.[39] Congress did not cure the constitutional violation by a subsequent enactment that raised judges' salaries by an amount greater than the amount of Social Security taxes that they were required to pay.[40]

Courts of Specialized Jurisdiction

By virtue of its power "to ordain and establish" courts, Congress has occasionally created courts under Article III to exercise a specialized jurisdiction. These tribunals are like other Article III courts in that they exercise "the judicial power of the United States," and only that power, that their judges must be appointed by the President and the Senate and must hold office during good behavior subject to removal by impeachment only, and that the compensation of their judges cannot be diminished during their continuance in office. One example of such courts was the Commerce Court created by the Mann-Elkins Act of 1910,[41] which was given exclusive jurisdiction of all cases to enforce orders of the Interstate Commerce Commission except those involving money penalties and criminal punishment, of cases brought to enjoin, annul, or set aside orders of the Commission, of cases brought under the act of 1903 to prevent unjust discriminations, and of all mandamus proceedings authorized by the act of 1903. This court

[36] 307 U.S. at 282.
[37] 532 U.S. 557, 571 (2001).
[38] 532 U.S. at 571.
[39] 532 U.S. at 572.
[40] 532 U.S. at 578-81.
[41] Ch. 309, 36 Stat. 539.

actually functioned for less than three years, being abolished in 1913, as was mentioned above.

Another court of specialized jurisdiction, but created for a limited time only, was the Emergency Court of Appeals organized by the Emergency Price Control Act of January 30, 1942.[42] By the terms of the statute, this court consisted of three or more judges designated by the Chief Justice from the judges of the Untied States district courts and circuit courts of appeal. The Court was vested with jurisdiction and powers of a district court to hear appeals filed within thirty days against denials of protests by the Price Administrator and with exclusive jurisdiction to set aside regulations, orders, or price schedules, in whole or in part, or to remand the proceeding, but the court was tightly constrained in its treatment of regulations. There was interplay with the district courts, which were charged with authority to enforce orders issued under the Act, although only the Emergency Court had jurisdiction to determine the validity of such orders.[43]

Other specialized courts are the Court of Appeals for the Federal Circuit, which is in many respects like the geographic circuits. Created in 1982,[44] this court has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims, from the Federal Merit System Protection Board, the Court of International Trade, the Patent Office in patent and trademark cases, and in various contract and tort cases. The Court of International Trade, which began life as the Board of General Appraisers, became the United States Customs Court in 1926, and was declared an Article III court in 1956, came to its present form and name in 1980.[45] The Judicial Panel on Multidistrict Litigation, staffed by federal

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[42] 56 Stat. 23, §§ 31-33.

[43] In Lockerty v. Phillips, 319 U.S. 182 (1943), the limitations on the use of injunctions, except the prohibition against interlocutory decrees, was unanimously sustained.

A similar court was created to be utilized in the enforcement of the economic controls imposed by President Nixon in 1971. Pub. L. 92-210, 85 Stat. 743, 211(b). Although controls ended in 1974, *see* 12 U.S.C. § 1904 note, Congress continued the Temporary Emergency Court of Appeals and gave it new jurisdiction. Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 633, 15 U.S.C. § 754, incorporating judicial review provisions of the Economic Stabilization Act. The Court was abolished, effective March 29, 1993, by P. L. 102-572, 106 Stat. 4506.

Another similar specialized court was created by § 209 of the Regional Rail Reorganization Act, P. L. 93-226, 87 Stat. 999, 45 U.S.C. § 719, to review the final system plan under the Act. Regional Rail Reorganization Act Cases (Blanchette v. Connecticut Gen. Ins. Corp.), 419 U.S. 102 (1974).

[44] By the Federal Courts Improvement Act of 1982, P. L. 97-164, 96 Stat. 37, 28 U.S.C. § 1295. Among other things, this Court assumed the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals.

[45] Act of Oct. 10, 1980, 94 Stat. 1727.

judges from other courts, is authorized to transfer actions pending in different districts to a single district for trial.[46]

To facilitate the gathering of foreign intelligence information, through electronic surveillance, search and seizure, as well as other means, Congress authorized in 1978 a special court, composed of seven regular federal judges appointed by the Chief Justice, to receive applications from the United States and to issue warrants for intelligence activities.[47]

Even greater specialization was provided by the special court created by the Ethics in Government Act;[48] the court was charged, upon the request of the Attorney General, with appointing an independent counsel to investigate and prosecute charges of illegality in the Executive Branch. The court also had certain supervisory powers over the independent counsel.

Legislative Courts

Legislative courts, so-called because they are created by Congress in pursuance of its general legislative powers, have comprised a significant part of the federal judiciary.[49] The distinction between constitutional courts and legislative courts was first made in *American Ins. Co. v. Canter*,[50] which involved the question of the admiralty jurisdiction of the territorial court of Florida, the judges of which were limited to a four-year term in office. Said Chief Justice Marshall for the Court: "These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those

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[46] 28 U.S.C. § 1407.

[47] P. L. 95-511, 92 Stat. 1788, 50 U.S.C. § 1803.

[48] Ethics in Government Act, Title VI, P. L. 95-521, 92 Stat. 1867, as amended, 28 U.S.C. §§ 591-599. The court is a "Special Division" of the United States Court of Appeals for the District of Columbia; composed of three regular federal judges, only one of whom may be from the D. C. Circuit, who are designated by the Chief Justice. 28 U.S. C. § 49. The constitutionality of the Special Division was upheld in Morrison v. Olson, 487 U.S. 654, 670-685 (1988). Authority for the court expired in 1999 under a sunset provision. Pub. L. 103-270, § 2, 108 Stat. 732 (1994).

[49] In Freytag v. Commissioner, 501 U.S. 868 (1991), a controverted decision held Article I courts to be "Courts of Law" for purposes of the appointments clause. Art. II, § 2, cl. 2. *See* id. at 888-892 (majority opinion), and 901-914 (Justice Scalia dissenting).

[50] 26 U.S. (1 Pet.) 511 (1828).

general powers which that body possesses over the territories of the United States."[51] The Court went on to hold that admiralty jurisdiction can be exercised in the States only in those courts which are established in pursuance of Article III, but that the same limitation does not apply to the territorial courts, for in legislating for them "Congress exercises the combined powers of the general, and of a state government."[52]

Canter postulated a simple proposition: "Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot."[53] A two-fold difficulty attended this proposition, however. Admiralty jurisdiction is included within the "judicial power of the United States" specifically in Article III, requiring an explanation how this territorial court could receive and exercise it. Second, if territorial courts could not exercise Article III power, how might their decisions be subjected to appellate review in the Supreme Court, or indeed in other Article III courts, which could exercise only Article III judicial power?[54] Moreover, if in fact some "judicial power" may be devolved upon courts not having the constitutional security of tenure and salary, what prevents Congress from undermining those values intended to be protected by Article III's guarantees by giving jurisdiction to nonprotected entities that, being subjected to influence, would be bent to the popular will?

Attempts to explain or to rationalize the predicament or to provide a principled limiting point have from *Canter* to the present resulted in "frequently arcane distinctions and confusing precedents" spelled out in cases comprising "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night."[55] Nonethe-

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[51] 26 U.S. at 546.

[52] In Glidden Co. v. Zdanok, 370 U.S. 530, 544-45 (1962), Justice Harlan asserted that Chief Justice Marshall in the Canter case "did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. . . . All the Chief Justice meant . . . is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article. . . ."

[53] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 106 (1982) (Justice White dissenting).

[54] That the Supreme Court could review the judgments of territorial courts was established in Durousseau v. United States, 10 U.S. (6 Cr.) 307 (1810). *See also* Benner v. Porter, 50 U.S. (9 How.) 235, 243 (1850); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434 (1872); Balzac v. Porto Rico, 258 U.S. 298, 312-313 (1922).

[55] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90, 91 (1982) (Justice Rehnquist concurring). The "darkling plain" language is his attribution to Justice White's historical summary.

less, Article I courts are quite usual entities in our judicial system.[56]

Power of Congress Over Legislative Courts.—In creating legislative courts, Congress is not limited by the restrictions imposed in Article III concerning tenure during good behavior and the prohibition against diminution of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court, and it may subject the judges of legislative courts to removal by the President,[57] or it may reduce their salaries during their terms.[58] Similarly, it follows that Congress can vest in legislative courts nonjudicial functions of a legislative or advisory nature and deprive their judgments of finality. Thus, in *Gordon v. United States*,[59] there was no objection to the power of the Secretary of the Treasury and Congress to revise or suspend the early judgments of the Court of Claims. Likewise, in *United States v. Ferreira*,[60] the Court sustained the act conferring powers on the Florida territorial court to examine claims rising under the Spanish treaty and to report its decisions and the evidence on which they were based to the Secretary of the Treasury for subsequent action. "A power of this description," it was said, "may constitutionally be conferred on a Secretary as well as on a commissioner. But [it] is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."[61]

Review of Legislative Courts by Supreme Court.—Chief Justice Taney's view, that would have been expressed in *Gordon*,[62]

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[56] In addition to the local courts of the District of Columbia, the bankruptcy courts, and the U. S. Court of Federal Claims, considered infra, these include the United States Tax Court, formerly an independent agency in the Treasury Department, but by the Tax Reform Act of 1969, § 951, 83 Stat. 730, 26 U.S.C. § 7441, made an Article I court of record, the Court of Veterans Appeals, Act of Nov. 18, 1988, 102 Stat. 4105, 38 U.S.C. § 4051, and the courts of the territories of the United States. Magistrate judges are adjuncts of the District Courts, *see* infra, and perform a large number of functions, usually requiring the consent of the litigants. *See* Gomez v. United States, 490 U.S. 858 (1989); Peretz v. United States, 501 U.S. 923 (1991). The U. S. Court of Military Appeals, strictly speaking, is not part of the judiciary but is a military tribunal, 10 U.S.C. § 867, although Congress designated it an Article I tribunal and has recently given the Supreme Court *certiorari* jurisdiction over its decisions.

[57] McAllister v. United States, 141 U.S. 174 (1891).

[58] United States v. Fisher, 109 U.S. 143 (1883); Williams v. United States, 289 U.S. 553 (1933).

[59] 69 U.S. (2 Wall.) 561 (1864).

[60] 54 U.S. (13 How.) 40 (1852).

[61] 54 U.S. at 48.

[62] The opinion in Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864), had originally been prepared by Chief Justice Taney, but following his death and reargument of the case the opinion cited was issued. The Court later directed the publishing of Taney's original opinion at 117 U.S. 697. *See also* United States v. Jones,

that the judgments of legislative courts could never be reviewed by the Supreme Court, was tacitly rejected in *De Groot v. United States*,[63] in which the Court took jurisdiction from a final judgment of the Court of Claims. Since the decision in this case, the authority of the Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts but rather upon the nature of the proceeding before the lower court and the finality of its judgment. The Supreme Court will neither review the administrative proceedings of legislative courts nor entertain appeals from the advisory or interlocutory decrees of such a body.[64] But in proceedings before a legislative court which are judicial in nature, admit of a final judgment, and involve the performance of judicial functions and therefore the exercise of judicial power, the Court may be vested with appellate jurisdiction.[65]

The "Public Rights" Distinction.—A major delineation of the distinction between Article I courts and Article III courts was attempted in *Murray's Lessee v. Hoboken Land & Improvement Co.*[66] At issue was a summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its customs collectors. It was objected that the assessment and collection was a judicial act carried out by nonjudicial officers and thus invalid under Article III. Accepting that the acts complained of were judicial, the Court nonetheless sustained the act by distinguishing between any act, "which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," which, in other words, is inherently judicial, and other acts which Congress may vest in courts or in other agencies. "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[67] The distinction was between those acts which historically had been determined by courts and those which historically had been resolved by

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119 U.S. 477, 478 (1886), in which the Court noted that the official report of Chief Justice Chase's Gordon opinion and the Court's own record showed differences and quoted the record.

[63] 72 U.S. (5 Wall.) 419 (1867). *See also* United States v. Jones, 119 U.S. 477 (1886).

[64] *E.g.*, Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930); D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). *See* Glidden Co. v. Zdanok, 370 U.S. 530, 576, 577-579 (1962).

[65] Pope v. United States, 323 U.S. 1, 14 (1944); D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[66] 59 U.S. (18 How.) 272 (1856).

[67] 59 U.S. at 284.

executive or legislative acts and comprehended those matters that arose between the government and others. Thus, Article I courts "may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control."[68]

Among the matters susceptible of judicial determination, but not requiring it, are claims against the United States,[69] the disposal of public lands and claims arising therefrom,[70] questions concerning membership in the Indian tribes,[71] and questions arising out of the administration of the customs and internal revenue laws.[72] Other courts similar to territorial courts, such as consular courts and military courts martial, may be justified on like grounds.[73]

The "public rights" distinction appears today to be a description without a significant distinction. Thus, in *Crowell v. Benson*,[74] the Court approved an administrative scheme for determination, subject to judicial review, of maritime employee compensation claims, although it acknowledged that the case involved "one of private right, that is, of the liability of one individual to another under the law as defined."[75] This scheme was permissible, the Court said, because in cases arising out of congressional statutes, an administrative tribunal could make findings of fact and render an initial decision on legal and constitutional questions, as long as there is adequate review in a constitutional court.[76] The "essential attributes" of decision must remain in an Article III court, but so long as it does, Congress may utilize administrative decisionmakers in those private rights cases that arise in the context of a

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[68] Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929).

[69] Gordon v. United States, 117 U.S. 697 (1864); McElrath v. United States, 102 U.S. 426 (1880); Williams v. United States, 289 U.S. 553 (1933). On the status of the then-existing Court of Claims, *see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[70] United States v. Coe, 155 U.S. 76 (1894) (Court of Private Land Claims).

[71] Wallace v. Adams, 204 U.S. 415 (1907); Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (Choctaw and Chickasaw Citizenship Court).

[72] Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); Ex Parte Bakelite Corp., 279 U.S. 438 (1929).

[73] *See* In re Ross, 140 U.S. 453 (1891) (consular courts in foreign countries). Military courts may, on the other hand, be a separate entity of the military having no connection to Article III. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

[74] 285 U.S. 22 (1932).

[75] 285 U.S. at 51. On the constitutional problems of assignment to an administrative agency, *see* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937).

[76] 301 U.S. at 51-65.

comprehensive federal statutory scheme.[77] That the "public rights" distinction marked a dividing line between those matters that could be assigned to legislative courts and to administrative agencies and those matters "of private right" that could not be was reasserted in *Marathon*, but there was much the Court plurality did not explain.[78]

The Court continued to waver with respect to the importance to decision-making of the public rights/private rights distinction. In two cases following *Marathon*, it rejected the distinction as "a bright line test," and instead focused on "substance"—i.e., on the extent to which the particular grant of jurisdiction to an Article I court threatened judicial integrity and separation of powers principles.[79] Nonetheless, the Court indicated that the distinction may be an appropriate starting point for analysis. Thus, the fact that private rights traditionally at the core of Article III jurisdiction are at stake leads the Court to "searching" inquiry as to whether Congress is encroaching inordinately on judicial functions, while the concern is not so great where "public" rights are involved.[80]

However, in a subsequent case, the distinction was pronounced determinative not only of the issue whether a matter could be referred to a non-Article III tribunal but whether Congress could dispense with civil jury trials.[81] In so doing, however, the Court viti-

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[77] 301 U.S. at 50, 51, 58-63. Thus, Article III concerns were satisfied by a review of the agency fact finding upon the administrative record. Id. at 63-65. The plurality opinion denied the validity of this approach in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39 (1982), although Justice White in dissent accepted it. Id. at 115. The plurality, rather, rationalized Crowell and subsequent cases on an analysis seeking to ascertain whether agencies or Article I tribunals were "adjuncts" of Article III courts, that is, whether Article III courts were sufficiently in charge to protect constitutional values. Id. at 76-87.

[78] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-70 (1982) (plurality opinion). Thus, Justice Brennan states that at a minimum a matter of public right must arise "'between the government and others'" but that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means to distinguish "private rights." Id. at 69 & n.23. Crowell v. Benson, however, remained an embarrassing presence.

[79] Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985); CFTC v. Schor, 478 U.S. 833 (1986). The cases also abandoned the principle that the Federal Government must be a party for the case to fall into the "public rights" category. Thomas, 473 U.S. at 586; *and see* id. at 596-99 (Justice Brennan concurring).

[80] "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 589 (1985) (quoting Northern Pipeline, 458 U.S. at 68 (plurality opinion)).

[81] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-55 (1989). A seventh Amendment jury-trial case, the decision is critical to the Article III issue as well, because, as the Court makes clear what was implicit before, whether Congress can submit a legal issue to an Article I tribunal and whether it can dispense with a civil jury on that legal issue must be answered by the same analysis. Id. at 52-53.

ated much of the core content of "private" rights as a concept and left resolution of the central issue to a balancing test. That is, "public" rights are, strictly speaking, those in which the cause of action inheres in or lies against the Federal Government in its sovereign capacity, the understanding since *Murray's Lessee*. However, to accommodate *Crowell v. Benson*, *Atlas Roofing*, and similar cases, seemingly private causes of action between private parties will also be deemed "public" rights, when Congress, acting for a valid legislative purpose pursuant to its Article I powers, fashions a cause of action that is analogous to a common-law claim and so closely integrates it into a public regulatory scheme that it becomes a matter appropriate for agency resolution with limited involvement by the Article III judiciary.[82] Nonetheless, despite its fixing by Congress as a "core proceeding" suitable for an Article I bankruptcy court adjudication, the Court held the particular cause of action at issue was a private issue as to which the parties were entitled to a civil jury trial (and necessarily which Congress could not commit to an Article I tribunal, save perhaps through the consent of the parties.[83]

Constitutional Status of the Court of Claims and the Court of Customs and Patent Appeals.—Though the Supreme Court for a long while accepted the Court of Claims as an Article III court,[84] it later ruled that court to be an Article I court and its judges without constitutional protection of tenure and salary.[85] Then, in the 1950s, Congress statutorily declared that the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals were Article III courts,[86] a questionable act under the standards the Court had utilized to determine whether courts were

[82] 492 U.S. at 52-54. The Court reiterated that the Government need not be a party as a prerequisite to a matter being of "public right." Id. at 54. Concurring, Justice Scalia argued that public rights historically were and should remain only those matters to which the Federal Government is a party. Id. at 65.

[83] 492 U.S. at 55-64. The Court reserved the question whether, a jury trial being required, a non-Article III bankruptcy judge could oversee such a jury trial. Id. at 64. That question remains unresolved, both as a matter, first, of whether there is statutory authorization for bankruptcy judges to conduct jury trials, and, second, if there is, whether they may constitutionally do so. *E.g.*, In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), *cert. granted*, 497 U.S. 1023, *vacated and remanded for consideration of a jurisdictional issue*, 498 U.S. 964 (1990), *reinstated*, 924 F.2d 36 (2d Cir.), *cert. denied*, 500 U.S. 928 (1991); In re Grabill Corp., 967 F.2d 1152 (7th Cir. 1991), *pet. for reh. en banc den.*, 976 F.2d 1126 (7th Cir. 1992).

[84] De Groot v. United States, 72 U.S. (5 Wall.) 419 (1866); United States v. Union Pacific Co., 98 U.S. 569, 603 (1878); Miles v. Graham, 268 U.S. 501 (1925).

[85] Williams v. United States, 289 U.S. 553 (1933); *cf.* Ex parte Bakelite Corp., 279 U.S. 438, 450-455 (1929).

[86] 67 Stat. 226, § 1, 28 U.S.C. § 171 (Court of Claims); 70 Stat. 532. § 1, 28 U.S.C. § 251 (Customs Court); 72 Stat. 848, § 1, 28 U.S.C. § 211 (Court of Customs and Patent Appeals).

legislative or constitutional.[87] But in *Glidden Co. v. Zdanok*,[88] five of seven participating Justices united to find that indeed the Court of Claims and the Court of Customs and Patent Appeals, at least, were constitutional courts and their judges eligible to participate in judicial business in other constitutional courts. Three Justices would have overruled *Bakelite* and *Williams* and would have held that the courts in question were constitutional courts.[89] Whether a court is an Article III tribunal depends largely upon whether legislation establishing it is in harmony with the limitations of that Article, specifically, "whether ... its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite." When a court is created "to carry into effect [federal] powers ... over subject matter ... and not over localities," a presumption arises that the status of such a tribunal is constitutional rather than legislative.[90] The other four Justices expressly declared that *Bakelite* and *Williams* should not be overruled,[91] but two of them thought the two courts had attained constitutional status by virtue of the clear manifestation of congressional intent expressed in the legislation.[92] Two Justices maintained that both courts remained legislative tribunals.[93] While the result is clear, no standard for pronouncing a court legislative rather than constitutional has obtained the adherence of a majority of the Court.[94]

Status of Courts of the District of Columbia.—Through a long course of decisions, the courts of the District of Columbia were

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[87] In Ex parte Bakelite Corp., 279 U.S. 438. 459 (1929), Justice Van Devanter refused to give any weight to the fact that Congress had bestowed life tenure on the judges of the Court of Customs Appeals because that line of thought "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred."

[88] 370 U.S. 530 (1962).

[89] Glidden Co. v. Zdanok, 370 U.S. 530, 531 (1962) (Justices Harlan, Brennan, and Stewart).

[90] 370 U.S. at 548, 552.

[91] 370 U.S. at 585 (Justice Clark and Chief Justice Warren concurring); 589 (Justices Douglas and Black dissenting).

[92] 370 U.S. at 585 (Justice Clark and Chief Justice Warren).

[93] 370 U.S. at 589 (Justices Douglas and Black). The concurrence thought that the rationale of Bakelite and Williams was based on a significant advisory and reference business of the two courts, which the two Justices now thought insignificant, but what there was of it they thought nonjudicial and the courts should not entertain it. Justice Harlan left that question open. Id. at 583.

[94] Aside from doctrinal matters, in 1982, Congress created the United States Court of Appeals for the Federal Circuit, giving it, *inter alia*, the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals. 96 Stat. 25, title 1, 28 U.S.C. § 41. At the same time Congress created the United States Claims Court, now the United States Court of Federal Claims, as an Article I tribunal, with the trial jurisdiction of the old Court of Claims. 96 Stat. 26, as amended, § 902(a)(1), 106 Stat. 4516, 28 U.S.C. §§ 171-180.

regarded as legislative courts upon which Congress could impose nonjudicial functions. In *Butterworth v. United States ex rel. Hoe*,[95] the Court sustained an act of Congress which conferred revisory powers upon the Supreme Court of the District in patent appeals and made its decisions binding only upon the Commissioner of Patents. Similarly, the Court later sustained the authority of Congress to vest revisory powers in the same court over rates fixed by a public utilities commission.[96] Not long after this the same rule was applied to the revisory powers of the District Supreme Court over orders of the Federal Radio Commission.[97] These rulings were based on the assumption, express or implied, that the courts of the District were legislative courts, created by Congress in pursuance of its plenary power to govern the District of Columbia. In dictum in *Ex parte Bakelite Corp.*,[98] while reviewing the history and analyzing the nature of the legislative courts, the Court stated that the courts of the District were legislative courts.

In 1933, nevertheless, the Court, abandoning all previous dicta on the subject, found the courts of the District of Columbia to be constitutional courts exercising judicial power of the United States,[99] with the result that it assumed the task of reconciling the performance of nonjudicial functions by such courts with the rule that constitutional courts can exercise only the judicial power of the United States. This task was accomplished by the argument that in establishing courts for the District, Congress is performing dual functions in pursuance of two distinct powers, the power to constitute tribunals inferior to the Supreme Court, and its plenary and exclusive power to legislate for the District of Columbia. However, Article III, § 1, limits this latter power with respect to tenure and compensation, but not with regard to vesting legislative and administrative powers in such courts. Subject to the guarantees of personal liberty in the Constitution, "Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a State legislature has in conferring jurisdiction on its courts."[100]

In 1970, Congress formally recognized two sets of courts in the District, federal courts, district courts and a Court of Appeals for

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[95] 112 U.S. 50 (1884).
[96] Keller v. Potomac Elec. Co., 261 U.S. 428 (1923).
[97] Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).
[98] 279 U.S. 438, 450-455 (1929).
[99] O'Donoghue v. United States, 289 U.S. 516 (1933).
[100] 289 U.S. at 535-46. Chief Justice Hughes in dissent argued that Congress' power over the District was complete in itself and the power to create courts there did not derive at all from Article III. Id. at 551. *See* the discussion of this point of O'Donoghue in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). *Cf.* Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967) (three-judge court).

the District of Columbia, created pursuant to Article III, and courts equivalent to state and territorial courts, created pursuant to Article I.[101] Congress' action was sustained in *Palmore v. United States*.[102] When legislating for the District, the Court held, Congress has the power of a local legislature and may, pursuant to Article I, § 8, cl. 17, vest jurisdiction to hear matters of local law and local concerns in courts not having Article III characteristics. The defendant's claim that he was denied his constitutional right to be tried before an Article III judge was denied on the basis that it was not absolutely necessary that every proceeding in which a charge, claim, or defense based on an act of Congress or a law made under its authority need be conducted in an Article III court. State courts, after all, could hear cases involving federal law as could territorial and military courts. "[T]he requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."[103]

Bankruptcy Courts.—After extended and lengthy debate, Congress in 1978 revised the bankruptcy act and created as an "adjunct" of the district courts a bankruptcy court composed of judges, vested with practically all the judicial power of the United States, serving for 14-year terms, subject to removal for cause by the judicial councils of the circuits, and with salaries subject to statutory change.[104] The bankruptcy courts were given jurisdiction over all civil proceedings arising under the bankruptcy code or arising in or related to bankruptcy cases, with review in Article III courts under a clearly erroneous standard. In a case in which a claim was made against a company for breaches of contract and warranty, purely state law claims, the Court held unconstitutional the conferral upon judges not having the Article III security of tenure and compensation of jurisdiction to hear state law claims of traditional common law actions of the kind existing at the time of the drafting

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[101] Pub. L. 91-358, 84 Stat. 475, D.C. Code § 11-101.

[102] 411 U.S. 389 (1973)

[103] 411 U.S. at 407-08. *See also* Pernell v. Southall Realty Co., 416 U.S. 363, 365-365 (1974); Swain v. Pressley, 430 U.S. 372 (1977); Key v. Doyle, 434 U.S. 59 (1978). Under Swain, provision for hearing of motions for postjudgement relief by convicted persons in the District, the present equivalent of *habeas* for federal convicts, is placed in Article I courts. That there are limits to Congress' discretion is asserted in dictum in Territory of Guam v. Olsen, 431 U.S. 195, 201-202, 204 (1977).

[104] Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549, codified in titles 11, 28. The bankruptcy courts were made "adjuncts" of the district courts by § 201(a), 28 U.S.C. § 151(a). For citation to the debate with respect to Article III versus Article I status for these courts, *see* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 61 n.12 (1982) (plurality opinion).

of the Constitution.[105] While the holding was extremely narrow, a plurality of the Court sought to rationalize and limit the Court's jurisprudence of Article I courts. According to the plurality, as a fundamental principle of separation of powers, the judicial power of the United States must be exercised by courts having the attributes prescribed in Article III. Congress may not evade the constitutional order by allocating this judicial power to courts whose judges lack security of tenure and compensation. Only in three narrowly circumscribed instances may judicial power be distributed outside the Article III framework: in territories and the District of Columbia, that is, geographical areas in which no State operated as sovereign and Congress exercised the general powers of government; courts martial, that is, the establishment of courts under a constitutional grant of power historically understood as giving the political branches extraordinary control over the precise subject matter; and the adjudication of "public rights," that is, the litigation of certain matters that historically were reserved to the political branches of government and that were between the government and the individual.[106] In bankruptcy legislation and litigation not involving any of these exceptions, the plurality would have held, the judicial power to process bankruptcy cases could not be assigned to the tribunals created by the act.[107]

The dissent argued that, while on its face Article III provided for exclusivity in assigning judicial power to Article III entities, the history since *Canter* belied that simplicity. Rather, the precedents clearly indicated that there is no difference in principle between the work that Congress may assign to an Article I court and that which must be given to an Article III court. Despite this, the dissent contended that Congress did not possess plenary discretion in choosing between the two systems; rather, in evaluating whether jurisdiction was properly reposed in an Article I court, the Supreme Court must balance the values of Article III against both the strength of the interest Congress sought to further by its Article I

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[105] The statement of the holding is that of the two concurring Justices, 458 U.S. at 89 (Justices Rehnquist and O'Connor), with which the plurality agreed "at the least," while desiring to go further. Id. at 87 n.40.

[106] 458 U.S. at 63-76 (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens).

[107] The plurality also rejected an alternative basis, a contention that as "adjuncts" of the district courts, the bankruptcy courts were like United States magistrates or like those agencies approved in Crowell v. Benson, 285 U.S. 22 (1932), to which could be asigned factfinding functions subject to review in Article III courts, the fount of the administrative agency system. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-86 (1982). According to the plurality, the act vested too much judicial power in the bankruptcy courts to treat them like agencies, and it limited the review of Article III courts too much.

investiture and the extent to which Article III values were undermined by the congressional action. This balancing would afford the Court, the dissent believed, the power to prevent Congress, were it moved to do so, from transferring jurisdiction in order to emasculate the constitutional courts of the United States.[108]

Again, no majority could be marshaled behind a principled discussion of the reasons for and the limitation upon the creation of legislative courts, not that a majority opinion, or even a unanimous one, would necessarily presage the settling of the law.[109] But the breadth of the various opinions not only left unclear the degree of discretion left in Congress to restructure the bankruptcy courts, but also placed in issue the constitutionality of other legislative efforts to establish adjudicative systems outside a scheme involving the creation of life-tenured judges.[110]

Congress responded to *Marathon* by enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[111] Bankruptcy courts were maintained as Article I entities, and overall their powers as courts were not notably diminished. However, Congress did establish a division between "core proceedings," which bankruptcy courts could hear and determine, subject to lenient review, and other proceedings, which, though initially heard and decided by bankruptcy courts, could be reviewed *de novo* in the district court at the behest of any party, unless the parties consented to bankruptcy-court jurisdiction in the same manner as core proceedings. A safety valve was included, permitting the district court to withdraw any proceeding from the bankruptcy court on cause shown.[112] Notice that in *Granfinanciera, S.A. v. Nordberg*,[113] the Court found that a cause of action founded on state law, though denominated a core proceeding, was a private right.

Agency Adjudication.—The Court in two decisions following *Marathon* involving legislative courts clearly suggested that the majority was now closer to the balancing approach of the *Marathon* dissenters than to the position of the *Marathon* plurality that Congress may confer judicial power on legislative courts in only

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[108] 458 U.S. at 92, 105-13, 113-16 (Justice White, joined by Chief Justice Burger and Justice Powell).

[109] Ex parte Bakelite Corp., 279 U.S. 438 (1929), was, after all, a unanimous opinion and did not long survive.

[110] In particular, the Federal Magistrates Act of 1968, under which judges may refer certain pretrial motions and the trial of certain matters to persons appointed to a specific term, was threatened. Pub. L. 90-578, 82 Stat. 1108, as amended, 28 U.S.C. §§ 631-639. *See* United States v. Raddatz, 447 U.S. 667 (1980); Mathews v. Weber, 423 U.S. 261 (1976).

[111] P. L. 98-353, 98 Stat. 333, judiciary provisions at 28 U.S.C. § 151 *et seq*.

[112] *See* 28 U.S.C. § 157.

[113] 492 U.S. 33 (1989).

very limited circumstances. Subsequently, however, *Granfinanciera, S.A. v. Nordberg*,[114] a reversion to the fundamentality of *Marathon*, with an opinion by the same author, Justice Brennan, cast some doubt on this proposition. In *Thomas v. Union Carbide Agric. Products Co.*,[115] the Court upheld a provision of the pesticide law requiring binding arbitration, with limited judicial review , of compensation due one registrant by another for mandatory sharing of registration information, the right arising from federal statutory law. And in *CFTC v. Schor*,[116] the Court upheld conferral on the agency of authority, in a reparations adjudication under the Act, also to adjudicate "counterclaims" arising out of the same transaction, including those arising under state common law. Neither the fact that the pesticide case involved a dispute between two private parties nor the fact that the CFTC was empowered to decide claims traditionally adjudicated under state law proved decisive to the Court's analysis.

In rejecting a "formalistic" approach and analyzing the "substance" of the provision at issue in *Union Carbide*, Justice O'Connor's opinion for the Court pointed to several considerations.[117] The right to compensation was not a purely private right, but "bears many of the characteristics of a 'public' right," since Congress was "authoriz[ing] an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program."[118] Also important was not "unduly constrict[ing] Congress in its ability to take needed and innovative action pursuant to its Article I powers;"[119] arbitration was "a pragmatic solution to [a] difficult problem." The limited nature of judicial review was seen as a plus in the sense that "no unwilling defendant is subjected to judicial enforcement power;" on the other hand, availability of limited judicial review of the arbitrator's findings and determination for fraud, misconduct, or misrepresentation, and for due process violations, preserved the "'appropriate exercise of the judicial function.'"[120] Thus, the Court concluded, Congress in exercise of Article I powers "may create a seemingly 'private' right that is so closely integrated into a public regulatory

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[114] 492 U.S. 33 (1989)

[115] 473 U.S. 568 (1985).

[116] 478 U.S. 833 (1986).

[117] *Contrast* the Court's approach to Article III separation of powers issues with the more rigid approach enunciated in INS v. Chadha *and* Bowsher v. Synar, involving congressional incursions on executive power.

[118] 473 U.S. at 589.

[119] CFTC v. Schor, 478 U.S. at 851 (summarizing the Thomas rule).

[120] Thomas, 473 U.S. at 591, 592 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).

scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." [121]

In *Schor*, the Court described Art. III, § 1 as serving a dual purpose: to protect the role of an independent judiciary and to safeguard the right of litigants to have claims decided by judges free from potential domination by the other branches of government. A litigant's Article III right is not absolute, the Court determined, but may be waived. This the litigant had done by submitting to the administrative law judge's jurisdiction rather than independently seeking relief as he was entitled to and then objecting only after adverse rulings on the merits. But the institutional integrity claim, not being personal, could not be waived, and the Court reached the merits. The threat to institutional independence was "weighed" by reference to "a number of factors." The conferral on the CFTC of pendent jurisdiction over common law counterclaims was seen as more narrowly confined than was the grant to bankruptcy courts at issue in *Marathon*, and as more closely resembling the "model" approved in *Crowell v. Benson*. The CFTC's jurisdiction, unlike that of bankruptcy courts, was said to be confined to "a particularized area of the law;" the agency's orders were enforceable only by order of a district court, [122] and reviewable under a less deferential standard, with legal rulings being subject to *de novo* review; and the agency was not empowered, as had been the bankruptcy courts, to exercise "all ordinary powers of district courts."

Granfinanciera followed analysis different from that in *Schor*, although it preserved *Union Carbide* through its concept of "public rights." State law and other legal claims founded on private rights could not be remitted to non-Article III tribunals for adjudication unless Congress in creating an integrated public regulatory scheme has so taken up the right as to transform it. It may not simply relabel a private right and place it into the regulatory scheme. The Court is hazy with respect to whether the right itself must be a creature of federal statutory action. The general descriptive language suggests that, but in its determination whether the right at issue in the case, the recovery of preferential or fraudulent transfers in the context of a bankruptcy proceeding, is a "private right," the Court seemingly goes beyond this point. Though a statutory interest, the actions were identical to state-law contract claims

[121] 473 U.S. at 594.

[122] *Cf.* Union Carbide, 473 U.S. at 591 (fact that "FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement" cited as lessening danger of encroachment on "Article III judicial powers").

brought by a bankrupt corporation to augment the estate.[123] *Schor* was distinguished solely on the waiver part of the decision, relating to the individual interest, without considering the part of the opinion deciding the institutional interest on the merits and utilizing a balancing test.[124]

Thus, while the Court has made some progress in reconciling its growing line of disparate cases, doctrinal harmony has not yet been achieved.

Noncourt Entities in the Judicial Branch

Passing on the constitutionality of the establishment of the Sentencing Commission as an "independent" body in the judicial branch, the Court acknowledged that the Commission is not a court and does not exercise judicial power. Rather, its function is to promulgate binding sentencing guidelines for federal courts. It acts, therefore, legislatively, and its membership of seven is composed of three judges and three nonjudges. But the standard of constitutionality, the Court held, is whether the entity exercises powers that are more appropriately performed by another branch or that undermine the integrity of the judiciary. Because the imposition of sentences is a function traditionally exercised within congressionally prescribed limits by federal judges, the Court found the functions of the Commission could be located in the judicial branch. Nor did performance of its functions contribute to a weakening of the judiciary, or an aggrandizement of power either, in any meaningful way, the Court observed.[125]

JUDICIAL POWER

Characteristics and Attributes of Judicial Power

Judicial power is the power "of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[126] It is "the right to determine actual controversies arising between diverse litigants, duly

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[123] Granfinanciera, 492 U.S. at 51-55, 55-60.

[124] 492 U.S. at 59 n.14.

[125] Mistretta v. United States, 488 U.S. 361, 384-97 (1989). Clearly, some of the powers vested in the Special Division of the United States Court of Appeals for the District of Columbia Circuit under the Ethics in Government Act in respect to the independent counsel were administrative, but because the major nonjudicial power, the appointment of the independent counsel, was specifically authorized in the appointments clause, the additional powers were miscellaneous and could be lodged there by Congress. Implicit in the Court's analysis was the principle that a line exists that Congress could not cross over. Morrison v. Olson, 487 U.S. 654, 677-685 (1988).

[126] JUSTICE SAMUEL MILLER, ON THE CONSTITUTION 314 (1891).

instituted in courts of proper jurisdiction."[127] Although the terms "judicial power" and "jurisdiction" are frequently used interchangeably and jurisdiction is defined as the power to hear and determine the subject matter in controversy between parties to a suit[128] or as the "power to entertain the suit, consider the merits and render a binding decision thereon,"[129] the cases and commentary support, indeed require, a distinction between the two concepts. Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case.[130]

Judicial power confers on federal courts the power to decide a case, to render a judgment conclusively resolving a case. Judicial power is the authority to render dispositive judgments, and Congress violates the separation of powers when it purports to alter *final* judgments of Article III courts.[131] After the Court had unexpectedly fixed on a shorter statute of limitations to file certain securities actions than that believed to be the time in many jurisdictions, and after several suits that had been filed later than the determined limitations had been dismissed and had become final because they were not appealed, Congress enacted a statute which, while not changing the limitations period prospectively, retroactively extended the time for suits dismissed and provided for the reopening of the final judgments rendered in the dismissals of suits.

Holding the statute invalid, the Court held it impermissible for Congress to disturb a final judgment. "Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that*

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[127] Muskrat v. United States, 219 U.S. 346, 361 (1911).

[128] United States v. Arrendondo, 31 U.S. (6 Pet.) 691 (1832).

[129] General Investment Co. v. New York Central R.R., 271 U.S. 228, 230 (1926).

[130] Williams v. United States, 289 U.S. 553, 566 (1933) ; Yakus v. United States, 321 U.S. 414, 467-468 (1944) (Justice Rutledge dissenting).

[131] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995). The Court was careful to delineate the difference between attempting to alter a final judgment, one rendered by a court and either not appealed or affirmed on appeal, and legislatively amending a statute so as to change the law as it existed at the time a court issued a decision that was on appeal or otherwise still alive at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers the prior interpretation. Id. at 226-27.

Article III creates or authorizes Congress to create not a collection of unconnected courts, but a judicial *department* composed of "inferior courts" and "one Supreme Court." "Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." Id. at 227.

very case was something other than what the courts said it was."[132] On the other hand, the Court ruled in *Miller v. French*[133] that the Prison Litigation Reform Act's automatic stay of ongoing injunctions remedying violations of prisoners' rights did not amount to an unconstitutional legislative revision of a final judgment. Rather, the automatic stay merely alters "the prospective effect" of injunctions, and it is well established that such prospective relief "remains subject to alteration due to changes in the underlying law."[134]

Included within the general power to decide cases are the ancillary powers of courts to punish for contempts of their authority,[135] to issue writs in aid of jurisdiction when authorized by statute,[136] to make rules governing their process in the absence of statutory authorizations or prohibitions,[137] to order their own process so as to prevent abuse, oppression, and injustice, and to protect their own jurisdiction and officers in the protection of property in custody of law,[138] to appoint masters in chancery, referees, auditors, and other investigators,[139] and to admit and disbar attorneys.[140]

"Shall Be Vested".—The distinction between judicial power and jurisdiction is especially pertinent to the meaning of the words "shall be vested" in § 1. Whereas all the judicial power of the United States is vested in the Supreme Court and the inferior federal courts created by Congress, neither has ever been vested with all the jurisdiction which could be granted and, Justice Story to the contrary,[141] the Constitution has not been read to mandate Congress to confer the entire jurisdiction it might.[142] Thus, except for

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[132] 514 U.S. at 227 (emphasis by Court).

[133] 530 U.S. 327 (2000).

[134] 530 U.S. at 344.

[135] Michaelson v. United States, 266 U.S. 42 (1924).

[136] McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); Ex parte Bollman, 8 U.S. (4 Cr.) 75 (1807).

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

[138] Gumbel v. Pitkin, 124 U.S. 131 (1888).

[139] Ex parte Peterson, 253 U.S. 300 (1920).

[140] Ex parte Garland, 71 U.S. (4 Wall.) 333, 378 (1867).

[141] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-331 (1816). *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) 1584-1590.

[142] *See, e.g.*, Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799)Justice Chase). A recent, sophisticated attempt to resurrect the core of Justice Story's argument is Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. REV. 205 (1985); *and see* Amar, Meltzer, and Redish, *Symposium: Article III and the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990). Briefly, the matter is discussed more fully infra, Professor Amar argues, in part, from the text of Article III, § 2, cl. 1, that the use of the word "all" in each of federal question, admiralty, and public ambassador subclauses means

the original jurisdiction of the Supreme Court, which flows directly from the Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it,[143] and, second, an act of Congress must have conferred it.[144] The fact that federal courts are of limited jurisdiction means that litigants in them must affirmatively establish that jurisdiction exists and may not confer nonexistent jurisdiction by consent or conduct.[145]

Finality of Judgment as an Attribute of Judicial Power

Since 1792, the federal courts have emphasized finality of judgment as an essential attribute of judicial power. In that year, Congress authorized Revolutionary War veterans to file pension claims in circuit courts of the United States, directed the judges to certify to the Secretary of War the degree of a claimant's disability and their opinion with regard to the proper percentage of monthly pay to be awarded, and empowered the Secretary to withhold judicially certified claimants from the pension list if he suspected "imposition or mistake."[146] The Justices then on circuit almost immediately forwarded objections to the President, contending that the statute was unconstitutional because the judicial power was constitutionally committed to a separate department and the duties imposed by the act were not judicial, and because the subjection of a court's opinions to revision or conrol by an officer of the executive or the legislature was not authorized by the Constitution.[147] Attor-

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that Congress must confer the entire judicial power to cases involving those issues, whereas it has more discretion in the other six categories.

[143] Which was, of course, the point of Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803), once the power of the Court to hold legislation unconstitutional was established.

[144] The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812); Kline v. Burke Construction Co., 260 U.S. 226 (1922). It should be noted, however, that some judges have expressed the opinion that Congress' authority is limited to some degree by the Constitution, such as by the due process clause, so that a limitation on jurisdiction which denied a litigant access to any remedy might be unconstitutional. *Cf.* Eisentrager v. Forrestal, 174 F.2d 961, 965-966 (D.C. Cir. 1949), *revd. on other grounds sub nom*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948); Petersen v. Clark, 285 F. Supp. 700, 703 n.5 (N.D. Calif. 1968); Murray v. Vaughn, 300 F. Supp. 688, 694-695 (D.R.I. 1969). The Supreme Court has had no occasion to consider the question.

[145] Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799); Bingham v. Cabot, 3 U.S. (3 Dall.) 382 (1798); Jackson v. Ashton, 33 U.S. (8 Pet.) 148 (1834); Mitchell v. Maurer, 293 U.S. 237 (1934).

[146] Act of March 23, 1792, 1 Stat. 243.

[147] 1 AMERICAN STATE PAPERS: MISCELLANEOUS DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 49, 51, 52 (1832). President Washington transmitted the remonstrances to Congress. 1 MESSAGES AND PAPERS

ney General Randolph, upon the refusal of the circuit courts to act under the new statute, filed a motion for mandamus in the Supreme Court to direct the Circuit Court in Pennsylvania to proceed on a petition filed by one Hayburn seeking a pension. Although the Court heard argument, it put off decision until the next term, presumably because Congress was already acting to delete the objectionable features of the act, and upon enactment of a new law the Court dismissed the action.[148] *Hayburn's Case* has been since followed, so that the Court has rejected all efforts to give it and the lower federal courts jurisdiction over cases in which judgment would have been subject to exective or legislative revision.[149] Thus, in a 1948 case, the Court held that an order of the Civil Aeronautics Board denying to one citizen air carrier and granting to another a certificate of convenience and necessity for an overseas and foreign air route was not reviewable. Such an order was subject to review and confirmance or revision by the President, and the Court decided it could not review the discretion exercised by him in that situation; the lower court had thought the matter could be handled by permitting presidential review of the order after judicial review, but this the Court rejected. "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government,"[150] More recently, the

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OF THE PRESIDENTS 123, 133 (J. Richardson comp., 1897). The objections are also appended to the order of the Court in Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792). Note that some of the Justices declared their willingness to perform under the act as commissioners rather than as judges. *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40, 52-53 (1852). The assumption by judges that they could act in some positions as individuals while remaining judges, an assumption many times acted upon, was approved in Mistretta v. United States, 488 U.S. 361, 397-408 (1989).

[148] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). The new pension law was the Act of February 28, 1793, 1 Stat. 324. The reason for the Court's inaction may, on the other hand, have been doubt about the proper role of the Attorney General in the matter, an issue raised in the opinion. *See* Marcus & Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 4; Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 DUKE L. J. 561, 590-618. Notice the Court's discussion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225-26 (1995).

[149] *See* United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865); In re Sanborn, 148 U.S. 222 (1893); *cf.* McGrath v. Kritensen, 340 U.S. 162, 167-168 (1950).

[150] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113-114 (1948).

Court avoided a similar situation by a close construction of a statute.[151]

Award of Execution.—The adherence of the Court to this proposition, however, has not extended to a rigid rule formulated by Chief Justice Taney, given its fullest expression in a posthumously-published opinion.[152] In *Gordon v. United States*,[153] the Court refused to hear an appeal from a decision of the Court of Claims; the act establishing the Court of Claims provided for appeals to the Supreme Court, after which judgments in favor of claimants were to be referred to the Secretary of the Treasury for payments out of the general appropriation for payment of private claims. But the act also provided that no funds should be paid out of the Treasury for any claims "till after an appropriation therefor shall be estimated by the Secretary of the Treasury."[154] The opinion of the Court merely stated that the implication of power in the executive officer and in Congress to revise all decisions of the Court of Claims requiring payment of money denied that court the judicial power from the exercise of which "alone" appeals could be taken to the Supreme Court.[155]

In his posthumously-published opinion, Chief Justice Taney, because the judgment of the Court of Claims and the Supreme Court depended for execution upon future action of the Secretary and of Congress, regarded any such judgment as nothing more than a certificate of opinion and in no sense a judicial judgment.

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[151] Connor v. Johnson, 402 U.S. 690 (1971). Under § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973e, no State may "enact or seek to administer" any change in election law or practice different from that in effect on a particular date without obtaining the approval of the Attorney General or the district court in the District of Columbia, a requirement interpreted to reach reapportionment and redistricting. Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971). The issue in Connor was whether a districting plan drawn up and ordered into effect by a federal district court, after it had rejected a legislatively-drawn plan, must be submitted for approval. Unanimously, on the papers without oral argument, the Court ruled that, despite the statute's inclusive language, it did not apply to court-drawn plans.

[152] The opinion was published in 117 U.S. 697. *See* supra, and text. *See* United States v. Jones, 119 U.S. 477 (1886). The Chief Justice's initial effort was in United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[153] 69 U.S. (2 Wall.) 561 (1865).

[154] Act of February 24, 1855, 10 Stat. 612, as amended, Act of March 3, 1963, 12 Stat. 737.

[155] Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865). Following repeal of the objectionable section, Act of March 17, 1866, 14 Stat. 9, the Court accepted appellate jurisdiction. United States v. Jones, 119 U.S. 477 (1886); De Groot v. United States, 72 U.S. (5 Wall.) 419 (1867). But note that execution of the judgments was still dependent upon congressional appropriations. On the effect of the requirement for appropriations at a time when appropriations had to be made for judgments over $100,000, *see* Glidden Co. v. Zdanok, 370 U.S. 530, 568-571 (1962). *Cf.* Regional Rail Reorganization Act Cases (Blanchette v. Connecticut General Ins. Corp.), 419 U.S. 102, 148-149 & n. 35 (1974).

Congress could not therefore authorize appeals to the Supreme Court in a case where its judicial power could not be exercised, where its judgment would not be final and conclusive upon the parties, and where processes of execution were not awarded to carry it into effect. Taney then proceeded to enunciate a rule which was rigorously applied until 1933: the award of execution is a part and an essential part of every judgment passed by a court exercising judicial powers and no decision was a legal judgment without an award of execution.[156] The rule was most significant in barring the lower federal courts from hearing proceedings for declaratory judgments[157] and in denying appellate jurisdiction in the Supreme Court from declaratory proceedings in state courts.[158] But, in 1927, the Court began backing away from its absolute insistence upon an award of execution. Unanimously holding that a declaratory judgment in a state court was *res judicata* in a subsequent proceeding in federal court, the Court admitted that "[w]hile ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function."[159] Then, in 1933, the Court interred the award-of-execution rule in its rigid form and accepted an appeal from a state court in a declaratory proceeding.[160] Finality of judgment, however, remains the rule in determination of what is judicial power without regard to the demise of Chief Justice Taney's formulation.

ANCILLARY POWERS OF FEDERAL COURTS

The Contempt Power

Categories of Contempt.—Crucial to an understanding of the history of the law governing the courts' powers of contempt is an awareness of the various kinds of contempt. With a few notable ex-

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[156] Published at 117 U.S. 697, 703. Subsequent cases accepted the doctrine that an award of execution as distinguished from finality of judgment was an essential attribute of judicial power. *See* In re Sanborn, 148 U.S. 122, 226, (1893); ICC v. Brimson, 154 U.S. 447, 483 (1894); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 457 (1899); Frasch v. Moore, 211 U.S. 1 (1908); Muskrat v. United States, 219 U.S. 346, 355, 361-362 (1911): Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

[157] Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927).

[158] Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Ass'n, 276 U.S. 71 (1928).

[159] Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 132 (1927).

[160] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933). The decisions in Swope and Wallace removed all constitutional doubts previously shrouding a proposed federal declaratory judgment act, which was enacted in 1934, 48 Stat. 955, 28 U.S.C. §§ 2201-2202, and unanimously sustained in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

ceptions,[161] the Court has consistently distinguished between criminal and civil contempts on the basis of the vindication of the authority of the courts on the one hand and the preservation and enforcement of the rights of the parties on the other. A civil contempt has been traditionally viewed as the refusal of a person in a civil case to obey a mandatory order. It is incomplete in nature, may be purged by obedience to the court order, and does not involve a sentence for a definite period of time. The classic criminal contempt is one where the act of contempt has been completed, punishment is imposed to vindicate the authority of the court, and a person cannot by subsequent action purge himself of such contempt.[162] In *International Union, UMW v. Bagwell*,[163] the Court formulated a new test for drawing the distinction between civil and criminal contempts, which has important consequences for the procedural rights to be accorded those cited. Henceforth, the imposition of non-compensatory contempt fines for the violation of any complex injunction will require criminal proceedings. This case, as have so many, involved the imposition of large fines (here, $52 million) upon a union in a strike situation for violations of an elaborate court injunction restraining union activity during the strike. The Court was vague with regard to the standards for determining when a court order is "complex" and thus requires the protection of criminal proceedings.[164] Much prior doctrine remains, however, as in the distinction between remedial sanctions, which are civil, and punitive sanctions, which are criminal, and between in-court and out-of-court contempts. In the case of *Shillitani v. United States*,[165] the defendants were sentenced by their respective District Courts for two years imprisonment for contempt of court; the sentence contained a purge clause providing for the unconditional release of the contemnors upon agreeing to testify before a grand jury. On appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing sentence.[166] Here, the purpose was to obtain answers to the questions for the grand jury, and the court

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[161] *E.g.*, United States v. United Mine Workers, 330 U.S. 258 (1947).

[162] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-443 (1911); Ex parte Grossman, 267 U.S. 87 (1925). *See also* Bessette v. W. B. Conkey Co., 194 U.S. 324, 327-328 (1904).

[163] 512 U.S. 821 (1994).

[164] 512 U.S. at 832-38. Relevant is the fact that the alleged contempts did not occur in the presence of the court and that determinations of violations require elaborate and reliable factfinding. *See esp.*id. at 837-38.

[165] 384 U.S. 364 (1966).

[166] 384 U.S. at 370.

provided for the defendants' release upon compliance; whereas, "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterence." [167] The issue of whether a certain contempt is civil or criminal can be of great importance as demonstrated in the dictum of *Ex parte Grossman*, [168] in which Chief Justice Taft, while holding for the Court on the main issue that the President may pardon a criminal contempt, noted that he may not pardon a civil contempt. Notwithstanding the importance of distinguishing between the two, there have been instances where defendants have been charged with both civil and criminal contempt for the same act. [169]

A second but more subtle distinction, with regard to the categories of contempt, is the difference between direct and indirect contempt—whether civil or criminal in nature. Direct contempt results when the contumacious act is committed "in the presence of the Court or so near thereto as to obstruct the administration of justice;" [170] indirect contempt is behavior which the Court did not itself witness. [171] The nature of the contumacious act, i.e., whether it is direct or indirect, is important because it determines the appropriate procedure for charging the contemnor. As will be evidenced in the following discussion, the history of the contempt powers of the American judiciary is marked by two trends: a shrinking of the court's power to punish a person summarily and a multiplying of the due process requirements that must otherwise be met when finding an individual to be in contempt. [172]

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[167] 384 U.S. at 370 n.6. *See* Hicks v. Feiock, 485 U.S. 624 (1988) (remanding for determination whether payment of child support arrearages would purge a determinate sentence, the proper characterization critical to decision on a due process claim).

[168] 267 U.S. 87, 119-120 (1925). In an analogous case, the Court was emphatic in a dictum that Congress cannot require a jury trial where the contemnor has failed to perform a positive act for the relief of private parties, Michaelson v. United States ex rel. Chicago, S.P., M. & Ry. Co., 266 U.S. 42, 65-66 (1924). *But see* Bloom v. Illinois, 391 U.S. 194, 202 (1968).

[169] *See* United States v. United Mine Workers, 330 U.S. 258, 299 (1947).

[170] Act of March 2, 1831, ch. 99, § 1, 4 Stat. 488. *Cf.* Rule 42(a), FRCrP, which provides that "[a] criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." *See also* Beale, *Contempt of Court, Civil and Criminal*, 21 HARV. L. REV. 161, 171-172 (1908).

[171] *See* Fox, *The Nature of Contempt of Court*, 37 L.Q. REV. 191 (1921).

[172] Many of the limitations placed on the inferior federal courts have been issued on the basis of the Supreme Court's supervisory power over them rather than upon a constitutional foundation, while, of course, the limitations imposed on state courts necessarily are on constitutional dimensions. Indeed, it is often the case that a limitation, which is applied to an inferior federal court as a superintending measure, is then transformed into a constitutional limitation and applied to state courts. *Compare* Cheff v. Schnackenberg, 384 U.S. 373 (1966), *with* Bloom v. Illinois, 391 U.S. 194 (1968). In the latter stage, the limitations then bind both federal and state courts alike. Therefore, in this section, Supreme Court constitutional limitations on

Sec. 1—Judicial Power, Courts, Judges

The Act of 1789.—The summary power of the courts of the United States to punish contempts of their authority had its origin in the law and practice of England where disobedience of court orders was regarded as contempt of the King himself and attachment was a prerogative process derived from presumed contempt of the sovereign.[173] By the latter part of the eighteenth century, summary power to punish was extended to all contempts whether committed in or out of court.[174] In the United States, the Judiciary Act of 1789 in section 17[175] conferred power on all courts of the United States "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." The only limitation placed on this power was that summary attachment was made a negation of all other modes of punishment. The abuse of this extensive power led, following the unsuccessful impeachment of Judge James H. Peck of the Federal District Court of Missouri, to the passage of the Act of 1831 limiting the power of the federal courts to punish contempts to misbehavior in the presence of the courts, "or so near thereto as to obstruct the administration of justice," to the misbehavior of officers of courts in their official capacity, and to disobedience or resistance to any lawful writ, process or order of the court.[176]

An Inherent Power.—The validity of the act of 1831 was sustained forty-three years later in *Ex parte Robinson*,[177] in which Justice Field for the Court expounded principles full of potentialities for conflict. He declared: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, that there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their "powers and duties depend upon the act calling them into existence, or subsequent

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state court contempt powers are cited without restriction for equal application to federal courts.

[173] Fox, *The King v. Almon*, 24 L.Q. REV. 184, 194-195 (1908).

[174] Fox, *The Summary Power to Punish Contempt*, 25 L.Q. REV.238, 252 (1909).

[175] 1 Stat. 83 (1789).

[176] 18 U.S.C. § 401. For a summary of the Peck impeachment and the background of the act of 1831, *see* Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1024-1028 (1924).

[177] 86 U.S. (19 Wall.) 505 (1874).

acts extending or limiting their jurisdiction."[178] With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.

By 1911, the Court was saying that the contempt power must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal.[179] In *Michaelson v. United States*,[180] the Court intentionally placed a narrow interpretation upon those sections of the Clayton Act[181] relating to punishment for contempt of court by disobedience of injunctions in labor disputes. The sections in question provided for a jury upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the State where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that "the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative." The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," and the power to enforce mandatory decrees by coercive means.[182] This latter power, to enforce, the Court has held, includes the authority to appoint private counsel to prosecute a criminal contempt.[183] While the contempt power may be in-

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[178] 86 U.S. at 505-11.

[179] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). *See also* In re Debs, 158 U.S. 564, 595 (1895).

[180] 266 U.S. 42 (1924).

[181] 38 Stat. 730, 738 (1914).

[182] 266 U.S. at 65-66. *See, generally*, Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

[183] Young v. United States ex rel. Vuitton, 481 U.S. 787, 793-801 (1987). However, the Court, invoking its supervisory power, instructed the lower federal courts first to request the United States Attorney to prosecute a criminal contempt and only if refused should they appoint a private lawyer. Id. at 801-802. Still using its supervisory power, the Court held that the district court had erred in appointing counsel for a party that was the beneficiary of the court order; disinterested counsel had to be appointed. Id. at 802-08. Justice Scalia contended that the power to prosecute is not comprehended within Article III judicial power and that federal judges had no power, inherent or otherwise, to initiate a prosecution for contempt or to appoint counsel to pursue it. Id. at 815. *See also* United States v. Providence Journal Co., 485 U.S. 693 (1988), which involved the appointment of a disinterested private attorney. The Supreme Court dismissed the writ of *certiorari* after granting it, however, holding that only the Solicitor General representing the United States could bring the petition to the Court. *See* 28 U.S.C. § 518.

herent, it is not unlimited. In *Spallone v. United States*,[184] the Court held that a district court had abused its discretion by imposing contempt sanctions on individual members of a city council for refusing to vote to implement a consent decree remedying housing discrimination by the city. The proper remedy, the Court indicated, was to proceed first with contempt sanctions against the city, and only if that course failed should it proceed against the council members individually.

First Amendment Limitations on the Contempt Power.— The phrase "in the presence of the Court or so near thereto as to obstruct the administration of justice" was interpreted so broadly in *Toledo Newspaper Co. v. United States*[185] as to uphold the action of a district court judge in punishing a newspaper for contempt for publishing spirited editorials and cartoons on questions at issue in a contest between a street railway company and the public over rates. A majority of the Court held that the test to be applied in determining the obstruction of the administration of justice is not the actual obstruction resulting from an act, but "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty." Similarly, the test whether a particular act is an attempt to influence or intimidate a court is not the influence exerted upon the mind of a particular judge but "the reasonable tendency of the acts done to influence or bring about the baleful result . . . without reference to the consideration of how far they may have been without influence in a particular case."[186] In *Craig v. Hecht*,[187] these criteria were applied to sustain the imprisonment of the comptroller of New York City for writing and publishing a letter to a public service commissioner which criticized the action of a United States district judge in receivership proceedings. The decision in the *Toledo Newspaper* case, however, did not follow earlier decisions interpreting the act of 1831 and was grounded on historical error. For these reasons, it was reversed in *Nye v. United States*,[188] and the theory of constructive contempt based on the "reasonable tendency" rule was rejected in a proceeding wherein defendants in a civil suit, by persuasion and the use of liquor, induced a plaintiff feeble in mind and body to ask for dismissal of the suit he had brought against them. The events in the episode occurred more than 100 miles from where the court was sitting and were held not to put the persons responsible for

[184] 493 U.S. 265 (1990). The decision was an exercise of the Court's supervisory power. Id. at 276. Four Justices dissented. Id. at 281.
[185] 247 U.S. 402 (1918).
[186] 247 U.S. at 418-21.
[187] 263 U.S. 255 (1923).
[188] 313 U.S. 33, 47-53 (1941).

them in contempt of court. Although *Nye v. United States* was exclusively a case of statutory construction, it was significant from a constitutional point of view because its reasoning was contrary to that of earlier cases narrowly construing the act of 1831 and asserting broad inherent powers of courts to punish contempts independently of, and contrary to, congressional regulation of this power. *Bridges v. California*[189] was noteworthy for the dictum of the majority that the contempt power of all courts, federal as well as state, is limited by the guaranty of the First Amendment against interference with freedom of speech or of the press.[190]

A series of cases involving highly publicized trials and much news media attention and exploitation,[191] however, caused the Court to suggest that the contempt and other powers of trial courts should be utilized to stem the flow of publicity before it can taint a trial. Thus, Justice Clark, speaking for the majority in *Sheppard v. Maxwell*,[192] noted that "[i]f publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but pallatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. Neither prosecutors, counsel for defense, the accused, witness, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Though the regulation the Justice had in mind was presumably to be of the parties and related persons rather than of the press, the potential for conflict with the First Amendment is obvious as well as is the necessity for protection of the equally important right to a fair trial.[193]

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[189] 314 U.S. 252, 260 (1941).

[190] *See also* Wood v. Georgia, 370 U.S. 375 (1962), further clarifying the limitations imposed by the First Amendment upon this judicial power and delineating the requisite serious degree of harm to the administration of law necessary to justify exercise of the contempt power to punish the publisher of an out-of-court statment attacking a charge to the grand jury, absent any showing of actual interference with the activities of the grand jury.

It is now clearly establihsed that courtroom conduct to be punishable as contempt "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Craig v. Harney, 331 U.S. 367, 376 (1947); In re Little, 404 U.S. 553, 555 (1972).

[191] *E.g.*, Estes v. Texas, 381 U.S. 532 (1965); Marshall v. United States, 360 U.S. 310 (1959); Sheppard v. Maxwell, 384 U.S. 333 (1966).

[192] 384 U.S. 333, 363 (1966).

[193] For another approach, bar rules regulating the speech of counsel and the First Amendment standard, *see* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

Due Process Limitations on Contempt Power: Right to Notice and to a Hearing versus Summary Punishment.—Included among the notable cases raising questions concerning the power of a trial judge to punish summarily for alleged misbehavior in the course of a trial is *Ex parte Terry*,[194] decided in 1888. Terry had been jailed by the United States Circuit Court of California for assaulting in its presence a United States marshal. The Supreme Court denied his petition for a writ of *habeas corpus*. In *Cooke v. United States*,[195] however, the Court remanded for further proceedings a judgment sentencing to jail an attorney and his client for presenting the judge a letter which impugned his impartiality with respect to their case, still pending before him. Distinguishing the case from that of *Terry*, Chief Justice Taft, speaking for the unanimous Court, said: "The important distinction . . . is that this contempt was not in open court. . . . To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law."[196]

As to the timeliness of summary punishment, the Court at first construed Rule 42(a) of the Federal Rules of Criminal Procedure, which was designed to afford judges clearer guidelines as to the exercise of their contempt power, in *Sacher v. United States*,[197] as to allow "the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay [would] prejudice the trial. . . . [On the other hand,] if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power."[198] However, subsequently, interpreting the due process clause and thus binding both federal and state courts, the Court held that, although the trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, if he does choose to wait until the conclusion of the proceeding he must afford the alleged contemnor at least reasonable notice of the specific charge and opportunity to

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[194] 128 U.S. 289 (1888).
[195] 267 U.S. 517 (1925).
[196] 267 U.S. at 535, 534.
[197] 343 U.S. 1 (1952).
[198] 343 U.S. at 11.

be heard in his own defense. Apparently, a "full scale trial" is not contemplated.[199]

Curbing the judge's power to consider conduct as occurring in his presence, the Court, in *Harris v. United States*,[200] held that summary contempt proceedings in aid of a grand jury probe, achieved through swearing the witness and repeating the grand jury's questions in the presence of the judge, did not constitute contempt "in the actual presence of the court" for purposes of Rule 42(a); rather, the absence of a disturbance in the court's proceedings or of the need to immediately vindicate the court's authority makes the witness' refusal to testify an offense punishable only after notice and a hearing.[201] Moreover, when it is not clear the judge was fully aware of the contemptuous behavior when it occurred, notwithstanding the fact it occurred during the trial, "a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete."[202]

Due Process Limitations on Contempt Power: Right to Jury Trial.—Originally the right to a jury trial was not available in criminal contempt cases.[203] But in *Cheff v. Schnackenberg*,[204] it was held that when the punishment in a criminal contempt case in federal court is more than the sentence for a petty offense, the Court drew the traditional line at six months, a defendant is entitled to trial by jury. Although the ruling was made pursuant to the Supreme Court's supervisory powers and was thus inapplicable to state courts and presumably subject to legislative revision, two years later the Court held that the Constitution did require jury trials in criminal contempt cases in which the offense was more

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[199] Taylor v. Hayes, 418 U.S. 488 (1974). In a companion case, the Court observed that although its rule conceivably encourages a trial judge to proceed immediately rather than awaiting a calmer moment, "[s]ummary convictions during trials that are unwarranted by the facts will not be invulnerable to appellate review." Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974).

[200] 382 US. 162 (1965), *overruling* Brown v. United States, 359 U.S. 41 (1959).

[201] *But see* Green v. United States, 356 U.S. 165 (1958) (noncompliance with order directing defendants to surrender to marshal for execution of their sentence is an offense punishable summarily as a criminal contempt); Reina v. United States, 364 U.S. 507 (1960).

[202] Johnson v. Mississippi, 403 U.S. 212, 215 (1971) (citing In re Oliver, 333 U.S. 257, 275-276 (1948)).

[203] *See* Green v. United States, 356 U.S. 165 (1958); United States v. Barnett, 376 U.S. 681 (1964), and cases cited. The dissents of Justices Black and Douglas in those cases prepared the ground for the Court's later reversal. On the issue, *see* Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042-1048 (1924).

[204] 384 U.S. 373 (1966).

than a petty one.[205] Whether an offense is petty or not is determined by the maximum sentence authorized by the legislature or, in the absence of a statute, by the sentence actually imposed. Again the Court drew the line between petty offenses and more serious ones at six months imprisonment. Although this case involved an indirect criminal contempt, willful petitioning to admit to probate a will known to be falsely prepared, the majority in dictum indicated that even in cases of direct contempt a jury will be required in appropriate instances. "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."[206] Presumably, there is no equivalent right to a jury trial in civil contempt cases,[207] although one could spend much more time in jail pursuant to a judgment of civil contempt than would be the case with most criminal contempts.[208] The Court has, however, expanded the right to jury trials in federal civil cases on nonconstitutional grounds.[209]

Due Process Limitations on Contempt Powers: Impartial Tribunal.—In *Cooke v. United States*,[210] Chief Justice Taft uttered some cautionary words to guide trial judges in the utilization of their contempt powers. "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal im-

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[205] Bloom v. Illinois, 391 U.S. 194 (1968). *See also* International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (refining the test for when contempt citations are criminal and thus require jury trials).

[206] 391 U.S. at 209. In Codispoti v. Pennsylvania, 418 U.S. 506 (1974) the Court held required a jury trial when the trial judge awaits the conclusion of the proceeding and then imposes separate contempt sentences in which the total aggregated more than six months. For a tentative essay at defining a petty offense when a fine is levied, *see* Muniz v. Hoffman, 422 U.S. 454, 475-477 (1975). In International Union, UMW v. Bagwell, 512 U.S. 821, 837 n.5 (1994), the Court continued to reserve the question of the distinction between petty and serious contempt fines, because of the size of the fine in that case.

[207] The Sixth Amendment is applicable only to criminal cases and the Seventh to suits at common law, but the due process clause is available if needed.

[208] Note that under 28 U.S.C. § 1826 a recalcitrant witness before a grand jury may be imprisoned for the term of the grand jury, which can be 36 months. 18 U.S.C. § 3331(a).

[209] *E.g.*, Beacon Theatres v. Westover, 359 U.S. 500 (1959); Dairy Queen v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 531 (1970). However, the Court's expansion of jury trial rights may have halted with McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[210] 267 U.S. 517, 539 (1925).

pulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course, where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." *Cornish v. United States*, 299 F. 283, 285; *Toledo Newspaper Co. v. United States*, 237 F. 986, 988. "The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."

Sacher v. United States[211] grew out of a tempestuous trial of eleven Communist Party leaders in which Sacher and others were counsel for the defense. Upon the conviction of the defendants, the trail judge at once found counsel guilty of criminal contempt and imposed jail terms of up to six months. At issue directly was whether the contempt charged was one which the judge was authorized to determine for himself or whether it was one which under Rule 42(b) could only be passed upon by another judge and after notice and hearing, but behind this issue loomed the applicability and nature of due process requirements, in particular whether the defense attorneys were constitutionally entitled to trial before a different judge. A divided Court affirmed most of the convictions, set aside others, and denied that due process required a hearing before a different judge. "We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power .... We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers

[211] 343 U.S. 1 (1952). *See* Dennis v. United States, 341 U.S. 494 (1951).

would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt. But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyers calling."[212]

In *Offutt v. United States*,[213] acting under its supervisory powers over the lower federal courts, the Court set aside a criminal contempt conviction imposed on a lawyer after a trial marked by highly personal recriminations between the trial judge and the lawyer. In a situation in which the record revealed that the contumacious conduct was the product of both lack of self-restraint on the part of the contemnor and a reaction to the excessive zeal and personal animosity of the trial judge, the majority felt that any contempt trial must be held before another judge. This holding that when a judge becomes personally embroiled in the controversy with an accused he must defer trial of his contempt citation to another judge, founded on the Court's supervisory powers, was constitutionalized in *Mayberry v. Pennsylvania*,[214] in which a defendant acting as his own counsel engaged in quite personal abuse of the trial judge. The Court appeared to leave open the option of the trial judge to act immediately and summarily to quell contempt by citing and convicting an offender, thus empowering the judge to keep the trial going,[215] but if he should wait until the conclusion of the trial he must defer to another judge.

Contempt by Disobedience of Orders.—Disobedience of injunctive orders, particularly in labor disputes, has been a fruitful source of cases dealing with contempt of court. In *United States v.*

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[212] 343 U.S. at 13-14.

[213] 348 U.S. 11 (1954).

[214] 400 U.S. 455 (1971). *See also* Johnson v. Mississippi, 403 U.S. 212 (1971); Holt v. Virginia, 381 U.S. 131 (1965). Even in the absence of a personal attack on a judge that would tend to impair his detachment, the judge may still be required to excuse himself and turn a citation for contempt over to another judge if the response to the alleged misconduct in his courtroom partakes of the character of "marked personal feelings" being abraded on both sides, so that it is likely the judge has felt a "sting" sufficient to impair his objectivity. Taylor v. Hayes, 418 U.S. 488 (1974).

[215] *See* Illinois v. Allen, 397 U.S. 337 (1970), in which the Court affirmed that summary contempt or expulsion may be used to keep a trial going.

United Mine Workers,[216] the Court held that disobedience of a temporary restraining order issued for the purpose of maintaining existing conditions, pending the determination of the court's jurisdiction, is punishable as criminal contempt where the issue is not frivolous but substantial. Second, the Court held that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional.[217] Third, on the basis of *United States v. Shipp*,[218] it was held that violations of a court's order are punishable as criminal contempt even though the order is set aside on appeal as in excess of the court's jurisdiction or though the basic action has become moot. Finally, the Court held that conduct can amount to both civil and criminal contempt, and the same acts may justify a court in resorting to coercive and punitive measures, which may be imposed in a single proceeding.[219]

Contempt Power in Aid of Administrative Power.—Proceedings to enforce the orders of administrative agencies and subpoenas issued by them to appear and produce testimony have become increasingly common since the leading case of *ICC v. Brimson*,[220] where it was held that the contempt power of the courts might by statutory authorization be utilized in aid of the Interstate Commerce Commission in enforcing compliance with its orders. In 1947 a proceeding to enforce a *subpoena duces tecum* issued by the Securities and Exchange Commission during the course of an investigation was ruled to be civil in character on the ground that the only sanction was a penalty designed to compel obedience. The Court then enunciated the principle that where a fine or imprisonment imposed on the contemnor is designed to coerce him to do what he has refused to do, the proceeding is one for civil contempt.[221] Notwithstanding the power of administrative agencies to cite an individual for contempt, however, such bodies

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[216] 330 U.S. 258, 293-307 (1947). *See also* International Union, UMW v. Bagwell, 512 U.S. 821 (1994).

[217] *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

[218] 203 U.S. 563 (1906).

[219] *See* United States v. United Mine Workers, 330 U.S. 258, 299 (1947). *But see* Cheff v. Schnackenberg, 384 U.S. 273 (1966), and "Due Process Limitations on Contempt Power: Right to Jury Trial", supra.

[220] 154 U.S. 447 (1894).

[221] Penfield Co. v. SEC, 330 U.S. 585 (1947). Note the dissent of Justice Frankfurter. For delegations of the subpoena power to administrative agencies and the use of judicial process to enforce them, *see also* McCrone v. United States, 307 U.S. 61 (1939); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

must be acting within the authority that has been lawfully delegated to them.[222]

Sanctions Other Than Contempt

Long recognized by the courts as inherent powers are those authorities that are necessary to the administration of the judicial system itself, of which the contempt power just discussed is only the most controversial.[223] Courts, as an independent and coequal branch of government, once they are created and their jurisdiction established, have the authority to do what courts have traditionally done in order to accomplish their assigned tasks.[224] Of course, these inherent powers may be limited by statutes and by rules,[225] but, just as was noted in the discussion of the same issue with respect to contempt, the Court asserts both the power to act in areas not covered by statutes and rules and the power to act unless Congress has not only provided regulation of the exercise of the power but also unmistakably enunciated its intention to limit the inherent powers.[226]

Thus, in the cited *Chambers* case, the Court upheld the imposition of monetary sanctions against a litigant and his attorney for bad-faith litigation conduct in a diversity case. Some of the conduct was covered by a federal statute and several sanction provisions of the Federal Rules of Civil Procedure, but some was not, and the Court held that, absent a showing that Congress had intended to limit the courts, they could utilize inherent powers to sanction for the entire course of conduct, including shifting attorney fees, ordinarily against the American rule.[227] In another case, a party failed to comply with discovery orders and a court order concerning a schedule for filing briefs. The Supreme Court held that the attorney's fees statute did not allow assessment of such fees in that sit-

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[222] Gojack v. United States, 384 U.S. 702 (1966). *See also* Sanctions of the Investigatory Power: Contempt, supra for a discussion on Congress' power to cite an individual for contempt by virtue of its investigatory duties, which is applicable, at least by analogy, to administrative agencies.

[223] "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute. . . ." United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 34 (1812).

[224] *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874); Link v. Wabash R.R., 370 U.S. 626, 630-631 (1962); Chambers v. NASCO, Inc., 501 U.S. 32, 43-46 (1991); and id. at 58 (Justice Scalia dissenting), 60, 62-67 (Justice Kennedy dissenting).

[225] Chambers v. NASCO, Inc., 501 U.S. at 47.

[226] 501 U.S. at 46-51. *But see* id. at 62-67 (Justice Kennedy dissenting).

[227] 501 U.S. at 49-51. On the implications of the fact that this was a diversity case, *see* id. at 51-55.

uation, but it remanded for consideration of sanctions under both the Federal Rule and the trial court's inherent powers, subject to a finding of bad faith.[228] But bad faith is not always required for the exercise of some inherent powers. Thus, courts may dismiss an action for an unexplained failure of the moving party to prosecute it.[229]

Power to Issue Writs: The Act of 1789

From the beginning of government under the Constitution of 1789, Congress has assumed, under the necessary and proper clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts and the power to regulate the issuance of writs.[230] The Thirteenth section of the Judiciary Act of 1789 authorized the circuit courts to issue writs of prohibition to the district courts and the Supreme Court to issue such writs to the circuit courts. The Supreme Court was also empowered to issue writs of mandamus "in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[231] Section 14 provided that all courts of the United States should "have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law."[232] Although the Act of 1789 left the power over writs subject largely to the common law, it is significant as a reflection of the belief, in which the courts have on the whole concurred, that an act of Congress is necessary to confer judicial power to issue writs.[233] Whether Article III itself is an independent source of the power of federal courts to fashion equitable remedies for constitutional violations or whether such remedies must fit within congressionally authorized writs or procedures is often left unexplored. In *Missouri v. Jenkins*,[234] for example, the Court, rejecting a claim that a federal court exceeded judicial power under Article III by or-

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[228] Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

[229] Link v. Wabash R.R., 370 U.S. 626 (1962).

[230] Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016-1023 (1924).

[231] 1 Stat. 73, § 81.

[232] Id. at §§ 81-82. *See also* United States v. Morgan, 346 U.S. 502 (1954), holding that the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a), gives federal courts the power to employ the ancient writ of *coram nobis*.

[233] This proposition was recently reasserted in Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985) (holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being granted by the relevant statutes).

[234] 495 U.S. 33 (1990).

dering local authorities to increase taxes to pay for desegregation remedies, declared that "a court order directing a local government body to levy its own taxes" is plainly a judicial act within the power of a federal court.[235] In the same case, the Court refused to rule on "the difficult constitutional issues" presented by the State's claim that the district court had exceeded its constitutional powers in a prior order directly raising taxes, instead ruling that this order had violated principles of comity.[236]

Common Law Powers of District of Columbia Courts.—That portion of § 13 of the Judiciary Act of 1789 which authorized the Supreme Court to issue writs of mandamus in the exercise of its original jurisdiction was held invalid in *Marbury v. Madison*,[237] as an unconstitutional enlargement of the Supreme Court's original jurisdiction. After two more futile efforts to obtain a writ of mandamus, in cases in which the Court found that power to issue the writ had not been vested by statute in the courts of the United States except in aid of already existing jurisdiction,[238] a litigant was successful in *Kendall v. United States ex rel. Stokes*,[239] in finding a court that would take jurisdiction in a mandamus proceeding. This was the circuit court of the United States for the District of Columbia, which was held to have jurisdiction, on the theory that the common law, in force in Maryland when the cession of that part of the State that became the District of Columbia was made to the United States, remained in force in the District. At an early time, therefore, the federal courts established the rule that mandamus can be issued only when authorized by a constitutional statute and within the limits imposed by the common law and the separation of powers.[240]

Habeas Corpus: Congressional and Judicial Control.—Although the writ of *habeas corpus*[241] has a special status because

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[235] 495 U.S. at 55 (citing Griffin v. Prince Edward County School Bd., 377 U.S. 218, 233-34 (1964) (an order that local officials "exercise the power that is theirs" to levy taxes in order to open and operate a desegregated school system "is within the court's power if required to assure . . . petitioners that their constitutional rights will no longer be denied them")).

[236] 495 U.S. at 50-52.

[237] 5 U.S. (1 Cr.) 137 (1803). *Cf.* Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321 (1796).

[238] McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821).

[239] 37 U.S. (12 Pet.) 524 (1838).

[240] In 1962, Congress conferred upon all federal district courts the same power to issue writs of mandamus as was exercisable by federal courts in the District of Columbia. 76 Stat. 744, 28 U.S.C. § 1361.

[241] Reference to the "writ of *habeas corpus*" is to the "Great Writ," *habeas corpus ad subjiciendum*, by which a court would inquire into the lawfulness of a detention of the petitioner. Ex parte Bollman, 8 U.S. (4 Cr.) 75, 95 (1807). For other uses, *see* Carbo v. United States, 364 U.S. 611 (1961); Price v. Johnston, 334 U.S. 266 (1948). Technically, federal prisoners no longer utilize the writ of *habeas corpus* in

its suspension is forbidden, except in narrow circumstances, by Article I. § 9, cl. 2, nowhere in the Constitution is the power to issue the writ vested in the federal courts. Could it be that despite the suspension clause restriction Congress could suspend *de facto* the writ simply by declining to authorize its issuance? Is a statute needed to make the writ available or does the right to *habeas corpus* stem by implication from the suspension clause or from the grant of judicial power?[242] Since Chief Justice Marshall's opinion in *Ex parte Bollman*,[243] it has been generally accepted that "the power to award the writ by any of the courts of the United States, must be given by written law."[244] The suspension clause, Marshall explained, was an "injunction," an "obligation" to provide "efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."[245] And so it has been understood since,[246] with a few judicial voices raised to suggest that what Congress could not do directly it could not do by omission.[247] But inasmuch as statutory authority has always existed authorizing the federal courts to grant the relief they deemed necessary under *habeas corpus*, the Court

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seeking post-conviction relief, now the largest office of the writ, but proceed under 28 U.S.C. § 2255, on a motion to vacate judgment. Intimating that if § 2255 afforded prisoners a less adequate remedy than they would have under *habeas corpus*, it would be unconstitutional, the Court in United States v. Hayman, 342 U.S. 205 (1952), held the two remedies to be equivalent. *Cf.* Sanders v. United States, 373 U.S. 1, 14 (1963). The claims cognizable under one are cognizable under the other. Kaufman v. United States, 394 U.S. 217 (1969). Therefore, the term *habeas corpus* is used here to include the § 2255 remedy. There is a plethora of writings about the writ. *See, e.g.*, P. BATOR, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (Westbury, N.Y.: 3d ed. 1988), Ch. XI, 1465-1597 (hereinafter Hart & Wechsler); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

[242] Professor Chafee contended that by the time of the Constitutional Convention the right to *habeas corpus* was so well established no affirmative authorization was needed. *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 146 (1952). *But compare* Collins, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 344-345 (1952).

[243] 8 U.S. (4 Cr.) 75 (1807).

[244] 8 U.S. at 94. *And see* Ex parte Dorr, 44 U.S. (3 How.) 103 (1845).

[245] 8 U.S. at 95. Note that in quoting the clause, Marshall renders "shall not be suspended" as "should not be suspended."

[246] *See* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). *Cf.* Carbo v. United States, 364 U.S. 611, 614 (1961).

[247] *E.g.*, Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *revd. on other grounds sub nom.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); *and see* Justice Black's dissent, id. at 791, 798: "*Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress." And in Jones v. Cunningham, 371 U.S. 236, 238 (1963), the Court said: "The *habeas corpus* jurisdictional statute implements the *constitutional command* that the writ of *habeas corpus* be made available." (Emphasis supplied).

has never had to face the question.[248] In *Felker v. Turpin*,[249] the Court again passed up the opportunity to delineate Congress' permissive authority over *habeas*, finding that none of the provisions of the Antiterrorism and Effective Death Penalty Act[250] raised questions of constitutional import.

Having determined that a statute was necessary before the federal courts had power to issue writs of *habeas corpus*, Chief Justice Marshall pointed to § 14 of the Judiciary Act of 1789 as containing the necessary authority.[251] As the Chief Justice read it, the authorization was limited to persons imprisoned under federal authority, and it was not until 1867, with two small exceptions,[252] that legislation specifically empowered federal courts to inquire into the imprisonment of persons under state authority.[253] Pursuant to this authorization, the Court expanded the use of the writ into a major instrument to reform procedural criminal law in federal and state jurisdictions.

Habeas Corpus: The Process of the Writ.—A petition for a writ of *habeas corpus* is filed by or on behalf of a person in "custody," a concept which has been expanded so much that it is no longer restricted to actual physical detention in jail or prison.[254] Traditionally, the proceeding could not be used to secure an adjudication of a question which if determined in the petitioner's favor would not result in his immediate release, since a discharge from

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[248] *Cf.* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

[249] 518 U.S. 651 (1996).

[250] Pub. L. 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.

[251] Ex parte Bollman, 8 U.S. (4 Cr.) 75, 94 (1807). *See* Fay v. Noia, 372 U.S. 391, 409 (1963).

[252] Act of March 2, 1833, § 7, 4 Stat. 634 (federal officials imprisoned for enforcing federal law); Act of August 29, 1842, 5 Stat. 539 (foreign nationals detained by a State in violation of a treaty). *See also* Bankruptcy Act of April 4, 1800,§ 38, 2 Stat. 19, 32 (*habeas corpus* for imprisoned debtor discharged in bankruptcy), repealed by Act of December 19, 1803, 2 Stat. 248.

[253] Act of February 5, 1867, 14 Stat. 385, conveyed power to federal courts "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." On the law with respect to state prisoners prior to this statute, *see* Ex parte Dorr, 44 U.S. (3 How.) 103 (1845); *cf.* Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823) (Justice Johnson); Ex parte Cabrera, 4 Fed. Cas. 964 (No. 2278) (C.C.D.Pa. 1805) (Justice Washington).

[254] 28 U.S.C. §§ 2241(c), 2254(a). "Custody" does not mean one must be confined; a person on parole or probation is in custody. Jones v. Cunningham, 371 U.S. 236 (1963). A person on bail or on his own recognizance is in custody, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300-301 (1984); Lefkowitz v. Newsome, 420 U.S. 283, 291 n.8 (1975); Hensley v. Municipal Court, 411 U.S. 345 (1973), and Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), held that an inmate of an Alabama prison was sufficiently in custody as well of Kentucky authorities who had lodged a detainer with Alabama to obtain the prisoner upon his release.

custody was the only function of the writ,[255] but this restraint too the Court has abandoned in an emphasis upon the statutory language directing the habeas court to "dispose of the matter as law and justice require."[256] Thus, even if a prisoner has been released from jail, the presence of collateral consequences flowing from his conviction gives the court jurisdiction to determine the constitutional validity of the conviction.[257]

Petitioners seeking federal *habeas* relief must first exhaust their state remedies, a limitation long settled in the case law and codified in 1948.[258] It is only required that prisoners once present their claims in state court, either on appeal or collateral attack, and they need not return time and again to raise their issues before coming to federal court.[259] While they were once required to petition the Supreme Court on *certiorari* to review directly their state convictions, prisoners have been relieved of this largely pointless exercise,[260] although if the Supreme Court has taken and decided a case its judgment is conclusive in *habeas* on all issues of fact or law actually adjudicated.[261] A federal prisoner in a § 2255 proceeding will file his motion in the court which sentenced him;[262] a state prisoner in a federal *habeas* action may file either in the district of the court in which he was sentenced or in the district in which he is in custody.[263]

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[255] McNally v. Hill, 293 U.S. 131 (1934); Parker v. Ellis, 362 U.S. 574 (1960).

[256] 28 U.S.C. § 2243. *See* Peyton v. Rowe, 391 U.S. 54 (1968). *See also* Maleng v. Cook, 490 U.S. 488 (1989).

[257] Carafas v. LaVallee, 391 U.S. 234 (1968), overruling Parker v. Ellis, 362 U.S. 574 (1960). In Peyton v. Rowe, 391 U.S. 54 (1968), the Court overruled McNally v. Hill, 293 U.S. 131 (1934), and held that a prisoner may attack on *habeas* the second of two consecutive sentences while still serving the first. *See also* Walker v. Wainwright, 390 U.S. 335 (1968) (prisoner may attack the first of two consecutive sentences although the only effect of a successful attack would be immediate confinement on the second sentence). Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), held that one sufficiently in custody of a State could use *habeas* to challenge the State's failure to bring him to trial on pending charges.

[258] 28 U.S.C. § 2254(b). *See* Preiser v. Rodriguez, 411 U.S. 475, 490-497 (1973), and id. at 500, 512-24 (Justice Brennan dissenting); Rose v. Lundy, 455 U.S. 509, 515-21 (1982). If a prisoner submits a petition with both exhausted and unexhausted claims, the habeas court must dismiss the entire petition. Rose v. Lundy, 455 U.S. at 518-519. Exhaustion first developed in cases brought by persons in state custody prior to any judgment. Ex parte Royall, 117 U.S. 241 (1886); Urquhart v. Brown, 205 U.S. 179 (1907).

[259] Brown v. Allen, 344 U.S. 443, 447-450 (1953); id. at 502 (Justice Frankfurter concurring); Castille v. Peoples, 489 U.S. 346, 350 (1989).

[260] Fay v. Noia, 372 U.S. 391, 435 (1963), overruling Darr v. Burford, 339 U.S. 200 (1950).

[261] 28 U.S.C. § 2244(c). But an affirmance of a conviction by an equally divided Court is not an adjudication on the merits. Neil v. Biggers, 409 U.S. 188 (1972).

[262] 28 U.S.C. § 2255.

[263] 28 U.S.C. § 2241(d). *Cf.* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), overruling Ahrens v. Clark, 335 U.S. 188 (1948), and holding a petitioner

Habeas corpus is not a substitute for an appeal.[264] It is not a method to test ordinary procedural errors at trial or violations of state law but only to challenge alleged errors which if established would go to make the entire detention unlawful under federal law.[265] If after appropriate proceedings, the *habeas* court finds that on the facts discovered and the law applied the prisoner is entitled to relief, it must grant it, ordinarily ordering the government to release the prisoner unless he is retried within a certain period.[266]

Congressional Limitation of the Injunctive Power

Although the speculations of some publicists and some judicial dicta[267] support the idea of an inherent power of the federal courts sitting in equity to issue injunctions independently of statutory limitations, neither the course taken by Congress nor the specific rulings of the Supreme Court support any such principle. Congress has repeatedly exercised its power to limit the use of the injunction in federal courts. The first limitation on the equity jurisdiction of the federal courts is to be found in § 16 of the Judiciary Act of 1789, which provided that no equity suit should be maintained where there was a full and adequate remedy at law. Although this provision did no more than declare a pre-existing rule long applied in chancery courts,[268] it did assert the power of Congress to regulate the equity powers of the federal courts. The Act of March 2, 1793,[269] prohibited the issuance of any injunction by any court of the United States to stay proceedings in state courts except where such injunctions may be authorized by any law relating to bank-

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may file in the district in which his custodian is located although the prisoner may be located elsewhere.

[264] Glasgow v. Moyer, 225 U.S. 420, 428 (1912); Riddle v. Dyche, 262 U.S. 333, 335 (1923); Eagles v. United States ex rel. Samuels, 329 U.S. 304, 311 (1946). *But compare* Brown v. Allen, 344 U.S. 443, 558-560 (1953) (Justice Frankfurter dissenting in part).

[265] Estelle v. McGuire, 502 U.S. 62 (1991); Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Pulley v. Harris, 465 U.S. 37, 41-42 (1984)

[266] 28 U.S.C. § 2244(b). *See* Whiteley v. Warden, 401 U.S. 560, 569 (1971); Irvin v. Dowd, 366 U.S. 717, 729 (1961).

[267] In United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), Justice Brewer, speaking for the Court, approached a theory of inherent equity jurisdiction when he declared: "The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either enunciations of those principles or limitations upon their application in particular cases." It should be emphasized, however, that the Court made no suggestion that it could apply pre-existing principles of equity without jurisdiction over the subject matter. Indeed, the inference is to the contrary. In a dissenting opinion in which Justices McKenna and Van Devanter joined, in Paine Lumber Co. v. Neal, 244 U.S. 459, 475 (1917). Justice Pitney contended that Article III, § 2, "had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate."

[268] Boyce's Executors v. Grundy, 28 U.S. (3 Pet.) 210 (1830).

[269] 1 Stat. 333, 28 U.S.C. § 2283.

ruptcy proceedings. In subsequent statutes, Congress prohibited the issuance of injunctions in the federal courts to restrain the collection of taxes,[270] provided for a three-judge court as a prerequisite to the issuance of injunctions to restrain the enforcement of state statutes for unconstitutionality,[271] for enjoining federal statutes for unconstitutionality,[272] and for enjoining orders of the Interstate Commerce Commission,[273] limited the power to issue injunctions restraining rate orders of state public utility commissions,[274] and the use of injunctions in labor disputes,[275] and placed a very rigid restriction on the power to enjoin orders of the Administrator under the Emergency Price Control Act.[276]

Perhaps pressing its powers further than prior legislation, Congress has enacted the Prison Litigation Reform Act of 1996.[277] Essentially, the law imposes a series of restrictions on judicial remedies in prison-conditions cases. Thus, courts may not issue prospective relief that extends beyond that necessary to correct the violation of a federal right that they have found, that is narrowly drawn, is the least intrusive, and that does not give attention to the adverse impact on public safety. Preliminary injunctive relief is limited by the same standards. Consent decrees may not be approved unless they are subject to the same conditions, meaning that the court must conduct a trial and find violations, thus cutting off consent decrees. If a decree was previously issued without regard to the standards now imposed, the defendant or intervenor is entitled to move to vacate it. No prospective relief is to last longer than two years if any party or intervenor so moves. Finally, a previously issued decree that does not conform to the new standards imposed by the Act is subject to termination upon the motion of the defendant or an intervenor. After a short period (30 or 60 days, depending on whether there is "good cause" for a 30-day extension), such a motion operates as an automatic stay of the prior decree

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[270] 26 U.S.C. § 7421(a).

[271] This provision was repealed in 1976, save for apportionment and districting suits and when otherwise required by an Act of Congress. P. L. 94-381, § 1, 90 Stat. 1119, and § 3, 28 U.S.C. § 2284. Congress occasionally provides for such courts, as in the Voting Rights Act. 42 U.S.C. §§ 1971, 1973c.

[272] Repealed by P. L. 94-381, § 2, 90 Stat. 1119. Congress occasionally provides for such courts now, in order to expedite Supreme Court consideration of constitutional challenges to critical federal laws. *See* Bowsher v. Synar, 478 U.S. 714, 719-721 (1986) (3-judge court and direct appeal to Supreme Court in the Balanced Budget and Emergency Deficit Control Act of 1985).

[273] Repealed by P. L. 93-584, § 7, 88 Stat. 1918.

[274] 28 U.S.C. § 1342.

[275] 29 U.S.C. §§ 52, 101-110.

[276] 56 Stat. 31, 204 (1942).

[277] The statute was part of an Omnibus Appropriations Act signed by the President on April 26, 1996. P. L. 104-134, §§ 801-10, 110 Stat. 1321-66-77, amending 18 U.S.C. § 3626.

pending the court's decision on the merits. The Court upheld the termination and automatic stay provisions in *Miller v. French*,[278] rejecting the contention that the automatic stay provision offends separation of powers principles by legislative revision of a final judgment. Rather, Congress merely established new standards for the enforcement of prospective relief, and the automatic stay provision "helps to implement the change in the law."[279] A number of constitutional challenges can be expected respecting Congress' power to limit federal judicial authority to remedy constitutional violations.

All of these restrictions have been sustained by the Supreme Court as constitutional and applied with varying degrees of thoroughness. The Court has made exceptions to the application of the prohibition against the stay of proceedings in state courts,[280] but it has on the whole adhered to the statute. The exceptions raise no constitutional issues, and the tendency has been alternately to contract and to expand the scope of the exceptions.[281]

In *Duplex Printing Press v. Deering*,[282] the Supreme Court placed a narrow construction upon the labor provisions of the Clayton Act and thereby contributed in part to the more extensive restriction by Congress on the use of injunctions in labor disputes in the Norris-LaGuardia Act of 1932, which has not only been declared constitutional[283] but has been applied liberally[284] and in such a manner as to repudiate the notion of an inherent power to issue injunctions contrary to statutory provisions.

Injunctions Under the Emergency Price Control Act of 1942.—*Lockerty v. Phillips*[285] justifies the same conclusion. Here the validity of the special appeals procedure of the Emergency Price Control Act of 1942 was sustained. This act provided for a special Emergency Court of Appeals, which, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of regulations, orders, and price schedules issued by the Office of Price Administration. The Emergency Court and the Emergency Court alone was permitted to enjoin regulations or or-

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[278] 530 U.S. 327 (2000).

[279] 530 U.S. at 348.

[280] Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); Gaines v. Fuentes, 92 U.S. 10 (1876); Ex parte Young, 209 U.S. 123 (1908).

[281] Infra, Anti-Injunction Statute.

[282] 254 U.S. 443 (1921).

[283] Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

[284] In addition to Lauf and New Negro Alliance, *see* Drivers' Union v. Valley Co., 311 U.S. 91, 100-103 (1940), *and compare* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), *with* Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).

[285] 319 U.S. 182 (1943).

ders of OPA, and even it could enjoin such orders only after finding that the order was not in accordance with law or was arbitrary or capricious. The Emergency Court was expressly denied power to issue temporary restraining orders or interlocutory decrees, and in addition the effectiveness of any permanent injunction it might issue was to be postponed for thirty days. If review was sought in the Supreme Court by *certiorari*, effectiveness was to be postponed until final disposition. A unanimous Court, speaking through Chief Justice Stone, declared that there "is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court." All federal courts, other than the Supreme Court, it was asserted, derive their jurisdiction solely from the exercise of the authority to ordain and establish inferior courts conferred on Congress by Article III, § 1, of the Constitution. This power, which Congress is left free to exercise or not, was held to include the power "'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" [286] Although the Court avoided passing upon the constitutionality of the prohibition against interlocutory decrees, the language of the Court was otherwise broad enough to support it, as was the language of *Yakus v. United States*, [287] which sustained a different phase of the special procedure for appeals under the Emergency Price Control Act. [288]

The Rule-Making Power and Powers Over Process

Among the incidental powers of courts is that of making all necessary rules governing their process and practice and for the orderly conduct of their business. [289] However, this power too is derived from the statutes and cannot go beyond them. The landmark case is *Wayman v. Southard*, [290] which sustained the validity of the Process Acts of 1789 and 1792 as a valid exercise of authority

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[286] 319 U.S. at 187 (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845). *See* South Carolina v. Katzenbach, 383 U.S. 301, 331-332 (1966), upholding a provision of the Voting Rights Act of 1965 that made the district court for the District of Columbia the only avenue of relief for States seeking to remove the coverage of the Act.

[287] 321 U.S. 414 (1944). *But compare* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (construing statute in way to avoid the constitutional issue raised in Yakus). In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), the Court held that, when judicial review of a deportation order had been precluded, due process required that the alien be allowed to make a collateral challenge to the use of that proceeding as an element of a subsequent criminal proceeding.

[288] Ch. 26, 56 Stat. 31, § 204 (1942).

[289] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629 (1924).

[290] 23 U.S. (10 Wheat.) 1 (1825).

under the necessary and proper clause. Although Chief Justice Marshall regarded the rule-making power as essentially legislative in nature, he ruled that Congress could delegate to the courts the power to vary minor regulations in the outlines marked out by the statute. Fifty-seven years later, in *Fink v. O'Neil*,[291] in which the United States sought to enforce by summary process the payment of a debt, the Supreme Court ruled that under the process acts the law of Wisconsin was the law of the United States, and hence the Government was required to bring a suit, obtain a judgment, and cause execution to issue. Justice Matthews for a unanimous Court declared that the courts have "no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the law confers and limits it."[292] Conceding, in 1934, the limited competence of legislative bodies to establish a comprehensive system of court procedure, and acknowledging the inherent power of courts to regulate the conduct of their business, Congress authorized the Supreme Court to prescribe rules for the lower federal courts not inconsistent with the Constitution and statutes.[293] Their operation being restricted, in conformity with the proviso attached to the congressional authorization, to matters of pleading and practice, the Federal Rules of Civil Procedure thus judicially promulgated neither affect the substantive rights of litigants[294] nor alter the jurisdiction[295] of federal courts and the venue of actions therein[296] and, thus circumscribed, have been upheld as valid.

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[291] 106 U.S. 272, 280 (1882).

[292] *See* Miner v. Atlass, 363 U.S. 641 (1960), holding that a federal district court, sitting in admiralty, has no inherent power, independent of any statute or the Supreme Court's Admiralty Rules, to order the taking of deposition for the purpose of discovery. *See also* Harris v. Nelson, 394 U.S. 286 (1969), in which the Court found statutory authority in the "All Writs Statute" for a *habeas corpus* court to propound interrogatories.

[293] In the Act of June 19, 1934, 48 Stat. 1064, and contained in 28 U.S.C. § 2072, Congress, in authorizing promulgation of rules of civil procedure, reserved the power to examine and override or amend rules proposed pursuant to the act which it found to be contrary to its legislative policy. *See* Sibbach v. Wilson, 312 U.S. 1, 14-16 (1941). Congress also has authorized promulgation of rules of criminal procedure, *habeas*, evidence, admiralty, bankruptcy, and appellate procedure. *See* Hart & Wechsler, supra at 749-765 (discussing development of rules and citing secondary authority). Congress in the 1970s disagreed with the direction of proposed rules of evidence and of *habeas* practice, and, first postponing their effectiveness, enacted revised rules. Pub. L. 93-505, 88 Stat. 1926 (1974); Pub. L. 94-426, 90 Stat. 1334 (1976). On this and other actions, *see* Hart & Wechsler, supra.

[294] However, the abolition of old rights and the creation of new ones in the course of litigation conducted in conformance with these judicially prescribed federal rules has been sustained as against the contention of a violation of substantive rights. Sibbach v. Wilson, 312 U.S. 1, 14 (1941).

[295] *Cf.* United States v. Sherwood, 312 U.S. 584, 589-590 (1941).

[296] Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946).

Limitations to This Power.—The principal function of court rules is that of regulating the practice of courts as regards forms, the operation and effect of process, and the mode and time of proceedings. However, rules are sometimes employed to state in convenient form principles of substantive law previously established by statutes or decisions. But no such rule "can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law." This rule is applicable equally to courts of law, equity, and admiralty, to rules prescribed by the Supreme Court for the guidance of lower courts, and to rules "which lower courts make for their own guidance under authority conferred."[297] As incident to the judicial power, courts of the United States possess inherent authority to supervise the conduct of their officers, parties, witnesses, counsel, and jurors by self-preserving rules for the protection of the rights of litigants and the orderly administration of justice.[298]

The courts of the United States possess inherent equitable powers over their process to prevent abuse, oppression, and injustice, and to protect their jurisdiction and officers in the protection of property in the custody of law.[299] Such powers are said to be essential to and inherent in the organization of courts of justice.[300] The courts of the United States also possess inherent power to amend their records, correct the errors of the clerk or other court officers, and to rectify defects or omissions in their records even after the lapse of a term, subject, however, to the qualification that the power to amend records conveys no power to create a record or re-create one of which no evidence exists.[301]

Appointment of Referees, Masters, and Special Aids

The administration of insolvent enterprises, investigations into the reasonableness of public utility rates, and the performance of

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[297] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629, 635, 636 (1924). It is not for the Supreme Court to prescribe how the discretion vested in a Court of Appeals should be exercised. As long as the latter court keeps within the bounds of judicial discretion, its action is not reviewable. In re Burwell, 350 U.S. 521 (1956).

[298] McDonald v. Pless, 238 U.S. 264, 266 (1915); Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844). *See* Thomas v. Arn, 474 U.S. 140 (1985) (court of appeal rule conditioning appeal on having filed with the district court timely objections to a master's report). In Rea v. United States, 350 U.S. 214, 218 (1956), the Court, citing McNabb v. United States, 318 U.S. 332 (1943), asserted that this supervisory power extends to policing the requirements of the Court's rules with respect to the law enforcement practices of federal agents. *But compare* United States v. Payner, 447 U.S. 727 (1980).

[299] Gumbel v. Pitkin, 124 U.S. 131 (1888); Covell v. Heyman, 111 U.S. 176 (1884); Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866).

[300] Eberly v. Moore, 65 U.S. (24 How.) 147 (1861); Arkadelphia Co. v. St. Louis S.W. Ry., 249 U.S. 134 (1919).

[301] Gagnon v. United States, 193 U.S. 451, 458 (1904).

other judicial functions often require the special services of masters in chancery, referees, auditors, and other special aids. The practice of referring pending actions to a referee was held in *Heckers v. Fowler* [302] to be coequal with the organization of the federal courts. In the leading case of *Ex parte Peterson*, [303] a United States district court appointed an auditor with power to compel the attendance of witnesses and the production of testimony. The court authorized him to conduct a preliminary investigation of facts and file a report thereon for the purpose of simplifying the issues for the jury. This action was neither authorized nor prohibited by statute. In sustaining the action of the district judge, Justice Brandeis, speaking for the Court, declared: "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." [304] The power to appoint auditors by federal courts sitting in equity has been exercised from their very beginning, and here it was held that this power is the same whether the court sits in law or equity.

Power to Admit and Disbar Attorneys

Subject to general statutory qualifications for attorneys, the power of the federal courts to admit and disbar attorneys rests on the common law from which it was originally derived. According to Chief Justice Taney, it was well settled by the common law that "it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." Such power, he made clear, however, "is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the right and dignity of the Court itself." [305] The Test-Oath Act of July 2, 1862, which purported to exclude

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[302] 69 U.S. (2 Wall.) 123, 128-129 (1864).

[303] 253 U.S. 300 (1920).

[304] 253 U.S. at 312.

[305] Ex parte Secombe, 60 U.S. (19 How.) 9, 13 (1857). In Frazier v. Heebe, 482 U.S. 641 (1987), the Court exercised its supervisory power to invalidate a district court rule respecting the admission of attorneys. *See* In re Sawyer, 360 U.S. 622 (1959), with reference to the extent to which counsel of record during a pending case may attribute error to the judiciary without being subject to professional discipline.

former Confederates from the practice of law in the federal courts, was invalidated in *Ex parte Garland*.[306] In the course of his opinion for the Court, Justice Field discussed generally the power to admit and disbar attorneys. The exercise of such a power, he declared, is judicial power. The attorney is an officer of the court, and though Congress may prescribe qualifications for the practice of law in the federal courts, it may not do so in such a way as to inflict punishment contrary to the Constitution or to deprive a pardon of the President of its legal effect.[307]

SECTION 2. Clause 1. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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[306] 71 U.S. (4 Wall.) 333 (1867).

[307] 71 U.S. at 378-80. Although a lawyer is admitted to practice in a federal court by way of admission to practice in a state court, he is not automatically sent out of the federal court by the same route, when "principles of right and justice" require otherwise. A determination of a state court that an accused practitioner should be disbarred is not conclusively binding on the federal courts. Theard v. United States, 354 U.S. 278 (1957), citing Selling v. Radford, 243 U.S. 46 (1917). *Cf.* In re Isserman, 345 U.S. 286, 288 (1953), where it was acknowledged that upon disbarment by a state court, Rule 2, par. 5 of the Rules of the Supreme Court imposes upon the attorney the burden of showing cause why he should not be disbarred in the latter, and upon his failure to meet that burden, the Supreme Court will "follow the finding of the state that the character requisite for membership in the bar is lacking." In 348 U.S. 1 (1954), Isserman's disbarment was set aside for reason of noncompliance with Rule 8 requiring concurrence of a majority of the Justices participating in order to sustain a disbarment. *See also* In re Disbarment of Crow, 359 U.S. 1007 (1959). For an extensive treatment of disbarment and American and English precedents thereon, *see* Ex parte Wall, 107 U.S. 265 (1883).

JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Late in the Convention, a delegate proposed to extend the judicial power to cases arising under the Constitution of the United States as well as under its laws and treaties. Madison's notes continue: "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department."

"The motion of Docr. Johnson was agreed to nem : con : it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—". [308]

That the Framers did not intend for federal judges to roam at large in construing the Constitution and laws of the United States but rather preferred and provided for resolution of disputes arising in a "judicial" manner is revealed not only in the language of § 2 and the passage quoted above but also in the refusal to associate the judges in the extra-judicial functions which some members of the Convention—Madison and Wilson notably—conceived for them. Thus, proposals for associating the judges in a council of revision to pass on laws generally were voted down four times, [309] and similar fates befell suggestions that the Chief Justice be a member of a privy council to assist the President, [310] and that the President or either House of Congress be able to request advisory opinions of the Supreme Court. [311] This intent of the Framers was early effectuated when the Justices declined a request of President Washington to tender him advice respecting legal issues growing out of United States neutrality between England and France in 1793. [312] Moreover, the refusal of the Justices to participate in the congressional plan for awarding veterans' pensions [313] bespoke a similar adherence to the restricted role of courts. These restrictions have been encapsulated in a series of principles or doctrines, the application of which determines whether an issue is meet for judicial resolution and whether the parties raising it are entitled to have it ju-

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[308] 2 M. Farrand, supra at 430.

[309] The proposal was contained in the Virginia Plan. 1 id. at 21. For the four rejections, *see* id. at 97-104, 108-10, 138-40, 2 id. at 73-80, 298.

[310] Id. at 328-29, 342-44. Although a truncated version of the proposal was reported by the Committee on Detail, id. at 367, the Convention never took it up.

[311] Id. at 340-41. The proposal was referred to the Committee on Detail and never heard of again.

[312] 1 C. Warren, supra at 108-111; 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 633-635 (H. Johnston ed., 1893); Hart & Wechsler, supra at 65-67.

[313] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), discussed "Finality of Judgment as an Attribute of Judicial Power", supra.

dicially resolved. Constitutional restrictions are intertwined with prudential considerations in the expression of these principles and doctrines, and it is seldom easy to separate out the two strands.[314]

The Two Classes of Cases and Controversies

By the terms of the foregoing section, the judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice Marshall in *Cohens v. Virginia*:[315] "In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended controversies between two or more States, 'between a State and citizens of another State,' and 'between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."[316]

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[317] The meaning attached to the terms "cases" and "controversies"[318] determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights "in a form prescribed by law."[319] "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are estab-

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[314] *See, e.g.*, Justice Brandeis dissenting in Ashwander v. TVA, 297 U.S. 288, 341, 345-348 (1936). *Cf.* Flast v. Cohen, 392 U.S. 83, 97 (1968); Rescue Army v. Municipal Court, 331 U.S. 549, 568-575 (1947).

[315] 19 U.S. (6 Wheat.) 264 (1821).

[316] 19 U.S. at 378.

[317] Muskrat v. United States, 219 U.S. 346, 356 (1911).

[318] The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less comprehensive word and includes only suits of a civil nature. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

[319] Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 819 (1824).

lished by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication." [320]

Chief Justice Hughes once essayed a definition, which, however, presents a substantial problem of labels. "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." [321] Of the "case" and "controversy" requirement, Chief Justice Warren admitted that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine." [322] Justice Frankfurter perhaps best captured the flavor of the "case" and "controversy" requirement by noting that it takes the "expert feel of lawyers" often to note it. [323]

From these quotations may be isolated several factors which, in one degree or another, go to make up a "case" and "controversy."

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[320] In re Pacific Ry. Comm'n, 32 F. 241, 255 (C.C. Calif. 1887) (Justice Field). *See also* Smith v. Adams, 130 U.S. 167, 173-174 (1889).

[321] Aetna Life Ins. Co. v. Haworth, 300 U.S. 229, 240-241 (1937). *Cf.* Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 242 (1952).

[322] Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

[323] "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149, 150 (1951).

Adverse Litigants

The presence of adverse litigants with real interests to contend for is a standard which has been stressed in numerous cases,[324] and the requirement implicates a number of complementary factors making up a justiciable suit. The requirement was a decisive factor, if not the decisive one, in *Muskrat v. United States*,[325] in which the Court struck down a statute authorizing certain named Indians to bring a test suit against the United States to determine the validity of a law affecting the allocation of Indian lands. Attorney's fees of both sides were to be paid out of tribal funds deposited in the United States Treasury. "The judicial power," said the Court, "... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.... It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question."[326]

Collusive and Feigned Suits.—Adverse litigants are lacking in those suits in which two parties have gotten together to bring a friendly suit to settle a question of interest to them. Thus, in *Lord v. Veazie*,[327] the latter had executed a deed to the former warranting that he had certain rights claimed by a third person, and suit was instituted to decide the "dispute." Declaring that "the

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[324] Lord v. Veazie, 49 U.S. (8 How.) 251 (1850); Chicago & G.T. Ry. v. Wellman, 143 U.S. 339 (1892); South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892); California v. San Pablo & T.R.R., 149 U.S. 308 (1893); Tregea v. Modesto Irrigation District, 164 U.S. 179 (1896); Lampasas v. Bell, 180 U.S. 276 (1901); Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Muskrat v. United States, 219 U.S. 346 (1911); United States v. Johnson, 319 U.S. 302 (1943); Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971).

[325] 219 U.S. 346 (1911).

[326] 219 U.S. at 361-62. The Indians obtained the sought-after decision the following year by the simple expedient of suing to enjoin the Secretary of the Interior from enforcing the disputed statute. Gritts v. Fisher, 224 U.S. 640 (1912). Other cases have involved similar problems, but they resulted in decisions on the merits. *E.g.*, Cherokee Intermarriage Cases, 203 U.S. 76 (1906); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 455-463 (1899); South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966); *but see* id. at 357 (Justice Black dissenting). The principal effect of Muskrat was to put in doubt for several years the validity of any sort of declaratory judgment provision in federal law.

[327] 49 U.S. (8 How.) 251 (1850).

whole proceeding was in contempt of the court, and highly reprehensible," the Court observed: "The contract set out in the pleadings was made for the purpose of instituting this suit.... The plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit.... And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed upon between themselves ... and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision...."[328] "Whenever," said the Court in another case, "in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must ... determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."[329] Yet several widely known constitutional decisions have been rendered in cases in which friendly parties contrived to have the actions brought and in which the suits were supervised and financed by one side.[330] And there are instances in which there may not be in fact an adverse party at certain stages, that is, some instances when the parties do not actually disagree, but in which the Court and the lower courts are empowered to adjudicate.[331]

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[328] 49 U.S. at 254-55.

[329] Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892).

[330] *E.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *Cf.* 1 C. Warren, supra at 147, 392-95; 2 id. at 279-82. In Powell v. Texas, 392 U.S. 514 (1968), the Court adjudicated on the merits a challenge to the constitutionality of criminal treatment of chronic alcoholics although the findings of the trial court, agreed to by the parties, appeared rather to be "the premises of a syllogism transparently designed to bring this case" within the confines of an earlier enunciated constitutional principle. But adversity arguably still existed.

[331] Examples are naturalization cases, Tutun v. United States, 270 U.S. 568 (1926), entry of judgment by default or on a plea of guilty, In re Metropolitan Ry. Receivership, 208 U.S. 90 (1908), and consideration by the Court of cases in which the Solicitor General confesses error below. *Cf.* Young v. United States, 315 U.S. 257, 258-259 (1942); Casey v. United States, 343 U.S. 808 (1952); Rosengart v. Laird, 404 U.S. 908 (1972) (Justice White dissenting). *See also* Sibron v. New York, 392 U.S. 40, 58-59 (1968).

Stockholder Suits.—Moreover, adversity in parties has often been found in suits by stockholders against their corporation in which the constitutionality of a statute or a government action is drawn in question, even though one may suspect that the interests of plaintiffs and defendant are not all that dissimilar. Thus, in *Pollock v. Farmers' Loan and Trust Co.*,[332] the Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing a statute which forbade the maintenance in any court of a suit to restrain the collection of any tax.[333] Subsequently, the Court sustained jurisdiction in cases brought by a stockholder to restrain a company from investing its funds in farm loan bonds issued by federal land banks[334] and by preferred stockholders against a utility company and the TVA to enjoin the performance of contracts between the company and TVA on the ground that the statute creating it was unconstitutional.[335] Perhaps most notorious was *Carter v. Carter Coal Co.*,[336] in which the president of the company brought suit against the company and its officials, among whom was Carter's father, a vice president of the company, and in which the Court entertained the suit and decided the case on the merits.[337]

Substantial Interest: Standing

Perhaps the most important element of the requirement of adverse parties may be found in the "complexities and vagaries" of the standing doctrine. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[338] The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the con-

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[332] 157 U.S. 429 (1895). The first injunction suit by a stockholder to restrain a corporation from paying a tax was apparently Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856). *See also* Brushaber v. Union Pacific Ry. Co., 240 U.S. 1 (1916).

[333] *Cf.* Cheatham v. United States, 92 U.S. 85 (1875); Snyder v. Marks, 109 U.S. 189 (1883).

[334] Smith v. Kansas City Title Co., 255 U.S. 180 (1921).

[335] Ashwander v. TVA, 297 U.S. 288 (1936). *See* id. at 341 (Justice Brandeis dissenting in part).

[336] 298 U.S. 238 (1936).

[337] Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 667-668 (1948) (detailing the framing of the suit).

[338] Flast v. Cohen, 392 U.S. 83, 99 (1968). That this characterization is not the view of the present Court, *see* Allen v. Wright, 468 U.S. 737, 750, 752, 755-56, 759-61 (1984). In taxpayer suits, it is appropriate to look to the substantive issues to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. Id. at 102; United States v. Richardson, 418 U.S. 166, 174-175 (1974); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78-79 (1978).

troversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[339] This practical conception of standing has now given way to a primary emphasis upon separation of powers as the guide. "[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'"[340]

Standing as a doctrine is composed of both constitutional and prudential restraints on the power of the federal courts to render decisions,[341] and is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action.[342] As such, it is often interpreted according to the prevailing philosophies of judicial activism and restraint and narrowly or broadly in terms of the viewed desirability of access to the courts by persons seeking to challenge legislation or other governmental action. The trend in the 1960s was to broaden access; in the 1970s, 1980s, and 1990s, it was to narrow access by stiffening the requirements of standing, although Court majorities were not entirely consistent. The major difficulty in setting forth the standards is that the Court's generalizations and the results it achieves are often at variance.[343]

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[339] Baker v. Carr, 369 U.S. 186, 204 (1962). That persons or organizations have a personal, ideological interest sufficiently strong to create adverseness is not alone enough to confer standing; rather, the adverseness is the consequence of one being able to satisfy the Article III requisite of injury in fact. Valley Forge Christian College v. Americans United, 454 U.S. 464, 482-486 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225-226 (1974). Nor is the fact that if plaintiffs have no standing to sue, no one would have standing, a sufficient basis for finding standing. Id. at 227.

[340] Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). All the standards relating to whether a plaintiff is entitled to adjudication of his claims must be evaluated "by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' . . . and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" Id. at 752 (quoting, respectively, Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892), and Flast v. Cohen, 392 U.S. 83, 97 (1968)). For the strengthening of the separation-of-powers barrier to standing, *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 571-78 (1992).

[341] *E.g.*, Valley Forge Christian College v. Americans United, 454 U.S. 464, 471-476 (1982); Allen v. Wright, 468 U.S. 737, 750-751 (1984).

[342] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 60 (4th ed. 1983).

[343] "[T]he concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . [and] this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition." Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982). "Generalizations about standing to sue are largely worthless as

The standing rules apply to actions brought in *federal* courts, and they have no direct application to actions brought in state courts.[344]

Citizen Suits.—Persons do not have standing to sue to enforce a constitutional provision when all they can show or claim is that they have an interest or have suffered an injury that is shared by all members of the public. Thus, a group of persons suing as citizens to litigate a contention that membership of Members of Congress in the military reserves constituted a violation of Article I,§ 6, cl. 2, was denied standing.[345] "The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract.... [The] claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance."[346]

Taxpayer Suits.—Save for a narrow exception, standing is also lacking when a litigant attempts to sue to contest governmental action that he claims injures him as a taxpayer. In *Frothingham v. Mellon*,[347] the Court denied standing to a taxpayer suing to restrain disbursements of federal money to those States that chose to participate in a program to reduce maternal and infant mortality; her claim was that Congress lacked power to appropriate funds for those purposes and that the appropriations would increase her taxes in future years in an unconstitutional manner. Noting that a federal taxpayer's "interest in the moneys of the Treasury ... is comparatively minute and indeterminate" and that "the effect upon future taxation, of any payment out of the funds ... [is] remote, fluctuating and uncertain," the Court ruled that plaintiff had failed to allege the type of "direct injury" necessary to confer standing.[348]

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such." Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 151 (1970). For extensive consideration of the doctrine, *see* Hart & Wechsler, supra at 107-196.

[344] Thus, state courts could adjudicate a case brought by a person without standing in the federal sense. If the plaintiff lost, he would have no recourse in the United States Supreme Court, inasmuch as he lacks standing, Tileston v. Ullman, 318 U.S. 44 (1943); Doremus v. Board of Education, 342 U.S. 429 (1952), but if plaintiff prevailed, the losing defendant may be able to appeal, because he might well be able to assert sufficient injury to his federal interests. ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).

[345] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

[346] 418 U.S. at 217. *See also* United States v. Richardson, 418 U.S. 166, 176-177 (1974); Valley Forge Christian College v. Americans United, 454 U.S. 464, 483 (1982); Allen v. Wright, 468 U.S. 737, 754 (1984); Whitmore v. Arkansas, 495 U.S. 149 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-77 (1992). *Cf.* Ex parte Levitt, 302 U.S. 633 (1937); Laird v. Tatum, 408 U.S. 1 (1972).

[347] Usually cited as Massachusetts v. Mellon, 262 U.S. 447 (1923), the two suits being consolidated.

[348] 262 U.S. at 487, 488.

Taxpayers were found to have standing, however, in *Flast v. Cohen*,[349] to contest the expenditure of federal moneys to assist religious-affiliated organizations. The Court asserted that the answer to the question whether taxpayers have standing depends on whether the circumstances of each case demonstrate that there is a logical nexus between the status asserted and the claim sought to be adjudicated. First, there must be a logical link between the status of taxpayer and the type of legislative enactment attacked; this means a taxpayer must allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8, rather than also of incidental expenditure of funds in the administration of an essentially regulatory statute. Second, there must be a logical nexus between the status of taxpayer and the precise nature of the constitutional infringement alleged; this means the taxpayer must allege the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the taxing and spending power, rather than simply arguing that the enactment is generally beyond the powers delegated to Congress. Both *Frothingham* and *Flast* met the first test, because they attacked a spending program. *Flast* met the second test, because the Establishment Clause of the First Amendment operates as a specific limitation upon the exercise of the taxing and spending power, while *Frothingham* had alleged only that the Tenth Amendment had been exceeded. Reserved was the question whether other specific limitations constrained the taxing and spending clause in the same manner as the Establishment Clause.[350]

Since *Flast*, the Court has refused to expand taxpayer standing. Litigants seeking standing as taxpayers to challenge legislation permitting the CIA to withhold from the public detailed information about its expenditures as a violation of Article I, § 9, cl. 7, and to challenge certain Members of Congress from holding commissions in the reserves as a violation of Article I, § 6, cl. 2, were denied standing, in the former cases because their challenge was not to an exercise of the taxing and spending power and in the latter because their challenge was not to legislation enacted under Article I, § 8, but rather was to executive action in permitting Members to maintain their reserve status.[351] An organization promoting

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[349] 392 U.S. 83 (1968).

[350] 392 U.S. at 105.

[351] United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227-28 (1974). Richardson in its generalized grievance constriction does not apply when Congress confers standing on litigants. FEC v. Akins, 524 U.S. 11 (1998). When Congress confers standing on "any person aggrieved" by the denial of information required to be furnished them, it matters

church-state separation was denied standing to challenge an executive decision to donate surplus federal property to a church-related college, both because the contest was to executive action under valid legislation and because the property transfer was not pursuant to a taxing and spending clause exercise but was taken under the property clause of Article IV, § 3, cl. 2.[352] It seems evident that for at least the foreseeable future taxpayer standing will be restricted to Establishment Clause limitations on spending programs.

Local taxpayers attacking local expenditures have generally been permitted more leeway than federal taxpayers insofar as standing is concerned. Thus, in *Everson v. Board of Education*,[353] such a taxpayer was found to have standing to challenge the use of public funds for transportation of pupils to parochial schools.[354] But in *Doremus v. Board of Education*,[355] the Court refused an appeal from a state court for lack of standing of a taxpayer challenging Bible reading in the classroom. No measurable disbursement of public funds was involved in this type of activity, so that there was no direct injury to the taxpayer, a rationale similar to the spending program-regulatory program distinction of *Flast*.

Constitutional Standards: Injury in Fact, Causation, and Redressability.—While the Court has been inconsistent, it has now settled upon the rule that, "at an irreducible minimum," the constitutional requisites under Article III for the existence of standing are that the plaintiff must personally have suffered some actual or threatened injury that can fairly be traced to the challenged action of the defendant, and that the injury is likely to be redressed by a favorable decision.[356]

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not that most people will be entitled and will thus suffer a "generalized grievance," the statutory entitlement is sufficient. Id. at 21-25.

[352] Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982). The Court's present position on Flast is set out severely in Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996), in which the Court largely plays down the "serious and adversarial treatment" prong of standing and strongly reasserts the separation-of-powers value of keeping courts within traditional bounds. The footnote is a response to Justice Souter's separate opinion utilizing Flast, id., 398-99, for a distinctive point.

[353] 330 U.S. 1 (1947).

[354] *See* Bradfield v. Roberts, 175 U.S. 291, 295 (1899); Crampton v. Zabriskie, 101 U.S. 601 (1880); Heim v. McCall, 239 U.S. 175 (1915). *See also* Illinois ex rel. McCollom v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962) (plaintiffs suing as parents and taxpayers).

[355] 342 U.S. 429 (1952). *Compare* Alder v. Board of Education, 342 U.S. 485 (1952). *See also* Richardson v. Ramirez, 418 U.S. 24 (1974).

[356] Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). *See*, however, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), a class action case, in which the majority opinion appears to reduce the significance of the personal stake requirement. Id. at 404 n.11, reserving full consideration of the dissent's argument at 401 n.1, 420-21.

For some time, injury alone was not sufficient; rather, the injury had to be "a wrong which directly results in the violation of a legal right,"[357] that is, "one of property, one arising out of contract, one protected against tortious invasion, or one founded in a statute which confers a privilege."[358] The problem was that the "legal right" language was "demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected."[359] The observable tendency of the Court, however, was to find standing frequently in cases distinctly not grounded in property rights.[360]

In any event, the "legal rights" language has now been dispensed with. Rejection occurred in two administrative law cases in which the Court announced that parties had standing when they suffered "injury in fact" to some interest, "economic or otherwise," that is arguably within the zone of interest to be protected or regulated by the statute or constitutional provision in question.[361] Now political,[362] environmental, aesthetic, and social interests, when impaired, afford a basis for making constitutional attacks upon governmental action.[363] The breadth of the injury in fact concept may be discerned in a series of cases involving the right of private parties to bring actions under the Fair Housing Act to challenge al-

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[357] Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938). *Cf.* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 151-152 (1951) (Justice Frankfurter concurring). *But see* Frost v. Corporation Comm'n, 278 U.S. 515 (1929); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

[358] Tennessee Power Co. v. TVA, 306 U.S. 118, 137-138 (1939).

[359] C. Wright, supra at 65-66.

[360] *E.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (indirect injury to organization and members by governmental maintenance of list of subversive organizations); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (same); Abington School Dist. v. Schempp, 374 U.S. 203, 224 n. 9 (1963) (parents and school children challenging school prayers); McGowan v. Maryland, 366 U.S. 420, 430-431 (1961) (merchants challenging Sunday closing laws); Baker v. Carr, 369 U.S. 186, 204-208 (1962) (voting rights).

[361] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). The "zone of interest" test is a prudential rather than constitutional standard. The Court sometimes uses language characteristic of the language. Thus, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), the Court refers to injury in fact as "an invasion of a legally-protected interest," but in context, here and in the cases cited, it is clear the reference is to any interest that the Court finds protectable under the Constitution, statutes, or regulations.

[362] Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

[363] *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871, 885 (1991); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72-74 (1978); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261-263 (1977); Singleton v. Wulff, 428 U.S. 106, 112-113 (1976); Warth v. Seldin, 422 U.S. 490, 498-499 (1975); O'Shea v. Littleton, 414 U.S. 488, 493-494 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 617-618 (1973).

leged discriminatory practices. The subjective and intangible interests of persons in enjoying the benefits of living in integrated communities were found sufficient to permit them to attack actions which threatened or harmed those interests even though the actions were not directed at them.[364] In *FEC v. Akins*,[365] the Court found "injury-in-fact" present when plaintiff voters alleged that the Federal Election Commission had denied them information, to which they alleged an entitlement, respecting an organization that might or might not be a political action committee. Congress had afforded persons access to the Commission and had authorized "any person aggrieved" by the actions of the FEC to sue to challenge the action. That the injury was widely shared did not make the claimed injury a "generalized grievance," the Court held, but rather in this case, as in others, it was a concrete harm to each member of the class. The case is a principal example of the ability of Congress to confer standing and to remove prudential constraints on judicial review. Similarly, the interests of individuals and associations of individuals in using the environment afforded them the standing to challenge actions which threatened those environmental conditions.[366] Even citizens who bring *qui tam* actions under the False Claims Act, an action that entitles them to a percentage of any civil penalty assessed for violation, have been held to have standing, on the theory that the Government has assigned a portion of its damages claim to the plaintiff, and the asignee of a claim has standing to assert the injury in fact suffered by the assignor.[367] Nonetheless, the Court has also in constitutional cases

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[364] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). While Congress had provided for standing in the Act, thus removing prudential considerations affecting standing, it could not abrogate constitutional constraints. *Gladstone Realtors*, supra 100. Thus, the injury alleged satisfied Article III.

[365] 524 U.S. 11 (1998).

[366] Sierra Club v. Morton, 405 U.S. 727, 735 (1972); United States v. SCRAP, 412 U.S. 669, 687-88 (1973); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72-74 (1978). But the Court has refused to credit general allegations of injury untied to specific governmental actions. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). In particular, SCRAP, is disfavored as too broad. Lujan v. Defenders of Wildlife, 504 U.S. at 566. Moreover, unlike the situation in taxpayer suits, there is no requirement of a nexus between the injuries claimed and the constitutional rights asserted. In Duke Power, 438 U.S. at 78-81, claimed environmental and health injuries grew out of construction and operation of nuclear power plants but were not directly related to the governmental action challenged, the limitation of liability and indemnification in cases of nuclear accident. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 264-65 (1991). Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000).

[367] Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000). The Court confirmed its conclusion by reference to the long tradition of *qui*

been wary of granting standing to persons who alleged threats or harm to interests which they shared with the larger community of people at large, a rule against airing "generalized grievances" through the courts,[368] although it is unclear whether this rule (or subrule) has a constitutional or a prudential basis.[369] And in a number of cases, the Court has refused standing apparently in the belief that the assertion of harm is too speculative or too remote to credit.[370]

Of increasing importance are the second and third elements of standing, causation and redressability, recently developed and held to be of constitutional requisite. There must be a causal connection between the injury and the conduct complained of; that is, the Court insists that the plaintiff show that "but for" the action, she would not have been injured. And the Court has insisted that there must be a "substantial likelihood" that the relief sought from the court if granted would remedy the harm.[371] Thus, poor people who had been denied service at certain hospitals were held to lack standing to challenge IRS policy of extending tax benefits to hospitals that did not serve indigents, since they could not show that alteration of the tax policy would cause the hospitals to alter their policies and treat them.[372] Low-income persons seeking the invali-

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tam actions, since the Constitution's restriction of judicial power to "cases" and "controversies" has been interpreted to mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." Id. at 1863.

[368] *See* "Citizen Suits" supra.

[369] *Compare* Warth v. Seldin, 422 U.S. 490, 499-500 (1975) (prudential), *with* Valley ForgeChristian College v. Americans United, 454 U.S. 464, 485, 490 (1982) (apparently constitutional). In Allen v. Wright, 468 U.S. 737, 751 (1984), it is again prudential.

[370] *E.g.* Laird v. Tatum, 408 U.S. 1 (1972) ("allegations of a subjective 'chill'are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). *See also* O'Shea v. Littleton, 414 U.S. 488 (1974); California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974); Rizzo v. Goode, 423 U.S. 262, 371-373 (1976). In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court held that victim of police chokehold seeking injunctive relief was unable to show sufficient likelihood of recurrence as to him.

[371] Lujan v. Defenders of Wildlife, 504 U.S. 555, 595 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984). *See also* ASARCO Inc. v. Kadish, 490 U.S. 605, 612-617 (1989) (plurality opinion). Although the two tests were initially articulated as two facets of a single requirement, the Court now insists they are separate inquiries. Id. at 753 n. 19. To the extent there is a difference, it is that the former examines a causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. Id. In Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Court denied standing because of the absence of redressability. An environmental group sued the company for failing to file timely reports required by statute; by the time the complaint was filed, the company was in full compliance. Acknowledging that the entity had suffered injury in fact, the Court found that no judicial action would afford it a remedy.

[372] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976). *See also* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (mother of illegitimate child

dation of a town's restrictive zoning ordinance were held to lack standing, because they had failed to allege with sufficient particularity that the complained-of injury, inability to obtain adequate housing within their means, was fairly attributable to the ordinance instead of to other factors, so that voiding of the ordinance might not have any effect upon their ability to find affordable housing.[373] Similarly, the link between fully integrated public schools and allegedly lax administration of tax policy permitting benefits to discriminatory private schools was deemed too tenuous, the harm flowing from private actors not before the courts and the speculative possibility that directing denial of benefits would result in any minority child being admitted to a school.[374] But the Court did permit plaintiffs to attack the constitutionality of a law limiting the liability of private utilities in the event of nuclear accidents and providing for indemnification, on a showing that "but for" the passage of the law there was a "substantial likelihood," based upon industry testimony and other material in the legislative history, that the nuclear power plants would not be constructed and that therefore the environmental and aesthetic harm alleged by plaintiffs would not occur; thus, a voiding of the law would likely relieve the plaintiffs of the complained of injuries.[375] Operation of these requirements makes difficult but not impossible the establishment of standing by persons indirectly injured by governmental action, that is, action taken as to third parties that is alleged to have as a consequence injured the claimants.[376]

In a case permitting a plaintiff contractors' association to challenge an affirmative-action, set-aside program, the Court seemed to

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lacked standing to contest prosecutorial policy of utilizing child support laws to coerce support of legitimate children only, since it was "only speculative" that prosecution of father would result in support rather than jailing).

[373] Warth v. Seldin, 422 U.S. 490 (1975). But in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 (1974), a person who alleged he was seeking housing in the community and that he would qualify if the organizational plaintiff were not inhibited by allegedly racially discriminatory zoning laws from constructing housing for low-income persons like himself was held to have shown a "substantial probability" that voiding of the ordinance would benefit him.

[374] Allen v. Wright, 468 U.S. 737 (1984). *But compare* Heckler v. Mathews, 465 U.S. 728 (1984), where persons denied equal treatment in conferral of benefits were held to have standing to challenge the treatment, although a judicial order could only have terminated benefits to the favored class. In that event, members would have secured relief in the form of equal treatment, even if they did not receive benefits. *And see* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Orr v. Orr, 440 U.S. 268, 271-273 (1979).

[375] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72-78 1978). The likelihood of relief in some cases appears to be rather speculative at best. *E.g.*, Bryant v. Yellen, 447 U.S. 352, 366-368 (1980); Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160-162 (1981).

[376] Warth v. Seldin, 422 U.S. 490, 505 (1975); Allen v. Wright, 468 U.S. 737, 756-761 (1984).

depart from several restrictive standing decisions in which it had held that the claims of attempted litigants were too "speculative" or too "contingent."[377] The association had sued, alleging that many of its members "regularly bid on and perform construction work" for the city and that they would have bid on the set-aside contracts but for the restrictions. The Court found the association had standing, because certain prior cases under the equal protection clause established a relevant proposition. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."[378] The association, therefore, established standing by alleging that its members were able and ready to bid on contracts but that a discriminatory policy prevented them from doing so on an equal basis.[379]

Redressability can be present in an environmental citizen suit even when the remedy is civil penalties payable to the government. The civil penalties, the Court explained, "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs'] injuries by abating current violations and preventing future ones."[380]

Prudential Standing Rules.—Even when Article III constitutional standing rules have been satisfied, the Court has held that principles of prudence may counsel the judiciary to refuse to adjudicate some claims.[381] It is clear that the Court feels free to disregard any of these prudential rules in cases in which it thinks

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[377] Thus, it appears that had the Court applied its standard in the current case, the results would have been different in such cases as Linda R. S. v. Richard D., 410 U.S. 614 (1973); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Allen v. Wright, 468 U.S. 737 (1984).

[378] Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993). The Court derived the proposition from another set of cases. Turner v. Fouche, 396 U.S. 346 (1970); Clements v. Fashing, 457 U.S. 957 (1982); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

[379] 508 U.S. at 666. *But see*, in the context of ripeness, Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993), in which the Court, over the dissent's reliance on Jacksonville, id. at 81-82, denied the relevance of its distinction between entitlement to a benefit and equal treatment. Id. at 58 n.19.

[380] Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 187 (2000).

[381] Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979) ("a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").

exceptionable circumstances exist,[382] and Congress is free to legislate away prudential restraints and confer standing to the extent permitted by Article III.[383] The Court has identified three rules as prudential ones,[384] only one of which has been a significant factor in the jurisprudence of standing. The first two rules are that the plaintiff's interest, to which she asserts an injury, must come within the "zone of interest" arguably protected by the constitutional provision or statute in question[385] and that plaintiffs may not air "generalized grievances" shared by all or a large class of citizens.[386] The important rule concerns the ability of a plaintiff to represent the constitutional rights of third parties not before the court.

Standing to Assert the Constitutional Rights of Others.— Usually, one may assert only one's interest in the litigation and not

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[382] Warth v. Seldin, 422 U.S. 490, 500-501 (1975); Craig v. Boren, 429 U.S. 190, 193-194 (1976).

[383] "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." Warth v. Seldin, 422 U.S. 490, 501 (1975). That is, the actual or threatened injury required may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Linda R.S. v. Richard D., 410 U.S. 614, 617 n. 3 (1973); O'Shea v. Littleton, 414 U.S. 488, 493 n. 2 (1974). Examples include United States v. SCRAP, 412 U.S. 669 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). *See also* Buckley v. Valeo, 424 U.S. 1, 8 n.4, 11-12 (1976). For a good example of the congressionally-created interest and the injury to it, *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-75 (1982) (Fair Housing Act created right to truthful information on availability of housing; black tester's right injured through false information, but white tester not injured because he received truthful information). It is clear, however, that the Court will impose separation-of-powers restraints on the power of Congress to create interests to which injury would give standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-78 (1992). Justice Scalia, who wrote the opinion in Lujan, reiterated the separation-of-powers objection to congressional conferral of standing in FEC v. Akins, 524 U.S. 11, 29, 36 (1998) (alleged infringement of President's ″take care″ obligation), but this time in dissent; the Court did not advert to this objection in finding that Congress had provided for standing based on denial of information to which the plaintiffs, as voters, were entitled.

[384] Valley Forge Christian College v. Americans United, 454 U.S. 464, 474-75 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984).

[385] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 153 (1970); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 n. 19 (1976); Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982); Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987). *See also* Bennett v. Spear, 520 U.S. 154 (1997).

[386] United States v. Richardson, 418 U.S. 166, 173, 174-176 (1974); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978); Allen v. Wright, 468 U.S. 737, 751 (1984). In United States v. SCRAP, 412 U.S. 669, 687-688 (1973), a congressional conferral case, the Court agreed that the interest asserted was one shared by all, but the Court has disparaged SCRAP, asserting that it "surely went to the very outer limit of the law," Whitmore v. Arkansas, 495 U.S. 149, 159 (1990).

challenge the constitutionality of a statute or a governmental action because it infringes the protectable rights of someone else.[387] In *Tileston v. Ullman*,[388] an early round in the attack on a state anticontraceptive law, a doctor sued, charging that he was prevented from giving his patients needed birth control advice. The Court held he had no standing; no right of his was infringed, and he could not represent the interests of his patients. But there are several exceptions to this part of the standing doctrine that make generalization misleading. Many cases allow standing to third parties if they demonstrate a requisite degree of injury to themselves and if under the circumstances the injured parties whom they seek to represent would likely not be able to assert their rights. Thus, in *Barrows v. Jackson*,[389] a white defendant who was being sued for damages for breach of a restrictive covenant directed against African Americans—and therefore able to show injury in liability for damages—was held to have standing to assert the rights of the class of persons whose constitutional rights were infringed.[390] Similarly, the Court has permitted defendants who have been convicted under state law—giving them the requisite injury—to assert the rights of those persons not before the Court whose rights would be adversely affected through enforcement of the law in question.[391] In fact, the Court has permitted persons who would be subject to future prosecution or future legal action—thus satisfying the injury requirement—to represent the rights of third parties with whom the challenged law has interfered with a relationship.[392] It is also

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[387] United States v. Raines, 362 U.S. 17, 21-23 (1960); Yazoo & M.V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912). *Cf.* Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).

[388] 318 U.S. 44 (1943). *See* Warth v. Seldin, 422 U.S. 490, 508-510 (1975) (challenged law did not adversely affect plaintiffs and did not adversely affect a relationship between them and persons they sought to represent).

[389] 346 U.S. 249 (1953).

[390] *See also* Buchanan v. Warley, 245 U.S. 60 (1917) (white plaintiff suing for specific performance of a contract to convey property to a Negro had standing to contest constitutionality of ordinance barring sale of property to African Americans, inasmuch as black defendant was relying on ordinance as his defense); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (white assignor of membership in discriminatory private club could raise rights of black assignee in seeking injunction against expulsion from club).

[391] *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (persons convicted of prescribing contraceptives for married persons and as accessories to crime of using contraceptives have standing to raise constitutional rights of patients with whom they had a professional relationship; although use of contraceptives was a crime, it was doubtful any married couple would be prosecuted so that they could challenge the statute); Eisenstadt v. Baird, 405 U.S. 438 (1972) (advocate of contraception convicted of giving device to unmarried woman had standing to assert rights of unmarried persons denied access; unmarried persons were not subject to prosecution and were thus impaired in their ability to gain a forum to assert their rights).

[392] *E.g.*, Doe v. Bolton, 410 U.S. 179, 188-189 (1973) (doctors have standing to challenge abortion statute since it operates directly against them and they should

possible, of course, that one's own rights can be affected by action directed at someone from another group.[393] A substantial dispute was occasioned in *Singleton v. Wulff*,[394] over the standing of doctors who were denied Medicaid funds for the performance of abortions not "medically indicated" to assert the rights of absent women to compensated abortions. All the Justices thought the Court should be hesitant to resolve a controversy on the basis of the rights of third parties, but they divided with respect to the standards exceptions. Four Justices favored a lenient standard, permitting third party representation when there is a close, perhaps confidential, relationship between the litigant and the third parties and when there is some genuine obstacle to third party assertion of their rights; four Justices would have permitted a litigant to assert the rights of third parties only when government directly interdicted the relationship between the litigant and the third parties through the criminal process and when litigation by the third parties is in all practicable terms impossible.[395]

Following *Wulff*, the Court emphasized the close attorney-client relationship in holding that a lawyer had standing to assert his client's Sixth Amendment right to counsel in challenging application of a drug-forfeiture law to deprive the client of the means of paying counsel.[396] However, a "next friend" whose stake in the outcome is only speculative must establish that the real party in interest is unable to litigate his own cause because of mental incapacity, lack of access to courts, or other disability.[397]

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not have to await criminal prosecution to challenge it); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976) (same); Craig v. Boren, 429 U.S. 190, 192-197 (1976) (licensed beer distributor could contest sex discriminatory alcohol laws because it operated on him, he suffered injury in fact, and was "obvious claimant" to raise issue); Carey v. Population Services Int'l, 431 U.S. 678, 682-684 (1977) (vendor of contraceptives had standing to bring action to challenge law limiting distribution). Older cases support the proposition. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[393] Holland v. Illinois, 493 U.S. 474 (1990) (white defendant had standing to raise a Sixth Amendment challenge to exclusion of blacks from his jury, since defendant had a right to a jury comprised of a fair cross section of the community). The Court has expanded the rights of non-minority defendants to challenge the exclusion of minorities from petit and grand juries, both on the basis of the injury-in-fact to defendants and because the standards for being able to assert the rights of third parties were met. Powers v. Ohio, 499 U.S. 400 (1991); Campbell v. Louisiana, 523 U.S. 392 (1998).

[394] 428 U.S. 106 (1976).

[395] *Compare* 428 U.S. at 112-18 (Justices Blackmun, Brennan, White, and Marshall), *with* id. at 123-31 (Justices Powell, Stewart, and Rehnquist, and Chief Justice Burger). Justice Stevens concurred with the former four Justices on narrower grounds limited to this case.

[396] Caplin & Drysdale v. United States, 491 U.S. 617, 623-624 n. 3 (1989).

[397] Whitmore v. Arkansas, 495 U.S. 149 (1990) (death row inmate's challenge to death penalty imposed on a fellow inmate who knowingly, intelligently, and voluntarily chose not to appeal cannot be pursued).

A variant of the general rule is that one may not assert the unconstitutionality of a statute in other respects when the statute is constitutional as to him.[398] Again, the exceptions may be more important than the rule. Thus, an overly broad statute, especially one that regulates speech and press, may be considered on its face rather than as applied, and a defendant to whom the statute constitutionally applies may thereby be enabled to assert its unconstitutionality.[399]

Organizational Standing.—Organizations do not have standing as such to represent their particular concept of the public interest,[400] but organizations have been permitted to assert the rights of their members.[401] In *Hunt v. Washington State Apple Advertising Comm'n*,[402] the Court promulgated elaborate standards, holding that an organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." Similar considerations arise in the context of class actions, in which the Court holds that a named representative with a justiciable claim for relief is necessary when the action is filed and when the class is certified, but that following class certification there need be only a live con-

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[398] United States v. Raines, 362 U.S. 17, 21-24 (1960).

[399] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940); Winters v. New York, 333 U.S. 507 (1948); Dombrowski v. Pfister, 380 U.S. 479, 486-487 (1965); Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974). The Court has narrowed its overbreadth doctrine, though not consistently, in recent years. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Young v. American Mini Theatres, 427 U.S. 50, 59-60 (1976), and id. at 73 (Justice Powell concurring); New York v. Ferber, 458 U.S. 747, 771-773 (1982). But the exception as stated in the text remains strong. *E.g.*, Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988).

[400] Sierra Club v. Morton, 401 U.S. 727 (1972). An organization may, of course, sue to redress injuries to itself. *See* Havens Realty Co. v. Coleman, 455 U.S. 363, 378-379 (1982).

[401] *E.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[402] 432 U.S. 333, 343 (1977). The organization here was not a voluntary membership entity but a state agency charged with furthering the interests of apple growers who were assessed annual sums to support the Commission. Id. at 341-45. *See also* Warth v. Seldin, 422 U.S. 490, 510-17 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39-40 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 263-264 (1977); Harris v. McRae, 448 U.S. 297, 321 (1980); International Union, UAW v. Brock, 477 U.S. 274 (1986).

troversy with the class, provided the adequacy of the representation is sufficient.[403]

Standing of States to Represent Their Citizens.—The right of a State to sue as *parens patriae*, in behalf of its citizens, has long been recognized.[404] No State, however, may be *parens patriae* of her citizens "as against the Federal Government."[405] But a State may sue to protect its citizens from environmental harm,[406] and to enjoin other States and private parties from engaging in actions harmful to the economic or other well being of it citizens.[407] The State must be more than a nominal party without a real interest of its own, merely representing the interests of particular citizens who cannot represent themselves;[408] it must articulate an interest apart from those of private parties that partakes of a "quasi-sovereign interest" in the health and well-being, both physical and economic, of its residents in general, although there are suggestions that the restrictive definition grows out of the Court's wish to constrain its original jurisdiction and may not fit such suits brought in the lower federal courts.[409]

Standing of Members of Congress.—The lower federal courts, principally the District of Columbia Circuit, developed a

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[403] United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). Geraghty was a mootness case.

[404] Louisiana v. Texas, 176 U.S. 1 (1900) (recognizing the propriety of *parens patriae* suits but denying it in this particular suit).

[405] Massachusetts v. Mellon, 262 U.S. 447, 485-486 (1923). *But see* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (denying such standing to raise two constitutional claims against the United States but deciding a third); Oregon v. Mitchell, 400 U.S. 112, 117 n. 1 (1970) (no question raised about standing or jurisdiction; claims adjudicated).

[406] Missouri v. Illinois, 180 U.S. 208 (1901); Kansas v. Colorado, 206 U.S. 46 (1907); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); New York v. New Jersey, 256 U.S. 296 (1921); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); North Dakota v. Minnesota, 263 U.S. 365 (1923).

[407] Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (antitrust); Maryland v. Louisiana, 451 U.S. 725, 737-739 (1981) (discriminatory state taxation of natural gas shipped to out-of-state customers); Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) (discrimination by growers against Puerto Rican migrant workers and denial of Commonwealth's opportunity to participate in federal employment service laws).

[408] New Hampshire v. Louisiana, 108 U.S. 76 (1883); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277 (1911); North Dakota v. Minnesota, 263 U.S. 365, 376 (1923); Pennsylvania v. New Jersey, 426 U.S. 660 (1976).

[409] Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607-08 (1982). Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that the Court's standards should apply only in original actions and not in actions filed in federal district courts, where, they contended, the prerogative of a State to bring suit on behalf of its citizens should be commensurate with the ability of private organizations to do so. Id. at 610. The Court admitted that different considerations might apply between original actions and district court suits. Id. at 603 n.12.

body of law with respect to the standing of Members of Congress, as Members, to bring court actions, usually to challenge actions of the executive branch.[410] When the Supreme Court finally addressed the issue on the merits in 1997, however, it severely curtailed Member standing.[411] All agree that a legislator "receives no special consideration in the standing inquiry,"[412] and that he, along with every other person attempting to invoke the aid of a federal court, must show "injury in fact" as a predicate to standing. What that injury in fact may consist of, however, is the basis of the controversy.

A suit by Members for an injunction against continued prosecution of the Indochina war was held maintainable on the theory that if the court found the President's actions to be beyond his constitutional authority, the holding would have a distinct and significant bearing upon the Members' duties to vote appropriations and other supportive legislation and to consider impeachment.[413] The breadth of this rationale was disapproved in subsequent cases. The leading decision is *Kennedy v. Sampson*,[414] in which a Member was held to have standing to contest the alleged improper use of a pocket veto to prevent from becoming law a bill the Senator had voted for. Thus, Congressmen were held to have a derivative rather than direct interest in protecting their votes, which was sufficient for

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[410] Member standing has not fared well in other Circuits. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).

[411] Raines v. Byrd, 521 U.S. 811 (1997). In Coleman v. Miller, 307 U.S. 433, 438 (1939), the Court had recognized that legislators can in some instances suffer an injury in respect to the effectiveness of their votes that will confer standing. In Pressler v. Blumenthal, 434 U.S. 1028 (1978), *affg*. 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), the Court affirmed a decision in which the lower court had found Member standing but had then decided against the Member on the merits. The "unexplicated affirmance" could have reflected disagreement with the lower court on standing or agreement with it on the merits. Note Justice Rehnquist's appended statement. Id. In Goldwater v. Carter, 444 U.S. 996 (1979), the Court vacated a decision, in which the lower Court had found Member standing, and directed dismissal, but none of the Justices who set forth reasons addressed the question of standing. The opportunity to consider Member standing was strongly pressed in Burke v. Barnes, 479 U.S. 361 (1987), but the expiration of the law in issue mooted the case.

[412] Reuss v. Balles, 584 F.2d 461, 466 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978).

[413] Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

[414] 511 F.2d 430 (D.C. Cir. 1974). In Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), the court again found standing by Members challenging a pocket veto, but the Supreme Court dismissed the appeal as moot. *Sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). Whether the injury was the nullification of the past vote on passage only or whether it was also the nullification of an opportunity to vote to override the veto has divided the Circuit, with the majority favoring the broader interpretation. Goldwater v. Carter, 617 F.2d 697, 702 n.12 (D.C. Cir.), and id. at 711-12 (Judge Wright), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979)

standing purposes, when some "legislative disenfranchisement" occurred.[415] In a comprehensive assessment of its position, the Circuit distinguished between (1) a diminution in congressional influence resulting from executive action that nullifies a specific congressional vote or opportunity to vote in an objectively verifiable manner, which will constitute injury in fact, and (2) a diminution in a legislator's effectiveness, subjectively judged by him, resulting from executive action, such a failing to obey a statute, where the plaintiff legislator has power to act through the legislative process, in which injury in fact does not exist.[416] Having thus established a fairly broad concept of Member standing, the Circuit then proceeded to curtail it by holding that the equitable discretion of the court to deny relief should be exercised in many cases in which a Member had standing but in which issues of separation of powers, political questions, and other justiciability considerations counseled restraint.[417] The status of this issue thus remains in confusion.

Member or legislator standing has been severely curtailed, although not quite abolished, in *Raines v. Byrd*.[418] Several Members of Congress, who had voted against passage of the Line Item Veto Act, sued in their official capacities as Members of Congress to invalidate the law, alleging standing based on the theory that the statute adversely affected their constitutionally prescribed lawmaking power.[419] Emphasizing its use of standing doctrine to maintain separation-of-powers principles, the Court adhered to its holdings that, in order to possess the requisite standing, a person must establish that he has a "personal stake" in the dispute and that the alleged injury suffered is particularized as to him.[420] Nei-

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[415] Kennedy v. Sampson, 511 F.2d 430, 435-436 (D.C. Cir. 1974). *See* Harrington v. Bush, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977). Harrington found no standing in a Member's suit challenging CIA failure to report certain actions to Congress, in order that Members could intelligently vote on certain issues. *See also* Reuss v. Balles, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978).

[416] Goldwater v. Carter, 617 F.2d 697, 702, 703 (D.C. Cir.) (*en banc*), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979). The failure of the Justices to remark on standing is somewhat puzzling, since it has been stated that courts "turn initially, although not invariably, to the question of standing to sue." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974). *But see* Harrington v. Bush, 553 F.2d 190, 207 (D.C. Cir. 1977). In any event, the Supreme Court's decision vacating Goldwater deprives the Circuit's language of precedential effect. United States v. Munsingwear, 340 U.S. 36, 39-40 (1950); O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975).

[417] Riegle v. FOMC, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

[418] 521 U.S. 811 (1997).

[419] The Act itself provided that "[a]ny Member of Congress or any individual adversely affected" could sue to challenge the law. 2 U.S.C. § 692(a)(1). After failure of this litigation, the Court in the following Term, on suits brought by claimants adversely affected by the exercise of the veto, held the statute unconstitutional. Clinton v. City of New York, 524 U.S. 417 (1998).

[420] 521 U.S. at 819.

ther requirement, the Court held, was met by these legislators. First, the Members did not suffer a particularized loss that distinguished them from their colleagues or from Congress as an entity. Second, the Members did not claim that they had been deprived of anything to which they were personally entitled. "[A]ppellees' claim of standing is based on loss of political power, not loss of any private right, which would make the injury more concrete. . . . If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds . . . as trustee for his constituents, not as a prerogative of personal power."[421]

So, there is no such thing as Member standing? Not necessarily so, because the Court turned immediately to preserving (at least a truncated version of) *Coleman v. Miller*,[422] in which the Court had found that 20 of the 40 members of a state legislature had standing to sue to challenge the loss of the effectiveness of their votes as a result of a tie-breaker by the lieutenant governor. Although there are several possible explanations for the result in that case, the Court in *Raines* chose to fasten on a particularly narrow point. "[O]ur holding in *Coleman* stands (at most, . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[423] Because these Members could still pass or reject appropriations bills, vote to repeal the Act, or exempt any appropriations bill from presidential cancellation, the Act did not nullify their votes and thus give them standing.[424]

It will not pass notice that the Court's two holdings do not cohere. If legislators have standing only to allege personal injuries suffered in their personal capacities, how can they have standing to assert official-capacity injury in being totally deprived of the effectiveness of their votes? A period of dispute in the D. C. Circuit seems certain to follow.

Standing to Challenge Lawfulness of Governmental Action.—Standing to sue on statutory or other non-constitutional grounds has a constitutional content to the degree that Article III requires a "case" or "controversy," necessitating a litigant who has sustained or will sustain an injury so that he will be moved to

[421] 521 U.S. at 821.
[422] 307 U.S. 433 (1939).
[423] 521 U.S. at 823.
[424] 521 U.S. at 824-26.

present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution."[425] Liberalization of the law of standing in this field has been notable. The "old law" required that in order to sue to contest the lawfulness of agency administrative action, one must have suffered a "legal wrong," that is, "the right invaded must be a legal right,"[426] requiring some resolution of the merits preliminarily. An injury-in-fact was insufficient.

A "legal right" could be established in one of two ways. It could be a common-law right, such that if the injury were administered by a private party, one could sue on it;[427] or it could be a right created by the Constitution or a statute.[428] The statutory right most relied on was the judicial review section of the Administrative Procedure Act, which provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[429] Early decisions under this statute interpreted the language as adopting the "legal interest" and "legal wrong" standard then prevailing as constitutional requirements of

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[425] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 151-152 (1970), citing Flast v. Cohen, 392 U.S. 83, 101 (1968). "But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' [quoting *Flast*, supra, 100], is one within the power of Congress to determine." Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).

[426] Tennessee Power Co. v. TVA, 306 U.S. 118, 137-138 (1939). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[427] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). This was apparently the point of the definition of "legal right" as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tennessee Power Co. v. TVA, 306 U.S. 118, 137-138 (1939).

[428] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). The Court approached this concept in two interrelated ways. (1) It might be that a plaintiff had an interest that it was one of the purposes of the statute in question to protect in some degree. Chicago Junction Case, 264 U.S. 258 (1924); Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930); Alton R.R. v. United States, 315 U.S. 15 (1942). Thus, in Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968), a private utility was held to have standing to contest allegedly illegal competition by TVA on the ground that the statute was meant to give private utilities some protection from certain forms of TVA competition. (2) It might be that a plaintiff was a "person aggrieved" within the terms of a judicial review section of an administrative or regulatory statute. Injury to an economic interest was sufficient to "aggrieve" a litigant. FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Associated Industries v. Ickes, 134 F.2d 694 (2d Cir.), *cert. dismd. as moot*, 320 U.S. 707 (1943).

[429] 5 U.S.C. § 702. *See also* 47 U.S.C. § 202(b)(6) (FCC); 15 U.S.C. § 77i(a) (SEC); 16 U.S.C. § 825a(b) (FPC).

standing, which generally had the effect of limiting the type of injury cognizable in federal court to economic ones.[430]

In 1970, however, the Court promulgated a two-pronged standing test: if the litigant (1) has suffered injury-in-fact and if he (2) shows that the interest he seeks to protect is arguably within the zone of interests to be protected or regulated by the statutory guarantee in question, he has standing.[431] Of even greater importance was the expansion of the nature of the cognizable injury beyond economic injury, to encompass "aesthetic, conservational, and recreational" interests as well.[432] "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[433] Thus, plaintiffs who pleaded that they used the

[430] FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 477 (1940); City of Chicago v. Atchison, T. & S.F. Ry. Co., 357 U.S. 77, 83 (1958); Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968).

[431] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). Justices Brennan and White argued that only injury-in-fact should be requisite for standing. Id. at 167. In Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987), the Court applied a liberalized zone-of-interest test. *But see* Lujan v. National Wildlife Federation, 497 U.S. 871, 885-889 (1990); Air Courier Conf. v. American Postal Workers Union, 498 U.S. 517 (1991). In applying these standards, the Court, once it determined that the litigant's interests were "arguably protected" by the statute in question, proceeded to the merits without thereafter pausing to inquire whether in fact the interests asserted were among those protected. Arnold Tours v. Camp, 400 U.S. 45 (1970); Investment Company Institute v. Camp, 401 U.S. 617 (1971); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320 n. 3 (1977). Almost contemporaneously, the Court also liberalized the ripeness requirement in review of administrative actions. Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). *See also* National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998), in which the Court found that a bank had standing to challenge an agency ruling expanding the role of employer credit unions to include multi-employer credit unions, despite a statutory limit that any such union could be of groups having a common bond of occupation or association. The Court held that a plaintiff did not have to show it was the congressional purpose to protect its interests. It is sufficient if the interest asserted is "arguably within the zone of interests to be protected . . . by the statute." Id. at 492 (internal quotation marks and citation omitted). But the Court divided 5-to-4 in applying the test. *And see* Bennett v. Spear, 520 U.S. 154 (1997).

[432] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 154 (1970).

[433] Sierra Club v. Morton, 405 U.S. 727, 734 (1972), Moreover, said the Court, once a person establishes that he has standing to seek judicial review of an action because of particularized injury to him, he may argue the public interest as a "representative of the public interest," as a "private attorney general," so that he may contest not only the action which injures him but the entire complex of actions of which his injury-inducing action is a part. Id. at 737-738, noting Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Brothers Radio Station, 309 U.S. (1940). *See also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 n. (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 n.16 (1982) (noting ability of such party to represent interests of third parties).

natural resources of the Washington area, that rail freight rates would deter the recycling of used goods, and that their use of natural resources would be disturbed by the adverse environmental impact caused by the nonuse of recyclable goods, had standing as "persons aggrieved" to challenge the rates set. Neither the large numbers of persons allegedly injured nor the indirect and less perceptible harm to the environment was justification to deny standing. The Court granted that the plaintiffs might never be able to establish the "attenuated line of causation" from rate setting to injury, but that was a matter for proof at trial, not for resolution on the pleadings.[434]

Much debate has occurred in recent years with respect to the validity of "citizen suit" provisions in the environmental laws, especially in light of the Court's retrenchment in constitutional standing cases. The Court in insisting on injury in fact as well as causation and redressability has curbed access to citizen suits,[435] but that Congress may expansively confer substantial degrees of standing through statutory creations of interests remains true.

The Requirement of a Real Interest

Almost inseparable from the requirements of adverse parties and substantial enough interests to confer standing is the requirement that a *real* issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions."[436] A party cannot maintain a suit "for a mere declaration in the air."[437] In *Texas v. ICC*,[438] the State attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an

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[434] United States v. SCRAP, 412 U.S. 669, 683-690 (1973). As was noted above, this case has been disparaged by the later Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566-67 (1992); Whitmore v. Arkansas, 495 U.S. 149, 158-160 (1990).

[435] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). *But see* Bennett v. Spear, 520 U.S. 154 (1997) (fact that "citizen suit" provision of Endangered Species Act is directed at empowering suits to further environmental concerns does not mean that suitor who alleges economic harm from enforcement of Act lacks standing); FEC v. Akins, 524 U.S. 11 (1998) (expansion of standing based on denial of access to information).

[436] Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945).

[437] Giles v. Harris, 189 U.S. 475, 486 (1903).

[438] 258 U.S. 158 (1922).

exertion of the judicial power."[439] And in *Ashwander v. TVA*,[440] the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining."[441]

Concepts of real interest and abstract questions appeared prominently in *United Public Workers v. Mitchell*,[442] an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no justiciable controversy except in regard to the one, calling for "concrete legal issues, presented in actual cases, not abstractions", and seeing the suit as really an attack on the political expediency of the Act.[443]

Advisory Opinions.—In 1793, the Court unanimously refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of international law arising out of the wars of the French Revolution.[444] Noting the constitutional separation of powers and functions in his reply, Chief Justice Jay said: "These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power

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[439] 258 U.S. at 162.

[440] 297 U.S. 288 (1936).

[441] 297 U.S. at 324. Chief Justice Hughes cited New York v. Illinois, 274 U.S. 488 (1927), in which the Court dismissed as presenting abstract questions a suit about the possible effects of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future, and Arizona v. California, 283 U.S. 423 (1931), in which it was held that claims based merely upon assumed potential invasions of rights were insufficient to warrant judicial intervention. *See also* Massachusetts v. Mellon, 262 U.S. 447, 484-485 (1923); New Jersey v. Sargent, 269 U.S. 328, 338-340 (1926); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76 (1867).

[442] 330 U.S. 75 (1947).

[443] 330 U.S. at 89-91. Justices Black and Douglas dissented, contending that the controversy was justiciable. Justice Douglas could not agree that the plaintiffs should have to violate the act and lose their jobs in order to test their rights. In CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the concerns expressed in Mitchell were largely ignored as the Court reached the merits in an anticipatory attack on the Act. *Compare* Epperson v. Arkansas, 393 U.S. 97 (1968).

[444] 1 C. Warren, supra at 108-111. The full text of the exchange appears in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-489 (H. Johnston ed., 1893).

given by the Constitution to the President, of calling on the heads of departments for opinions, seem to have been purposely as well as expressly united to the Executive departments."[445] Although the Court has generally adhered to its refusal, Justice Jackson was not quite correct when he termed the policy a "firm and unvarying practice. . . ."[446] The Justices in response to a letter calling for suggestions on improvements in the operation of the courts drafted a letter suggesting that circuit duty for the Justices was unconstitutional, but they apparently never sent it;[447] Justice Johnson communicated to President Monroe, apparently with the knowledge and approval of the other Justices, the views of the Justices on the constitutionality of internal improvements legislation;[448] and Chief Justice Hughes in a letter to Senator Wheeler on President Roosevelt's Court Plan questioned the constitutionality of a proposal to increase the membership and have the Court sit in divisions.[449] Other Justices have individually served as advisers and confidants of Presidents in one degree or another.[450]

Nonetheless, the Court has generally adhered to the early precedent and would no doubt have developed the rule in any event, as a logical application of the case and controversy doctrine. As stated by Justice Jackson, when the Court refused to review an order of the Civil Aeronautics Board, which in effect was a mere recommendation to the President for his final action: "To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render

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[445] Jay Papers at 488.

[446] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[447] *See* supra.

[448] 1 C. Warren, supra at 595-597.

[449] Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee, 75th Congress, 1st sess. (1937), pt. 3, 491. *See also* Chief Justice Taney's private advisory opinion to the Secretary of the Treasury that a tax levied on the salaries of federal judges violated the Constitution. S. TYLER, MEMOIRS OF ROGER B. TANEY 432-435 (1876).

[450] *E.g.*, Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A.J. 919 (1969); Jaffe, *Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship*, 83 HARV. L. REV. 366 (1969). The issue has lately earned the attention of the Supreme Court, Mistretta v. United States, 488 U.S. 361, 397-408 (1989) (citing examples and detailed secondary sources), when it upheld the congressionally-authorized service of federal judges on the Sentencing Commission.

no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."[451] The early refusal of the Court to render advisory opinions has discouraged direct requests for advice so that the advisory opinion has appeared only collaterally in cases where there was a lack of adverse parties,[452] or where the judgment of the Court was subject to later review or action by the executive or legislative branches of Government,[453] or where the issues involved were abstract or contingent.[454]

Declaratory Judgments.—Rigid emphasis upon such elements of judicial power as finality of judgment and award of execution coupled with equally rigid emphasis upon adverse parties and real interests as essential elements of a case and controversy created serious doubts about the validity of any federal declaratory judgment procedure.[455] These doubts were largely dispelled by Court decisions in the late 1920s and early 1930s,[456] and Congress quickly responded with the Federal Declaratory Judgment Act of 1934.[457] Quickly tested, the Act was unanimously sustained.[458] "The principle involved in this form of procedure," the House Report said, "is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts."[459] Said the Senate Report: "The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice."[460]

The 1934 Act provided that "[i]n cases of actual controversy" federal courts could "declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed. . . ."[461] Upholding the Act, the Court said: "The Declaratory Judgment Act of 1934, in its limita-

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[451] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113-114 (1948).

[452] Muskrat v. United States, 219 U.S. 346 (1911).

[453] United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[454] United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[455] *Cf.* Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928).

[456] Fidelity National Bank & Trust Co. v. Swope, 274 U.S. 123 (1927); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1963).

[457] 48 Stat. 955, as amended, 28 U.S.C. §§ 2201-2202.

[458] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

[459] H. Rep. No. 1264, 73d Congress, 2d Sess. (1934), 2.

[460] S. Rep. No. 1005, 73d Congress, 2d Sess. (1934), 2.

[461] 48 Stat. 955. The language remains quite similar. 28 U.S.C. § 2201.

tion to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish."[462] Finding that the issue in the case presented a definite and concrete controversy, the Court held that a declaration should have been issued.[463]

It has insistently been maintained by the Court that "the requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit."[464] As Justice Douglas has written: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[465] It remains, therefore, for the courts to determine in each case the degree of controversy necessary to establish a case for purposes of jurisdiction. Even then, however, the Court is under no compulsion to exercise its jurisdiction.[466] Utilization of declaratory judgments to settle disputes and identify rights in many private areas, like insurance and patents in particular but extending into all areas of civil litigation, except taxes,[467] is common. The Court

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[462] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-240 (1937),

[463] 300 U.S. at 242-44.

[464] Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).

[465] Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

[466] Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942); Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 243 (1952); Public Affairs Associates v. Rickover, 369 U.S. 111, 112 (1962). *See also* Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

[467] An exception "with respect to Federal taxes" was added in 1935. 49 Stat. 1027. The Tax Injunction Act of 1937, 50 Stat. 738, U.S.C. § 1341, prohibited federal injunctive relief directed at state taxes but said nothing about declaratory relief. It was held to apply, however, in California v. Grace Brethren Church, 457 U.S. 393 (1982). Earlier, in Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943), the Court had reserved the issue but held that considerations of comity should preclude federal courts from giving declaratory relief in such cases. *Cf.* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

has, however, at various times demonstrated a substantial reluctance to have important questions of public law, especially regarding the validity of legislation, resolved by such a procedure.[468] In part, this has been accomplished by a strict insistence upon concreteness, ripeness, and the like.[469] Nonetheless, even at such times, several noteworthy constitutional decisions were rendered in declaratory judgment actions.[470]

As part of the 1960s hospitality to greater access to courts, the Court exhibited a greater receptivity to declaratory judgments in constitutional litigation, especially cases involving civil liberties issues.[471] The doctrinal underpinnings of this hospitality were sketched out by Justice Brennan in his opinion for the Court in *Zwickler v. Koota*,[472] in which the relevance to declaratory judgments of the *Dombrowski v. Pfister*[473] line of cases involving federal injunctive relief against the enforcement of state criminal statutes was in issue. First, it was held that the vesting of "federal question" jurisdiction in the federal courts by Congress following the Civil War, as well as the enactment of more specific civil rights jurisdictional statutes, "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."[474] Escape from that duty might be found only in "narrow circumstances," such as an appropriate application of the abstention doctrine, which was not proper where a statute affecting civil liberties was so broad as to reach protected activities as well as unprotected activities. Second, the judicially-developed doctrine that a litigant must show "special circumstances" to justify the issuance of a federal injunction against the enforcement of state criminal laws is not applicable to requests for federal declaratory relief: "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclu-

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[468] *E.g.*, Ashwander v. TVA, 297 U.S. 288 (1936); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Eccles v. Peoples Bank, 333 U.S. 426 (1948); Rescue Army v. Municipal Court, 331 U.S. 549, 572-573 (1947).

[469] United Public Workers v. Mitchell, 330 U.S. 75 (1947); Poe v. Ullman, 367 U.S. 497 (1961); Altvater v. Freeman, 319 U.S. 359 (1943); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

[470] *E.g.*, Currin v. Wallace, 306 U.S. 1 (1939); Perkins v. Elg, 307 U.S. 325 (1939); Ashwander v. TVA, 297 U.S. 288 (1936); Evers v. Dwyer, 358 U.S. 202 (1958).

[471] *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Turner v. City of Memphis, 369 U.S. 350 (1962); Powell v. McCormack, 395 U.S. 486 (1969). *But see* Golden v. Zwickler, 394 U.S. 103 (1969).

[472] 389 U.S. 241 (1967).

[473] 380 U.S. 479 (1965).

[474] Zwickler v. Koota, 389 U.S. 241, 248 (1967).

sion as to the propriety of the issuance of the injunction."[475] This language was qualified subsequently, so that declaratory and injunctive relief were equated in cases in which a criminal prosecution is pending in state court at the time the federal action is filed[476] or is begun in state court after the filing of the federal action but before any proceedings of substance have taken place in federal court,[477] and federal courts were instructed not to issue declaratory judgments in the absence of the factors permitting issuance of injunctions under the same circumstances. But in the absence of a pending state action or the subsequent and timely filing of one, a request for a declaratory judgment that a statute or ordinance is unconstitutional does not have to meet the stricter requirements justifying the issuance of an injunction.[478]

Ripeness.—Just as standing historically has concerned *who* may bring an action in federal court, the ripeness doctrine concerns *when* it may be brought. Formerly, it was a wholly constitutional principle requiring a determination that the events bearing on the substantive issue have happened or are sufficiently certain to occur so as to make adjudication necessary and so as to assure that the issues are sufficiently defined to permit intelligent resolution; the focus was on the harm to the rights claimed rather than on the harm to the plaintiff that gave him standing to bring the action,[479] although, to be sure, in most cases the harm is the same. But in liberalizing the doctrine of ripeness in recent years the Court subdivided it into constitutional and prudential parts[480] and conflated standing and ripeness considerations.[481]

The early cases generally required potential plaintiffs to expose themselves to possibly irreparable injury in order to invoke federal

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[475] Zwickler v. Koota, 389 U.S. 241, 254 (1967).

[476] Samuels v. Mackell, 401 U.S. 66 (1971). The case and its companion, Younger v. Harris, 401 U.S. 37 (1971), substantially undercut much of the Dombrowski language and much of Zwickler was downgraded.

[477] Hicks v. Miranda, 422 U.S. 332, 349 (1975).

[478] Steffel v. Thompson, 415 U.S. 452 (1974). In cases covered by *Steffel*, the federal court may issue preliminary or permanent injunctions to protect its judgments, without satisfying the Younger tests. Doran v. Salem Inn, 422 U.S. 922, 930-931 (1975); Wooley v. Maynard, 430 U.S. 705, 712 (1977).

[479] United Public Workers v. Mitchell, 330 U.S. 75 (1947); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954). For recent examples of lack of ripeness, *see* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Texas v. United States, 523 U.S. 296 (1998).

[480] Regional Rail Reorganization Act Cases, 419 U.S. 102, 138-148 (1974) (certainty of injury a constitutional limitation, factual adequacy element a prudential one).

[481] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81-82 (1978) (that plaintiffs suffer injury-in-fact and such injury would be redressed by granting requested relief satisfies Article III ripeness requirement; prudential element satisfied by determination that Court would not be better prepared to render a decision later than now). *But compare* Renne v. Geary, 501 U.S. 312 (1991).

judicial review. Thus, in *United Public Workers v. Mitchell*,[482] government employees alleged that they wished to engage in various political activities and that they were deterred from their desires by the Hatch Act prohibitions on political activities. As to all but one plaintiff, who had himself actually engaged in forbidden activity, the Court held itself unable to adjudicate because the plaintiffs were not threatened with "actual interference" with their interests. The Justices viewed the threat to plaintiffs' rights as hypothetical and refused to speculate about the kinds of political activity they might engage in or the Government's response to it. "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations."[483] Similarly, resident aliens planning to work in the Territory of Alaska for the summer and then return to the United States were denied a request for an interpretation of the immigration laws that they would not be treated on their return as excludable aliens entering the United States for the first time, or alternatively, for a ruling that the laws so interpreted would be unconstitutional. The resident aliens had not left the country and attempted to return, although other alien workers had gone and been denied reentry, and the immigration authorities were on record as intending to enforce the laws as they construed them.[484] Of course, the Court was not entirely consistent in applying the doctrine.[485]

It remains good general law that pre-enforcement challenges to criminal and regulatory legislation will often be unripe for judicial consideration because of uncertainty of enforcement,[486] because the

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[482] 330 U.S. 75 (1947).

[483] 330 U.S. at 90. In CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), without discussing ripeness, the Court decided on the merits anticipatory attacks on the Hatch Act. Plaintiffs had, however, alleged a variety of more concrete infringements upon their desires and intentions than the UPW plaintiffs had.

[484] International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954). *See also* Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938); Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

[485] In Adler v. Board of Education, 342 U.S. 485 (1952), without discussing ripeness, the Court decided on the merits a suit about a state law requiring dismissal of teachers advocating violent overthrow of the government, over a strong dissent arguing the case was indistinguishable from Mitchell. Id. at 504 (Justice Frankfurter dissenting). In Cramp v. Board of Public Instruction, 368 U.S. 278 (1961), a state employee was permitted to attack a non-Communist oath, although he alleged he believed he could take the oath in good faith and could prevail if prosecuted, because the oath was so vague as to subject plaintiff to the "risk of unfair prosecution and the potential deterrence of constitutionally protected conduct." Id. at 283-84. *See also* Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[486] *E.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (no adjudication of challenge to law barring use of contraceptives because in 80 years of the statute's existence the State had never instituted a prosecution). *But compare* Epperson v. Arkansas, 393 U.S.

plaintiffs can allege only a subjective feeling of inhibition or fear arising from the legislation or from enforcement of it,[487] or because the courts need before them the details of a concrete factual situation arising from enforcement in order to engage in a reasoned balancing of individual rights and governmental interests.[488] But one who challenges a statute or possible administrative action need demonstrate only a realistic danger of sustaining an injury to his rights as a result of the statute's operation and enforcement and need not await the consummation of the threatened injury in order to obtain preventive relief, such as exposing himself to actual arrest or prosecution. When one alleges an intention to engage in conduct arguably affected with a constitutional interest but proscribed by statute and there exists a credible threat of prosecution thereunder, he may bring an action for declaratory or injunctive relief.[489] Similarly, the reasonable certainty of the occurrence of the perceived threat to a constitutional interest is sufficient to afford a basis for bringing a challenge, provided the court has sufficient facts before it to enable it to intelligently adjudicate the issues.[490]

Of considerable uncertainty in the law of ripeness is the *Duke Power* case, in which the Court held ripe for decision on the merits a challenge to a federal law limiting liability for nuclear accidents at nuclear power plants, on the basis that because plaintiffs had

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97 (1987) (merits reached in absence of enforcement and fair indication State would not enforce it); Vance v. Amusement Co., 445 U.S. 308 (1980) (reaching merits, although State asserted law would not be used, although local prosecutor had so threatened; no discussion of ripeness, but dissent relied on Poe, id. at 317-18).

[487] *E.g.*, Younger v. Harris, 401 U.S. 37, 41-42 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Golden v. Zwickler, 394 U.S. 103 (1969); O'Shea v. Littleton, 414 U.S. 488 (1974); Spomer v. Littleton, 414 U.S. 514 (1974); Rizzo v. Goode, 423 U.S. 362 (1976). In the context of the ripeness to challenge of agency regulations, as to which there is a presumption of available judicial remedies, the Court has long insisted that federal courts should be reluctant to review such regulations unless the effects of administrative action challenged have been felt in a concrete way by the challenging parties, i.e., unless the controversy is "ripe." *See*, of the older cases, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967). More recent cases include Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993); Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990).

[488] *E.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294-297 (1981); Renne v. Geary, 501 U.S. 312, 320-323 (1991).

[489] Steffel v. Thompson, 415 U.S. 452 (1974); Wooley v. Maynard, 430 U.S. 705, 707-708, 710 (1977); Babbitt v. United Farm Workers, 442 U.S. 289, 297-305 (1979) (finding some claims ripe, others not). *Compare* Doe v. Bolton, 410 U.S. 179, 188-189 (1973), *with* Roe v. Wade, 410 U.S. 113, 127-128 (1973). *See also* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Colautti v. Franklin, 439 U.S. 379 (1979).

[490] Buckley v. Valeo, 424 U.S. 1, 113-118 (1976); Regional Rail Reorganization Act Cases, 419 U.S. 102, 138-148 (1974) (holding some but not all the claims ripe). *See also* Goldwater v. Carter, 444 U.S. 996, 997 (Justice Powell concurring) (parties had not put themselves in opposition).

sustained injury-in-fact and had standing the Article III requisite of ripeness was satisfied and no additional facts arising out of the occurrence of the claimed harm would enable the court better to decide the issues.[491] Should this analysis prevail, ripeness as a limitation on justiciability will decline in importance.

Mootness.—It may be that a case presenting all the attributes necessary for federal court litigation will at some point lose some attribute of justiciability, will, in other words, become "moot." The usual rule is that an actual controversy must exist at all stages of trial and appellate consideration and not simply at the date the action is initiated.[492] "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.... Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' ... and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals.... The parties must continue to have a 'personal

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[491] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81-82 (1978). The injury giving standing to plaintiffs was the environmental harm arising from the plant's routine operation; the injury to their legal rights was alleged to be the harm caused by the limitation of liability in the event of a nuclear accident. The standing injury had occurred, the ripeness injury was conjectural and speculative and might never occur. *See* id. at 102 (Justice Stevens concurring in the result). It is evident on the face of the opinion and expressly stated by the objecting Justices that the Court utilized its standing/ripeness analyses in order to reach the merits, so as to remove the constitutional cloud cast upon the federal law by the district court decision. Id. at 95, 103 (Justices Rehnquist and Stevens concurring in the result).

[492] *E.g.*, United States v. Munsingwear, 340 U.S. 36 (1950); Golden v. Zwickler, 394 U.S. 103, 108 (1969); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); Roe v. Wade, 410 U.S. 113, 125 (1973); Sosna v. Iowa, 419 U.S. 393, 398-399 (1975); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980), and id. at 411 (Justice Powell dissenting); Burke v. Barnes, 479 U.S. 361, 363 (1987); Honig v. Doe, 484 U.S. 305, 317 (1988); Lewis v. Continental Bank Corp., 494 U.S. 472, 477-478 (1990). Munsingwear had long stood for the proposition that the appropriate practice of the Court in a civil case that had become moot while on the way to the Court or after *certiorari* had been granted was to vacate or reverse and remand with directions to dismiss. But, in U. S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), the Court held that when mootness occurs because the parties have reached a settlement, vacatur of the judgment below is ordinarily not the best practice; instead, equitable principles should be applied so as to preserve a presumptively correct and valuable precedent, unless a court concludes that the public interest would be served by vacatur.

stake in the outcome' of the lawsuit."[493] Since, with the advent of declaratory judgments, it is open to the federal courts to "declare the rights and other legal relations" of the parties with *res judicata* effect,[494] the question in cases alleged to be moot now seems largely if not exclusively to be decided in terms of whether an actual controversy continues to exist between the parties rather than some additional older concepts.[495]

Cases may become moot because of a change in the law,[496] or in the status of the parties,[497] or because of some act of one of the

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[493] Lewis v. Continental Bank Corp., 494 U.S. 472, 477-78 (1990) (internal citations omitted). The Court's emphasis upon mootness as a constitutional rule mandated by Article III is long stated in the cases. *E.g.*, Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Sibron v. New York, 392 U.S. 40, 57 (1968). *See* Honig v. Doe, 484 U.S. 305, 317 (1988), and id. at 332 (Justice Scalia dissenting). *But compare* Franks v. Bowman Transp. Co., 424 U.S. 747, 756 n.8 (1976) (referring to mootness as presenting policy rather than constitutional considerations). If this foundation exists, it is hard to explain the exceptions, which partake of practical reasoning. In any event, Chief Justice Rehnquist has argued that the mootness doctrine is not constitutionally based, or not sufficiently based only on Article III, so that the Court should not dismiss cases that have become moot after the Court has taken them for review. Id. at 329 (concurring). Consider the impact of Cardinal Chemical Co. v. Morton Int'l, Inc., 508 U.S. 83 (1993).

[494] *But see* Steffel v. Thompson, 415 U.S. 452, 470-72 (1974); id. at 477 (Justice White concurring), 482 n.3 (Justice Rehnquist concurring) (on *res judicata* effect in state court in subsequent prosecution). In any event, the statute authorizes the federal court to grant "[f]urther necessary or proper relief" which could include enjoining state prosecutions.

[495] Award of process and execution are no longer essential to the concept of judicial power. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

[496] *E.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852); United States v. Alaska Steamship Co., 253 U.S. 113 (1920); Hall v. Beals, 396 U.S. 45 (1969); Sanks v. Georgia, 401 U.S. 144 (1971); Richardson v. Wright, 405 U.S. 208 (1972); Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972); Lewis v. Continental Bank Corp., 494 U.S. 481 (1990). *But compare* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288-289 (1982) (case not mooted by repeal of ordinance, since City made clear its intention to reenact it if free from lower court judgment). Following Aladdin's Castle, the Court in Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 660-63 (1993), held that when a municipal ordinance is repealed but replaced by one sufficiently similar so that the challenged action in effect continues, the case is not moot. *But see* id. at 669 (Justice O'Connor dissenting) (modification of ordinance more significant and case is mooted).

[497] Atherton Mills v. Johnston, 259 U.S. 13 (1922) (in challenge to laws regulating labor of youths 14 to 16, Court held case two-and-one-half years after argument and dismissed as moot since certainly none of the challengers was now in the age bracket); Golden v. Zwickler, 394 U.S. 103 (1969); DeFunis v. Odegaard, 416 U.S. 312 (1974); Dove v. United States, 423 U.S. 325 (1976); Lane v. Williams, 455 U.S. 624 (1982). *Compare* County of Los Angeles v. Davis, 440 U.S. 625 (1979), *with* Vitek v. Jones, 445 U.S. 480 (1980). In Arizonans For Official English v. Arizona, 520 U.S. 43 (1997), a state employee attacking an English-only work requirement had standing at the time she brought the suit, but she resigned following a decision in the trial court, thus mooting the case before it was taken to the appellate court, which should not have acted to hear and decide it.

parties which dissolves the controversy.[498] But the Court has developed several exceptions, which operate to prevent many of the cases in which mootness is alleged from being in law moot. Thus, in criminal cases, although the sentence of the convicted appellant has been served, the case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."[499] The "mere possibility" of such a consequence, even a "remote" one, is enough to find that one who has served his sentence has retained the requisite personal stake giving his case "an adversary cast and making it justiciable."[500] This exception has its counterpart in civil litigation in which a lower court judgment may still have certain present or future adverse effects on the challenging party.[501]

A second exception, the "voluntary cessation" doctrine, focuses on whether challenged conduct which has lapsed or the utilization of a statute which has been superseded is likely to recur.[502] Thus, cessation of the challenged activity by the voluntary choice of the person engaging in it, especially if he contends that he was properly engaging in it, will moot the case only if it can be said with assurance "that 'there is no reasonable expectation that the wrong

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[498] *E.g.*, Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919); Oil Workers Local 8-6 v. Missouri, 361 U.S. 363 (1960); A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961); Preiser v. Newkirk, 422 U.S. 395 (1975); County of Los Angeles v. Davis, 440 U.S. 625 (1979).

[499] Sibron v. New York, 395 U.S. 40, 50-58 (1968). *But compare* Spencer v. Kemna, 523 U.S. 1 (1998).

[500] Benton v. Maryland, 395 U.S. 784, 790-791 (1969). The cases have progressed from leaning toward mootness to leaning strongly against. *E.g.*, St. Pierre v. United States, 319 U.S. 41 (1943); Fiswick v. United States, 329 U.S. 211 (1946); United States v. Morgan, 346 U.S. 502 (1954); Pollard v. United States, 352 U.S. 354 (1957); Ginsberg v. New York, 390 U.S. 629, 633-634 n. 2 (1968); Sibron v. New York, 392 U.S. 40, 49-58 (1968); *but see* Lane v. Williams, 455 U.S. 624 (1982). The exception permits review at the instance of the prosecution as well as defendant. Pennsylvania v. Mimms, 434 U.S. 106 (1977). When a convicted defendant dies while his case is on direct review, the Court's present practice is to dismiss the petition for certiorari. Dove v. United States, 423 U.S. 325 (1976), overruling Durham v. United States, 401 U.S. 481 (1971).

[501] Southern Pacific Terminal Co. v. ICC, 219 U.S. 433, 452 (1911); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968). *See* Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) (holding that expiration of strike did not moot employer challenge to state regulations entitling strikers to state welfare assistance since the consequences of the regulations would continue).

[502] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); Walling v. Helmerich & Payne, 323 U.S. 37 (1944); Porter v. Lee, 328 U.S. 246 (1946); United States v. W.T. Grant Co., 345 U.S. 629 (1953); Gray v. Sanders, 372 U.S. 368 (1963); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202-04 (1969); DeFunis v. Odegaard, 416 U.S. 312, 318 (1974); County of Los Angeles v. Davis, 440 U.S. 625, 631-34 (1979), and id. at 641-46 (Justice Powell dissenting); Vitek v. Jones, 445 U.S. 480, 486-487 (1980), and id. at 500-01 (Justice Stewart dissenting); Princeton University v. Schmidt, 455 U.S. 100 (1982); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288-289 (1982).

will be repeated.'" [503] Otherwise, "[t]he defendant is free to return to his old ways" and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." [504]

Still a third exception concerns the ability to challenge short-term conduct which may recur in the future, which has been denominated as disputes "capable of repetition, yet evading review." [505] Thus, in cases in which (1) the challenged action is too short in its duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again, mootness will not be found when the complained-of conduct ends. [506] The imposition of short sentences in criminal cases, [507] the issuance of injunctions to expire in a brief period, [508] and the short-term factual context of certain events, such as elections [509] or pregnancies, [510] are all instances in which this exception is frequently invoked.

An interesting and potentially significant liberalization of the law of mootness, perhaps as part of a continuing circumstances exception, is occurring in the context of class action litigation. It is now clearly established that, when the controversy becomes moot as to the plaintiff in a certified class action, it still remains alive for the class he represents so long as an adversary relationship sufficient to constitute a live controversy between the class members and the other party exists. [511] The Court was closely divided, how-

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[503] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d. Cir. 1945)).

[504] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). *But see* A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961).

[505] Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[506] Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Murphy v. Hunt, 455 U.S. 478, 482 (1982). *See* Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125-26 (1974), and id. at 130-32 (Justice Stewart dissenting), Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 189-91 (2000),. The degree of expectation or likelihood that the issue will recur has frequently divided the Court. *Compare* Murphy v. Hunt, *with* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); *compare* Honig v. Doe, 484 U.S. 305, 318-23 (1988), *with* id. at 332 (Justice Scalia dissenting).

[507] Sibron v. New York, 392 U.S. 40, 49-58 (1968). *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

[508] Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968). *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (short-term court order restricting press coverage).

[509] *E.g.*, Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5 (1973); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974). *Compare* Mills v. Green, 159 U.S. 651 (1895); Ray v. Blair, 343 U.S. 154 (1952).

[510] Roe v. Wade, 410 U.S. 113, 124-125 (1973).

[511] Sosna v. Iowa, 419 U.S. 393 (1975); Franks v. Bowman Transp. Co., 424 U.S. 747, 752-757 (1976). A suit which proceeds as a class action but without formal cer-

ever, with respect to the right of the named party, when the substantive controversy became moot as to him, to appeal as error the denial of a motion to certify the class which he sought to represent and which he still sought to represent. The Court held that in the class action setting there are two aspects of the Article III mootness question, the existence of a live controversy and the existence of a personal stake in the outcome for the named class representative.[512] Finding a live controversy, the Court determined that the named plaintiff retained a sufficient interest, "a personal stake," in his claimed right to represent the class in order to satisfy the "imperatives of a dispute capable of judicial resolution;" that is, his continuing interest adequately assures that "sharply presented issues" are placed before the court "in a concrete factual setting" with "self-interested parties vigorously advocating opposing positions."[513]

The immediate effect of the decision is that litigation in which class actions are properly certified or in which they should have been certified will rarely ever be mooted if the named plaintiff (or in effect his attorney) chooses to pursue the matter, even though the named plaintiff can no longer obtain any personal relief from the decision sought.[514] Of much greater potential significance is the possible extension of the weakening of the "personal stake" requirement in other areas, such as the representation of third-party claims in non-class actions and the initiation of some litigation in the form of a "private attorneys general" pursuit of adjudication.[515] It may be that the evolution in this area will be confined to the

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tification may not receive the benefits of this rule. Board of School Commr's v. Jacobs, 420 U.S. 128 (1975). *See also* Weinstein v. Bradford, 423 U.S. 147 (1975); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976). *But see* the characterization of these cases in United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400 n. 7 (1980). Mootness is not necessarily avoided in properly certified cases, but the standards of determination are unclear. *See* Kremens v. Bartley, 431 U.S. 119 (1977).

[512] United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

[513] 445 U.S. at 403. Justices Powell, Stewart, Rehnquist, and Chief Justice Burger dissented, id. at 409, arguing there could be no Article III personal stake in a procedural decision separate from the outcome of the case. In Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980), in an opinion by Chief Justice Burger, the Court held that a class action was not mooted when defendant tendered to the named plaintiffs the full amount of recovery they had individually asked for and could hope to retain. Plaintiffs' interest in shifting part of the share of costs of litigation to those who would share in its benefits if the class were certified was deemed to be a sufficient "personal stake", although the value of this interest was at best speculative.

[514] The named plaintiff must still satisfy the class action requirement of adequacy of representation. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 405-407 (1980). On the implications of Geraghty, which the Court has not returned to, *see* Hart & Wechsler, supra at 225-230.

[515] Geraghty, 445 U.S. at 404 & n.11.

class action context, but cabining of a "flexible" doctrine of standing may be difficult.[516]

Retroactivity Versus Prospectivity.—One of the distinguishing features of an advisory opinion is that it lays down a rule to be applied to future cases, much as does legislation generally. It should therefore follow that an Article III court could not decide purely prospective cases, cases which do not govern the rights and disabilities of the parties to the cases.[517] The Court asserted that this principle is true, while applying it only to give retroactive effect to the parties to the immediate case.[518] Yet, occasionally, the Court did not apply its holding to the parties before it,[519] and in a series of cases beginning in the mid-1960s it became embroiled in attempts to limit the retroactive effect of its—primarily but not exclusively[520] —constitutional-criminal law decisions. The results have been confusing and unpredictable.[521]

Prior to 1965, "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions."[522] Statutory and judge-made law have consequences, at least to the extent that people must rely on them in making decisions and shaping their conduct. Therefore, the Court was moved to recognize that there should be a reconciling of constitutional interests reflected in a new rule of law with reliance interests found-

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[516] 445 U.S. at 419-24 (Justice Powell dissenting).

[517] For a masterful discussion of the issue in both criminal and civil contexts, *see* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

[518] Stovall v. Denno, 388 U.S. 293, 301 (1967).

[519] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422 (1964); James v. United States, 366 U.S. 213 (1961). *See also* Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

[520] Noncriminal constitutional cases included Lemon v. Kurtzman, 411 U.S. 192 (1973); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969). Indeed, in Buckley v. Valeo, 424 U.S. 1 (1976), and Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court postponed the effectiveness of its decision for a period during which Congress could repair the flaws in the statute. Noncriminal, nonconstitutional cases include Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Allen v. State Board of Elections, 393 U.S. 544 (1969); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964).

[521] Because of shifting coalitions of Justices, Justice Harlan complained, the course of retroactivity decisions "became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." Mackey v. United States, 401 U.S. 667, 676 (1971) (separate opinion).

[522] Robinson v. Neil, 409 U.S. 505, 507 (1973). The older rule of retroactivity derived from the Blackstonian notion "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" Linkletter v. Walker, 381 U.S. 618, 622-623 (1965) (quoting 1 W. Blackstone, Commentaries *69).

ed upon the old.[523] In both criminal and civil cases, however, the Court's discretion to do so has been constrained by later decisions.

When in the 1960s the Court began its expansion of the Bill of Rights and applied the rulings to the States, a necessity arose to determine the application of the rulings to criminal defendants who had exhausted all direct appeals but could still resort to *habeas corpus*, to those who had been convicted but still were on direct appeal, and to those who had allegedly engaged in conduct but who had not gone to trial. At first, the Court drew the line at cases in which judgments of conviction were not yet final, so that all persons in those situations obtained retrospective use of decisions,[524] but the Court then promulgated standards for a balancing process that resulted in different degrees of retroactivity in different cases.[525] Generally, in cases in which the Court declared a rule which was "a clear break with the past," it denied retroactivity to all defendants, with the sometime exception of the appellant himself.[526] With respect to certain cases in which a new rule was intended to overcome an impairment of the truth-finding function of a criminal trial[527] or to cases in which the Court found that a constitutional doctrine barred the conviction or punishment of someone,[528] full retroactivity, even to *habeas* claimants, was the rule. Justice Harlan strongly argued that the Court should sweep away its confusing balancing rules and hold that all defendants whose cases are still pending on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule, but that no *habeas* claimant should be entitled to benefit.[529]

The Court has now drawn a sharp distinction between criminal cases pending on direct review and cases pending on collateral re-

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[523] Lemon v. Kurtzman, 411 U.S. 192, 198-199 (1973).

[524] Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966).

[525] Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, 388 U.S. 293 (1967); Adams v. Illinois, 405 U.S. 278 (1972). Stovall, 388 U.S. at 297.

[526] Desist v. United States, 394 U.S. 224, 248 (1969); United States v. Peltier, 422 U.S. 531 (1975); Brown v. Louisiana, 447 U.S. 323, 335-336 (1980) (plurality opinion); Michigan v. Payne, 412 U.S. 47, 55 (1973); United States v. Johnson, 457 U.S. 537, 549-550, 551-552 (1982).

[527] Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion); Brown v. Louisiana, 447 U.S. 323, 328-330 (1980) (plurality opinion); Hankerson v. North Carolina, 432 U.S. 233, 243 (1977).

[528] United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971); Moore v. Illinois, 408 U.S. 786, 800 (1972); Robinson v. Neil, 409 U.S. 505, 509 (1973).

[529] Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion); Desist v. United States, 394 U.S. 244, 256 (1969) (dissenting). Justice Powell has also strongly supported the proposed rule. Hankerson v. North Carolina, 432 U.S. 233, 246-248 (1977) (concurring in judgment); Brown v. Louisiana, 447 U.S. 323, 337 (1980) (concurring in judgment).

view. For cases on direct review, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[530] Justice Harlan's *habeas* approach was then adopted by a plurality in *Teague v. Lane*[531] and then by the Court in *Penry v. Lynaugh*.[532] Thus, for collateral review in federal courts of state court criminal convictions, the general rule is that "new rules" of constitutional interpretation, those that break new ground or impose a new obligation on the States or the Federal Government, announced after a defendant's conviction has become final, will not be applied. For such *habeas* cases, a "new rule" is defined very broadly to include interpretations that are a logical outgrowth or application of an earlier rule unless the result was "dictated" by that precedent.[533] The only exceptions are for decisions placing certain conduct or defendants beyond the reach of the criminal law, and for decisions recognizing a fundamental procedural right "without which the likelihood of an accurate conviction is seriously diminished."[534]

What the rule is to be in civil cases, and indeed if there *is* to be a rule, has been disputed to a rough draw in recent cases. As was noted above, there is a line of civil cases, constitutional and nonconstitutional, in which the Court has declined to apply new rules, the result often of overruling older cases, retrospectively, sometimes even to the prevailing party in the case.[535] As in crimi-

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[530] Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

[531] 489 U.S. 288 (1989).

[532] 492 U.S. 302 (1989).

[533] *Penry*, 492 U.S. at 314. Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" and if it was not "an illogical or even a grudging application" of the prior decision. Butler v. McKellar, 494 U.S. 407, 412-415 (1990). For additional elaboration on "new law," *see* O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

[534] Teague v. Lane, 489 U.S. 288, 307, 311-313 (1989) (plurality opinion); Butler v. McKellar, 494 U.S. 407, 415-416 (1990). Under the second exception it is "not enough that a new rule is aimed at improving the accuracy of a trial. . . . A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis in original).

[535] The standard that has been applied was enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Briefly, the question of retroactivity or prospectivity was to be determined by a balancing of the equities. To be limited to prospectivity, a decision must have established a new principle of law, either by overruling clear past precedent on which reliance has been had or by deciding an issue of first impression whose resolution was not clearly foreshadowed. The courts must look to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Then, the courts must look to see

nal cases, the creation of new law, through overrulings or otherwise, may result in retroactivity in all instances, in pure prospectivity, or in partial prospectivity in which the prevailing party obtains the results of the new rule but no one else does. In two cases raising the question when States are required to refund taxes collected under a statute that is subsequently ruled to be unconstitutional, the Court revealed itself to be deeply divided.[536] The question in *Beam* was whether the company could claim a tax refund under an earlier ruling holding unconstitutional the imposition of certain taxes upon its products. The holding of a fractionated Court was that it could seek a refund, because in the earlier ruling the Court had applied the holding to the contesting company, and once a new rule has been applied retroactively to the litigants in a civil case considerations of equality and *stare decisis* compel application to all.[537] While partial or selective prospectivity is thus ruled out, neither pure retroactivity nor pure prospectivity is either required or forbidden.

Four Justices adhered to the principle that new law, new rules, as defined above, may be applied purely prospectively, without violating any tenet of Article III or any other constitutional value.[538] Three Justices argued that all prospectivity, whether partial or total, violates Article III by expanding the jurisdiction of the federal courts beyond true cases and controversies.[539] Apparently, the Court now has resolved this dispute, although the principal decision is a close five-to-four result. In *Harper v. Virginia Dep't of Taxation*,[540] the Court adopted the principle of the *Griffith* decision in criminal cases and disregarded the *Chevron Oil* approach in civil

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whether a decision to apply retroactively a decision will produce substantial inequitable results. Id. at 106-07. American Trucking Assn's v. Smith, 496 U.S. 167, 179-86 (1990) (plurality opinion).

[536] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); American Trucking Assn's, Inc. v. Smith, 496 U.S. 167 (1990). And, of course, the retirements since the decisions were handed down further complicates discerning the likely Court position.

[537] Beam. The holding described in the text is expressly that of only a two-Justice plurality. 501 U.S. at 534-44 (Justices Souter and Stevens). Justice White, Justice Blackmun, and Justice Scalia (with Justice Marshall joining the latter Justices) concurred, id. at 544, 547, 548 (respectively), but on other, and in the instance of the three latter Justices, and broader justifications. Justices O'Connor and Kennedy and Chief Justice Rehnquist dissented. Id. at 549.

[538] Beam, 501 U.S. at 549 (dissenting opinion of Justices O'Connor and Kennedy and Chief Justice Rehnquist), and id. at 544 (Justice White concurring). *And see* Smith, 496 U.S. at 171 (plurality opinion of Justices O'Connor, White, Kennedy, and Chief Justice Rehnquist).

[539] Beam, 501 U.S. at 547, 548 (Justices Blackmun, Scalia, and Marshall concurring). These three Justices, in Smith, 496 U.S. at 205, had joined the dissenting opinion of Justice Stevens arguing that constitutional decisions must be given retroactive effect.

[540] 509 U.S. 86 (1993).

cases. Henceforth, in civil cases, the rule is: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[541] Four Justices continued to adhere to *Chevron Oil*, however,[542] so that with one Justice each retired from the different sides one may not regard the issue as definitively settled.[543] Future cases must, therefore, be awaited for resolution of this issue.

Political Questions

It may be that the Court will refuse to adjudicate a case assuredly within its jurisdiction, presented by parties with standing in which adverseness and ripeness will exist, a case in other words presenting all the qualifications we have considered making it a justiciable controversy. The "label" for such a case is that it presents a "political question." Although the Court has referred to the political question doctrine as "one of the rules basic to the federal system and this Court's appropriate place within that structure,"[544] a commentator has remarked that "[i]t is, measured by any of the normal responsibilities of a phrase of definition, one of the least satisfactory terms known to the law. The origin, scope,

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[541] 509 U.S. at 97. While the conditional language in this passage might suggest that the Court was leaving open the possibility that in some cases it might rule purely prospectively, not even applying its decision to the parties before it, other language belies that possibility. "This rule extends *Griffith's* ban against 'selective application of new rules.'" [Citing 479 U.S. at 323]. Inasmuch as *Griffith* rested in part on the principle that "the nature of judicial review requires that [the Court] adjudicate specific cases," 479 U.S. at 322, deriving from Article III's case or controversy requirement for federal courts and forbidding federal courts from acting legislatively, the "Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." 509 U.S. at 97 (quoting *American Trucking*, 496 U.S. at 214 (Justice Stevens dissenting)). The point is made more clearly in Justice Scalia's concurrence, in which he denounces all forms of nonretroactivity as "the handmaid of judicial activism." Id. at 105.

[542] 509 U.S. at 110 (Justice Kennedy, with Justice White, concurring); 113 (Justice O'Connor, with Chief Justice Rehnquist, dissenting). However, these Justices disagreed in this case about the proper application of *Chevron Oil*.

[543] *But see* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (setting aside a state court refusal to give retroactive effect to a U. S. Supreme Court invalidation of that State's statute of limitations in certain suits, in an opinion by Justice Breyer, Justice Blackmun's successor); Ryder v. United States, 515 U.S. 177, 184-85 (1995) ("whatever the continuing validity of *Chevron Oil* after" *Harper* and *Reynoldsville Casket*).

[544] Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947); *cf.* Baker v. Carr, 369 U.S. 186, 278 (1962) (Justice Frankfurter dissenting). The most successful effort at conceptualization of the doctrine is Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). *See* Hart & Wechsler, supra at 270-294.

and purpose of the concept have eluded all attempts at precise statements."[545] That the concept of political questions may be "more amenable to description by infinite itemization than by generalization"[546] is generally true, although the Court's development of rationale in *Baker v. Carr*[547] has changed this fact radically. The doctrine may be approached in two ways, by itemization of the kinds of questions that have been labeled political and by isolation of the factors that have led to the labeling.

Origins and Development.—In *Marbury v. Madison*,[548] Chief Justice Marshall stated: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court."[549]

But the doctrine was asserted even earlier as the Court in *Ware v. Hylton*[550] refused to pass on the question whether a treaty had been broken. And in *Martin v. Mott*,[551] the Court held that the President acting under congressional authorization had exclusive and unreviewable power to determine when the militia should be called out. But it was in *Luther v. Borden*[552] that the concept was first enunciated as a doctrine separate from considerations of interference with executive functions. This case presented the question of the claims of two competing factions to be the only lawful government of Rhode Island during a period of unrest in 1842.[553] Chief Justice Taney began by saying that the answer was primarily

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[545] Frank, *Political Questions, in Supreme Court and Supreme Law* 36 (E. Cahn ed., 1954).

[546] Id.

[547] Baker v. Carr, 369 U.S. 186, 208-232 (1962).

[548] 5 U.S. (1 Cr.) 137, 170 (1803).

[549] In Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840), the Court, refusing an effort by mandamus to compel the Secretary of the Navy to pay a pension, said: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." It therefore follows that mandamus will lie against an executive official only to compel the performance of a ministerial duty, which admits of no discretion, and may not be invoked to control executive or political duties which admit of discretion. *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[550] 3 U.S. (3 Dall.) 199 (1796).

[551] 25 U.S. (12 Wheat.) 19 (1827).

[552] 48 U.S. (7 How.) 1 (1849).

[553] *Cf.* Baker v. Carr, 369 U.S. 186, 218-22 (1962); id. at 292-97 (Justice Frankfurter dissenting).

a matter of state law that had been decided in favor of one faction by the state courts.[554]

Insofar as the Federal Constitution had anything to say on the subject, the Chief Justice continued, that was embodied in the clause empowering the United States to guarantee to every State a republican form of government,[555] and this clause committed determination of the issue to the political branches of the Federal Government. "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must neccessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."[556] Here, the contest had not proceeded to a point where Congress had made a decision, "[y]et the right to decide is placed there, and not in the courts."[557]

Moreover, in effectuating the provision in the same clause that the United States should protect them against domestic violence, Congress had vested discretion in the President to use troops to protect a state government upon the application of the legislature or the governor. Before he could act upon the application of a legislature or a governor, the President "must determine what body of men constitute the legislature, and who is the governor . . . ." No court could review the President's exercise of discretion in this respect; no court could recognize as legitimate a group vying against the group recognized by the President as the lawful government.[558] Although the President had not actually called out the militia in Rhode Island, he had pledged support to one of the competing governments, and this pledge of military assistance if it were needed had in fact led to the capitulation of the other faction, thus making an effectual and authoritative determination not reviewable by the Court.[559]

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[554] Luther v. Borden, 48 U.S. (7 How.) 1, 40 (1849).
[555] 48 U.S. at 42 (citing Article IV, § 4).
[556] 48 U.S. at 42
[557] 48 U.S. at 42
[558] 48 U.S. at 43.
[559] 48 U.S. at 44.

The Doctrine Before Baker v. Carr.—Over the years, the political question doctrine has been applied to preclude adjudication of a variety of issues. Certain factors appear more or less consistently through most but not all of these cases, and it is perhaps best to indicate the cases and issues deemed political before attempting to isolate these factors.

(1) By far the most consistent application of the doctrine has been in cases in which litigants asserted claims under the republican form of government clause,[560] whether the attack was on the government of the State itself[561] or on some manner in which it had acted,[562] but there have been cases in which the Court has reached the merits.[563]

(2) Although there is language in the cases that would if applied make all questions touching on foreign affairs and foreign policy political,[564] whether the courts have adjudicated a dispute in this area has often depended on the context in which it arises. Thus, the determination by the President whether to recognize the government of a foreign state[565] or who is the *de jure* or *de facto* ruler of a foreign state[566] is conclusive on the courts, but in the absence of a definitive executive action the courts will review the record to determine whether the United States has accorded a sufficient degree of recognition to allow the courts to take judicial

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[560] Article IV, 4.

[561] As it was on the established government of Rhode Island in Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *See also* Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Taylor v. Beckham, 178 U.S. 548 (1900).

[562] Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. City of Portland, 223 U.S. 151 (1912) (attacks on initiative and referendum); Marshall v. Dye, 231 U.S. 250 (1913) (state constitutional amendment procedure); O'Neill v. Leamer, 239 U.S. 244 (1915) (delegation to court to form drainage districts); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916) (submission of legislation to referendum); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (workmen's compensation); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930) (concurrence of all but one justice of state high court required to invalidate statute); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) (delegation of legislative powers).

[563] All the cases, however, predate the application of the doctrine in Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912). *See* Attorney General of the State of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905) (legislative creation and alteration of school districts "compatible" with a republican form of government); Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897) (delegation of power to court to determine municipal boundaries does not infringe republican form of government); Minor v. Happersett, 88 U.S. (21 Wall) 162, 175-176 (1875) (denial of suffrage to women no violation of republican form of government).

[564] Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

[565] United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818); Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852).

[566] Jones v. United States, 137 U.S. 202 (1890); Oetjen v. Central Leather Co., 246 U.S. 297 (1918). *See* Ex parte Hitz, 111 U.S. 766 (1884).

notice of the existence of the state.[567] Moreover, the courts have often determined for themselves what effect, if any, should be accorded the acts of foreign powers, recognized or unrecognized.[568] Similarly, the Court when dealing with treaties and the treaty power has treated as political questions whether the foreign party had constitutional authority to assume a particular obligation[569] and whether a treaty has lapsed because of the foreign state's loss of independence[570] or because of changes in the territorial sovereignty of the foreign state,[571] but the Court will not only interpret the domestic effects of treaties,[572] it will at times interpret the effects bearing on international matters.[573] The Court has deferred to the President and Congress with regard to the existence of a state of war and the dates of the beginning and ending and of states of belligerency between foreign powers, but the deference has sometimes been forced.[574]

(3) Ordinarily, the Court will not look behind the fact of certification that the standards requisite for the enactment of legislation[575] or ratification of a constitutional amendment[576] have in fact

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[567] United States v. The Three Friends, 166 U.S. 1 (1897); In re Baiz, 135 U.S. 403 (1890). *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[568] United States v. Reynes, 50 U.S. (9 How.) 127 (1850); Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838); Keene v. McDonough, 33 U.S. (8 Pet.) 308 (1834). *See also* Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); Underhill v. Hernandez, 168 U.S. 250 (1897). *But see* United States v. Belmont, 301 U.S. 324 (1937). On the "act of State" doctrine, *compare* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *with* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). *And see* First National City Bank v. Banco Para el Comercio de Cuba, 462 U.S. 611 (1983); W. S. Kirkpatrick Co. v. Environmental Tectronics Corp., 493 U.S. 400 (1990).

[569] Doe v. Braden, 57 U.S. (16 How.) 635 (1853).

[570] Terlinden v. Ames, 184 U.S. 270 (1902); Clark v. Allen, 331 U.S. 503 (1947).

[571] Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852). On the effect of a violation by a foreign state on the continuing effectiveness of the treaty, *see* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Charlton v. Kelly, 229 U.S. 447 (1913).

[572] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). *Cf.* Chinese Exclusion Cases, 130 U.S. 581 (1889) (conflict of treaty with federal law). On the modern formulation, *see* Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229-230 (1986).

[573] Perkins v. Elg, 307 U.S. 325 (1939); United States v. Rauscher, 119 U.S. 407 (1886).

[574] Commercial Trust Co v. Miller, 262 U.S. 51 (1923); Woods v. Miller Co., 333 U.S. 138 (1948); Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924); Ludecke v. Watkins, 335 U.S. 160 (1948); Lee v. Madigan, 358 U.S. 228 (1959); The Divina Pastora, 17 U.S. (4 Wheat.) 52 (1819). The cases involving the status of Indian tribes as foreign states usually have presented political questions but not always. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); United States v. Sandoval, 231 U.S. 28 (1913); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[575] Field v. Clark, 143 U.S. 649 (1892); Harwood v. Wentworth, 162 U.S. 547 (1896); *cf.* Gardner v. The Collector, 73 U.S. (6 Wall.) 499 (1868). *See*, for the modern formulation, United States v. Munoz-Flores, 495 U.S. 385 (1990).

[576] Coleman v. Miller, 307 U.S. 433 (1939) (Congress' discretion to determine what passage of time will cause an amendment to lapse, and effect of previous rejection by legislature).

been met, although it will interpret the Constitution to determine what the basic standards are,[577] and it will decide certain questions if the political branches are in disagreement.[578]

(4) Prior to *Baker v. Carr*,[579] cases challenging the distribution of political power through apportionment and districting,[580] weighted voting,[581] and restrictions on political action[582] were held to present nonjusticiable political questions.

From this limited review of the principal areas in which the political question doctrine seemed most established, it is possible to extract some factors that seemingly convinced the courts that the issues presented went beyond the judicial responsibility. These factors, necessarily stated baldly in so summary a fashion, would appear to be the lack of requisite information and the difficulty of obtaining it,[583] the necessity for uniformity of decision and deferrence to the wider responsibilities of the political departments,[584] and the lack of adequate standards to resolve a dispute.[585] But present in all the political cases was (and is) the most important factor, a "prudential" attitude about the exercise of judicial review, which emphasizes that courts should be wary of deciding on the merits any issue in which claims of principle as to the issue and of expediency as to the power and prestige of courts are in sharp conflict. The political question doctrine was (and is) thus a way of avoiding

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[577] Missouri Pac. Ry. v. Kansas, 248 U.S. 276 (1919); Rainey v. United States, 232 U.S. 310 (1914); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Twin City Bank v. Nebeker, 167 U.S. 196 (1897); Lyons v. Woods, 153 U.S. 649 (1894); United States v. Ballin, 144 U.S. 1 (1892) (statutes); United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); Hawke v. Smith, 253 U.S. 221 (1920); National Prohibition Cases, 253 U.S. 350 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (constitutional amendments).

[578] Pocket Veto Case, 279 U.S. 655 (1929); Wright v. United States, 302 U.S. 583 (1938).

[579] 369 U.S. 186 (1962).

[580] Colegrove v. Green, 328 U.S. 549 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947).

[581] South v. Peters, 339 U.S. 276 (1950) (county unit system for election of statewide officers with vote heavily weighted in favor of rural, lightly-populated counties).

[582] MacDougall v. Green, 335 U.S. 281 (1948) (signatures on nominating petitions must be spread among counties of unequal population).

[583] Thus, *see, e.g.*, Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); Coleman v. Miller, 307 U.S. 433, 453, (1939).

[584] Thus, *see, e.g.*, Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839). Similar considerations underlay the opinion in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), in which Chief Justice Taney wondered how a court decision in favor of one faction would be received with Congress seating the representatives of the other faction and the President supporting that faction with military force.

[585] Baker v. Carr, 369 U.S. 186, 217, 226 (1962) (opinion of the Court); id. at 68, 287, 295, (Justice Frankfurter dissenting)

a principled decision damaging to the Court or an expedient decision damaging to the principle.[586]

Baker v. Carr.—In *Baker v. Carr*,[587] the Court undertook a major rationalization and formulation of the political question doctrine, which has considerably narrowed its application. Following *Baker*, the whole of the apportionment-districting-election restriction controversy previously immune to federal-court adjudication was considered and decided on the merits,[588] and the Court's subsequent rejection of the doctrine disclosed the narrowing in other areas as well.[589]

According to Justice Brennan, who delivered the opinion of the Court, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[590] Thus, the "nonjusticiability of a political question is primarily a function of the separation of powers."[591] "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[592] Following a discussion of several areas in which the doctrine had been used, Justice Brennan continued: "It is apparent that several formulations which vary slightly according to the set-

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[586] For a statement of the "prudential" view, *see generally* A. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS (1962), *but see esp.* 23-28, 69-71, 183-198. *See also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Justice Frankfurter dissenting.) The opposing view, which has been called the "classicist" view, is that courts are duty bound to decide all cases properly before them. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). *See also* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW—SELECTED ESSAYS 11-15 (1961).

[587] 369 U.S. 186 (1962).

[588] Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Hadley v. Junior College District, 397 U.S. 50 (1970) (apportionment and districting, congressional, legislative, and local); Gray v. Sanders, 372 U.S. 368 (1963) (county unit system weighing statewide elections); Moore v. Ogilvie, 394 U.S. 814 (1969) (geographic dispersion of persons signing nominating petitions).

[589] Powell v. McCormack, 395 U.S. 486 (1969). Nonetheless, the doctrine continues to be sighted.

[590] Baker v. Carr, 369 U.S. 186, 210 (1962). This formulation fails to explain cases like Moyer v. Peabody, 212 U.S. 78 (1909), in which the conclusion of the Governor of a State that insurrection existed or was imminent justifying suspension of constitutional rights was deemed binding on the Court. *Cf.* Sterling v. Constantin, 287 U.S. 378 (1932). The political question doctrine was applied in cases challenging the regularity of enactments of territorial legislatures. Harwood v. Wentworth, 162 U.S. 547 (1896); Lyons v. Woods, 153 U.S. 649 (1894); Clough v. Curtis, 134 U.S. 361 (1890). *See also* In re Sawyer, 124 U.S. 200 (1888); Walton v. House of Representatives, 265 U.S. 487 (1924).

[591] 369 U.S. at 210.

[592] 369 U.S. at 211.

tings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[593]

Powell v. McCormack.—Because *Baker* had apparently restricted the political question doctrine to intrafederal issues, there was no discussion of the doctrine when the Court held that it had power to review and overturn a state legislature's refusal to seat a member-elect because of his expressed views.[594] But in *Powell v. McCormack*,[595] the Court was confronted with a challenge to the exclusion of a member-elect by the United States House of Representatives. Its determination that the political question doctrine did not bar its review of the challenge indicates the narrowness of application of the doctrine in its present state. Taking Justice Brennan's formulation in *Baker* of the factors that go to make up a political question,[596] Chief Justice Warren determined that the only critical one in this case was whether there was a "textually demonstrable constitutional commitment" to the House to deter-

[593] 369 U.S. at 217. It remains unclear after Baker whether the political question doctrine is applicable *solely* to intrafederal issues or only *primarily*, so that the existence of one or more of these factors in a case involving, say, a State, might still give rise to nonjusticiability. At one point, id. at 210, Justice Brennan says that nonjusticiability of a political question is "primarily" a function of separation of powers but in the immediately preceding paragraph he states that "it is" the intrafederal aspect "and not the federal judiciary's relationship to the States" that raises political questions. But subsequently, id. at 226, he balances the present case, which involves a State and not a branch of the Federal Government, against each of the factors listed in the instant quotation and notes that none apply. His discussion of why guarantee clause cases are political presents much the same difficulty, id. at 222-26, inasmuch as he joins the conclusion that the clause commits resolution of such issues to Congress with the assertion that the clause contains no "criteria by which a court could determine which form of government was republican," id. at 222, a factor not present when the equal protection clause is relied on. Id. at 226.

[594] Bond v. Floyd, 385 U.S. 116 (1966).

[595] 395 U.S. 486 (1969).

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

mine in its sole discretion the qualifications of members.[597] In order to determine whether there was a textual commitment, the Court reviewed the Constitution, the Convention proceedings, and English and United States legislative practice to ascertain what power had been conferred on the House to judge the qualifications of its members; finding that the Constitution vested the House with power only to look at the qualifications of age, residency, and citizenship, the Court thus decided that in passing on Powell's conduct and character the House had exceeded the powers committed to it and thus judicial review was not barred by this factor of the political question doctrine.[598] Although this approach accords with the "classicist" theory of judicial review,[599] it circumscribes the political question doctrine severely, inasmuch as all constitutional questions turn on whether a governmental body has exceeded its specified powers, a determination the Court traditionally makes, whereas traditionally the doctrine precluded the Court from inquiring whether the governmental body had exceeded its powers. In short, the political question consideration may now be one on the merits rather than a decision not to decide.

Chief Justice Warren disposed of the other factors present in political question cases in slightly more than a page. Since resolution of the question turned on an interpretation of the Constitution, a judicial function which must sometimes be exercised "at variance with the construction given the document by another branch," there was no lack of respect shown another branch, nor, because the Court is the "ultimate interpreter of the Constitution," will there be "multifarious pronouncements by various departments on one question," nor, since the Court is merely interpreting the Constitution, is there an "initial policy determination" not suitable for courts. Finally, "judicially . . . manageable standards" are present in the text of the Constitution.[600] The effect of *Powell* is to discard all the *Baker* factors inhering in a political question, with the excep-

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[597] 395 U.S. at 319.

[598] 395 U.S. at 519-47. The Court noted, however, that even if this conclusion had not been reached from unambiguous evidence, the result would have followed from other considerations. Id. at 547-48.

[599] *See* H. Wechsler, supra at 11-12. Professor Wechsler believed that congressional decisions about seating members were immune to review. Id. Chief Justice Warren noted that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution." Powell v. McCormack, 395 U.S. 486, 521 n.42 (1969). *And see* id. at 507 n.27 (reservation on limitations that might exist on Congress' power to expel or otherwise punish a sitting member).

[600] 395 U.S. at 548-549. With the formulation of Chief Justice Warren, *compare* that of then-Judge Burger in the lower court. 395 F.2d 577, 591-596 (D.C. Cir. 1968).

tion of the textual commitment factor, and that was interpreted in such a manner as seldom if ever to preclude a judicial decision on the merits.

The Doctrine Reappears.—Reversing a lower federal court ruling subjecting the training and discipline of National Guard troops to court review and supervision, the Court held that under Article I, § 8, cl. 16, the organizing, arming, and disciplining of such troops are committed to Congress and by congressional enactment to the Executive Branch. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."[601] The suggestion of the infirmity of the political question doctrine was rejected, since "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise."[602] In staying a grant of remedial relief in another case, the Court strongly suggested that the actions of political parties in national nominating conventions may also present issues not meet for judicial resolution.[603] A challenge to the Senate's interpretation of and exercise of its impeachment powers was held to be nonjusticiable; there was a textually demonstrable commitment of the

[601] Gilligan v. Morgan, 413 U.S. 1, 10 (1973). Similar prudential concerns seem to underlay, though they did not provide the formal basis for, decisions in O'Shea v. Littleton, 414 U.S. 488 (1974), and Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).

[602] 413 U.S. at 11. Other considerations of justiciability, however, id. at 10, preclude using the case as square precedent on political questions. Notice that in Scheuer v. Rhodes, 416 U.S. 232, 249 (1974), the Court denied that the Gilligan v. Morgan holding barred adjudication of damage actions brought against state officials by the estates of students killed in the course of the conduct that gave rise to both cases.

[603] O'Brien v. Brown, 409 U.S. 1 (1972) (granting stay). The issue was mooted by the passage of time and was not thereafter considered on the merits by the Court. Id. at 816 (remanding to dismiss as moot). It was also not before the Court in Cousins v. Wigoda, 419 U.S. 477 (1975), but it was alluded to there. *See* id. at 483 n.4, and id. at 491 (Justice Rehnquist concurring). *See also* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Justices Rehnquist, Stewart, and Stevens, and Chief Justice Burger using political question analysis to dismiss a challenge to presidential action). *But see* id. at 997, 998 (Justice Powell rejecting analysis for this type of case).

issue to the Senate, and there was a lack of judicially discoverable and manageable standards for resolving the issue.[604]

Despite the occasional resort to the doctrine, the Court continues to reject its application in language that confines its scope. Thus, when parties challenged the actions of the Secretary of Commerce in declining to certify, as required by statute, that Japanese whaling practices undermined the effectiveness of international conventions, the Court rejected the Government's argument that the political question doctrine precluded decision on the merits. The Court's prime responsibility, it said, is to interpret statutes, treaties, and executive agreements; the interplay of the statutes and the agreements in this case implicated the foreign relations of the Nation. "But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."[605]

After requesting argument on the issue, the Court held that a challenge to a statute on the ground that it did not originate in the House of Representatives as required by the origination clause was justiciable.[606] Turning back reliance on the various factors set out in *Baker*, in much the same tone as in *Powell v. McCormack*, the Court continued to evidence the view that only questions textually committed to another branch are political questions. Invalidation of a statute because it did not originate in the right House would not demonstrate a "lack of respect" for the House that passed the bill. "[D]isrespect," in the sense of rejecting Congress' reading of the Constitution, "cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible."[607] That the House of Representatives has the power and incentives to protect its prerogatives by not passing a bill violating the origination clause did not make this case nonjusticiable. "[T]he fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question."[608] The Court also rejected the contention that, because the case did not involve

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[604] Nixon v. United States, 506 U.S. 224 (1993). The Court pronounced its decision as perfectly consonant with Powell v. McCormack. Id. at 236-38.

[605] Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986). *See also* Davis v. Bandemer, 478 U.S. 109 (1986) (challenge to political gerrymandering is justiciable).

[606] United States v. Munoz-Flores, 495 U.S. 385 (1990).

[607] 495 U.S. at 390 (emphasis in original).

[608] 495 U.S. at 393.

a matter of individual rights, it ought not be adjudicated. Political questions are not restricted to one kind of claim, but the Court frequently has decided separation-of-power cases brought by people in their individual capacities. Moreover, the allocation of powers within a branch, just as the separation of powers among branches, is designed to safeguard liberty.[609] Finally, the Court was sanguine that it could develop "judicially manageable standards" for disposing of origination clause cases, and, thus, it did not view the issue as political in that context.[610]

In short, the political question doctrine may not be moribund, but it does seem applicable to a very narrow class of cases. Significantly, the Court made no mention of the doctrine while resolving issues arising from Florida's recount of votes in the closely contested 2000 presidential election,[611] despite the fact that the Constitution vests in Congress the authority to count electoral votes, and further provides for selection of the President by the House of Representatives if no candidate receives a majority of electoral votes.[612]

JUDICIAL REVIEW

The Establishment of Judicial Review

Judicial review is one of the distinctive features of United States constitutional law. It is no small wonder, then, to find that the power of the federal courts to test federal and state legislative enactments and other actions by the standards of what the Constitution grants and withholds is nowhere expressly conveyed. But it is hardly noteworthy that its legitimacy has been challenged from the first, and, while now accepted generally, it still has detractors and its supporters disagree about its doctrinal basis and its application.[613] Although it was first asserted in *Marbury v.*

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[609] 495 U.S. at 393-95.

[610] 495 U.S. at 395-96.

[611] *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000); and Bush v. Gore, 531 U.S. 98 (2000).

[612] 12th Amendment.

[613] *See* the richly detailed summary and citations to authority in G. GUNTHER, CONSTITUTIONAL LAW 1-38 (12th ed. 1991); For expositions on the legitimacy of judicial review, *see* L. HAND, THE BILL OF RIGHTS (1958); H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW—SELECTED ESSAYS 1-15 (1961); A. BICKEL, THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS 1-33 (1962); R. BERGER, CONGRESS V. THE SUPREME COURT (1969). For an extensive historical attack on judicial review, *see* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES chs. 27-29 (1953), with which *compare* Hart, *Book Review*, 67 HARV. L. REV. 1456 (1954). A brief review of the ongoing debate on the subject, in a work that now is a classic attack on judicial review, is Westin, *Introduction: Charles Beard and American Debate over Judicial Review, 1790-1961*, in C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 1-34

Madison[614] to strike down an act of Congress as inconsistent with the Constitution, judicial review did not spring full-blown from the brain of Chief Justice Marshall. The concept had been long known, having been utilized in a much more limited form by Privy Council review of colonial legislation and its validity under the colonial charters,[615] and there were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.[616]

Practically all of the framers who expressed an opinion on the issue in the Convention appear to have assumed and welcomed the existence of court review of the constitutionality of legislation,[617]

(1962 reissue of 1938 ed.), and bibliography at 133-149. While much of the debate focuses on judicial review of acts of Congress, the similar review of state acts has occasioned much controversy as well.

[614] 5 U.S. (1 Cr.) 137 (1803). A state act was held inconsistent with a treaty in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[615] J. Goebel, supra at 60-95.

[616] Id. at 96-142.

[617] M. Farrand, supra at 97-98 (Gerry), 109 (King), 2 id. at 28 (Morris and perhaps Sherman). 73 (Wilson), 75 (Strong, but the remark is ambiguous). 76 (Martin), 78 (Mason), 79 (Gorham, but ambiguous), 80 (Rutledge), 92-93 (Madison), 248 (Pinckney), 299 (Morris), 376 (Williamson), 391 (Wilson), 428 (Rutledge), 430 (Madison), 440 (Madison), 589 (Madison); 3 id. at 220 (Martin). The only expressed opposition to judicial review came from Mercer with a weak seconding from Dickinson. "Mr. Mercer ... disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable." 2 id. at 298. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." Id. at 299. Of course, the debates in the Convention were not available when the state ratifying conventions acted, so that the delegates could not have known these views about judicial review in order to have acted knowingly about them. Views, were, however, expressed in the ratifying conventions recognizing judicial review, some of them being uttered by Framers. 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836). 131 (Samuel Adams, Massachusetts), 196-197 (Ellsworth, Connecticut). 348, 362 (Hamilton, New York): 445-446. 478 (Wilson, Pennsylvania), 3 id. at 324-25, 539, 541 (Henry, Virginia), 480 (Mason, Virginia), 532 (Madison, Virginia), 570 (Randolph, Virginia); 4 id. at 71 (Steele, North Carolina), 156-157 (Davie, North Carolina). In the Virginia convention, John Marshall observed if Congress "were to make a law not warranted by any of the powers enumerated, it would be considered by the judge as an infringement of the Constitution which they are to guard ... They would declare it void .... To what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 id. at 553-54. Both Madison and Hamilton similarly asserted the power of judicial review in their campaign for ratification. THE FEDERALIST (J. Cooke ed. 1961). *See* Nos. 39 and 44, at 256, 305 (Madison), Nos. 78 and 81, at 524-530, 541-552 (Hamilton). The persons supporting or at least indicating they thought judicial review existed did not constitute a majority of the Framers, but the absence of controverting statements, with the exception of the Mercer-Dickinson comments, indicates at least acquiesence if not agreements by the other Framers.

To be sure, subsequent comments of some of the Framers indicate an understanding contrary to those cited in the convention. *See, e.g.*, Charles Pinckney in

and prior to *Marbury* the power seems very generally to have been assumed to exist by the Justices themselves.[618] In enacting the Judiciary Act of 1789, Congress explicitly made provision for the exercise of the power,[619] and in other debates questions of constitu-

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1799: "On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 412 (F. Wharton ed., 1849).

Madison's subsequent changes of position are striking. His remarks in the Philadelphia Convention, in the Virginia ratifying convention, and in The Federalist, cited above, all unequivocally favor the existence of judicial review. And in Congress arguing in support of the constitutional amendments providing a bill of rights, he observed: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," 1 ANNALS OF CONGRESS 457 (1789); 5 WRITINGS OF JAMES MADISON 385 (G. Hunt ed., 1904). Yet, in a private letter in 1788, he wrote: "In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with the final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper." Id. at 294. At the height of the dispute over the Alien and Sedition Acts, Madison authored a resolution ultimately passed by the Virginia legislature which, though milder, and more restrained than one authored by Jefferson and passed by the Kentucky legislature, asserted the power of the States, though not of one State or of the state legislatures alone, to "interpose" themselves to halt the application of an unconstitutional law. 3 I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION, 1787-1800 460-464, 467-471 (1950); Report on the Resolutions of 1798, 6 Writings of James Madison, op. cit., 341-406. Embarrassed by the claim of the nullificationists in later years that his resolution supported their position, Madison distinguished his and their positions and again asserted his belief in judicial review. 6 I. Brant, supra, 481-485, 488-489.

The various statements made and positions taken by the Framers have been culled and categorized and argued over many times. For a recent compilation reviewing the previous efforts, *see* R. Berger, supra, chs. 3-4.

[618] Thus, the Justices on circuit refused to adminster a pension act on grounds of its unconstitutionally, *see* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), and supra, "Finality of Judgment as an Attribute of Judicial Power". Chief Justice Jay and other Justices wrote that the imposition of circuit duty on Justices was unconstitutional, although they never mailed the letter, supra in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), a feigned suit, the constitutionality of a federal law was argued before the Justices and upheld on the merits, in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1797), a state law was overturned, and dicta in several opinions asserted the principle. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Justice Iredell), and several Justices on circuit, quoted in J. Goebel, supra at 589-592.

[619] In enacting the Judiciary Act of 1789, 1 Stat. 73, Congress chose not to vest "federal question" jurisdiction in the federal courts but to leave to the state courts the enforcement of claims under the Constitution and federal laws. In§ 25, 1 Stat. 85, Congress provided for review by the Supreme Court of final judgments in state courts (1) "... where is drawn in question the validity of a treaty or statute of, or

tionality and of judicial review were prominent.[620] Nonetheless, although judicial review is consistent with several provisions of the Constitution and the argument for its existence may be derived from these provisions, they do not compel the conclusion that the Framers intended judicial review nor that it must exist. It was Chief Justice Marshall's achievement that, in doubtful circumstances and an awkward position, he carried the day for the device, which, though questioned, has expanded and become solidified at the core of constitutional jurisprudence.

Marbury v. Madison.—Chief Justice Marshall's argument for judicial review of congressional acts in *Marbury v. Madison*[621] had been largely anticipated by Hamilton.[622] For example, he had written: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[623]

At the time of the change of Administration from Adams to Jefferson, several commissions of appointment to office had been signed but not delivered and were withheld on Jefferson's express instruction. Marbury sought to compel the delivery of his commission by seeking a writ of mandamus in the Supreme Court in the exercise of its original jurisdiction against Secretary of State Madison. Jurisdiction was based on § 13 of the Judiciary Act of 1789,[624] which Marbury, and ultimately the Supreme Court, interpreted to authorize the Court to issue writs of mandamus in suits in its

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an authority exercised under the United States, and the decision is against their validity;" (2) "... where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity;" or (3) "... where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed" thereunder. The ruling below was to be "re-examined and reversed or affirmed in the Supreme Court ...."

[620] *See* in particular the debate on the President's removal powers, discussed supra, "The Removal Power" with statements excerpted in R. Berger, supra at 144-150. Debates on the Alien and Sedition Acts and on the power of Congress to repeal the Judiciary Act of 1801 similarly saw recognition of judicial review of acts of Congress. C. Warren, supra at 107-124.

[621] 5 U.S. (1 Cr.) 137 (1803).

[622] THE FEDERALIST, Nos. 78 and 81 (J. Cooke ed. 1961), 521-530, 541-552.

[623] Id., No. at 78, 525.

[624] 1 Stat. 73, 80.

original jurisdiction.[625] Though deciding all the other issues in Marbury's favor, the Chief Justice wound up concluding that the § 13 authorization was an attempt by Congress to expand the Court's original jurisdiction beyond the constitutional prescription and was therefore void.[626]

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States"; Marshall began his discussion of this final phase of the case, "but, happily, not of an intricacy proportioned to its interest."[627] First, certain fundamental principles warranting judicial review were noticed. The people had come together to establish a government. They provided for its organization and assigned to its various departments their powers and established certain limits not to be transgressed by those departments. The limits were expressed in a written constitution, which would serve no purpose "if these limits may, at any time, be passed by those intended to be restrained." Because the Constitution is "a superior paramount law," it is unchangeable by ordinary legislative means and "a legislative act contrary to the constitution is not law."[628] "If an act of the legislature, repugnant to the constitution, is void, does it notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" The answer, thought the Chief Justice, was obvious. "It is emphatically the province and duty of the judicial department to say what the law is.... If two laws conflict with each other, the courts must decide on the operation of each."

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding

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[625] The section first denominated the original jurisdiction of the Court and then described the Court's appellate jurisdiction. Following and indeed attached to the sentence on appellate jurisdiction, being separated by a semi-colon, is the language saying "and shall have power to issue ... writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The Chief Justice could easily have interpreted the authority to have been granted only in cases under appellate jurisdiction or as authority conferred in cases under both original and appellate jurisdiction when the cases are otherwise appropriate for one jurisdiction or the other. Textually, the section does not compel a reading that Congress was conferring on the Court an original jurisdiction to issue writs of mandamus *per se*.

[626] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 173-180 (1803). For a classic treatment of *Marbury*, *see* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1.

[627] 5 U.S. at 176. One critic has written that by this question Marshall "had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant." A. Bickel, supra at 3. Marshall, however, soon reached this question, though more by way of assertion than argument. 5 U.S. (1 Cr.) at 177-78.

[628] 5 U.S. at 176-77.

the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."[629] To declare otherwise, Chief Justice Marshall said, would be to permit a legislative body to pass at pleasure the limits imposed on its powers by the Constitution.[630]

The Chief Justice then turned from the philosophical justification for judicial review as arising from the very concept of a written constitution, to specific clauses of the Constitution. The judicial power, he observed, was extended to "all cases arising under the constitution."[631] It was "too extravagant to be maintained that the Framers had intended that a case arising under the constitution should be decided without examining the instrument under which it arises."[632] Suppose, he said, that Congress laid a duty on an article exported from a State or passed a bill of attainder or an *ex post facto* law or provided that treason should be proved by the testimony of one witness. Would the courts enforce such a law in the face of an express constitutional provision? They would not, he continued, because their oath required by the Constitution obligated them to support the Constitution and to enforce such laws would violate the oath.[633] Finally, the Chief Justice noticed the supremacy clause, which gave the Constitution precedence over laws and treaties and provided that only laws "which shall be made in pursuance of the constitution" are to be the supreme laws of the land.[634]

The decision in *Marbury v. Madison* has never been disturbed, although it has been criticized and has had opponents throughout our history. It not only carried the day in the federal courts, but from its announcement judicial review by state courts of local legis-

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[629] 5 U.S. at 177-78.

[630] 5 U.S. at 178.

[631] 5 U.S. at 178. The reference is, of course, to the first part of clause 1, § 2, Art. III: "The judicial power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." *Compare* A. Bickel, supra at 5-6, *with* R. Berger, supra at 189-222.

[632] 5 U.S. at 179.

[633] 5 U.S. at 179-80. The oath provision is contained in Art. VI, cl. 3. *Compare* A. Bickel, supra at 7-8, *with* R. Berger, supra at 237-244.

[634] 5 U.S. at 180. *Compare* A. Bickel, supra at 8-12, *with* R. Berger, supra at 223-284.

lation under local constitutions made rapid progress and was securely established in all States by 1850.[635]

Judicial Review and National Supremacy.—Even many persons who have criticized the concept of judicial review of congressional acts by the federal courts have thought that review of state acts under federal constitutional standards is soundly based in the supremacy clause, which makes the Constitution and constitutional laws and treaties the supreme law of the land,[636] to effectuate which Congress enacted the famous § 25 of the Judiciary Act of 1789.[637] Five years before *Marbury v. Madison*, the Court held invalid a state law as conflicting with the terms of a treaty,[638] and seven years after Chief Justice Marshall's opinion a state law was voided as conflicting with the Constitution.[639]

Virginia provided a states' rights challenge to a broad reading of the supremacy clause and to the validity of § 25 in *Martin v. Hunter's Lessee*[640] and in *Cohens v. Virginia*.[641] In both cases, it was argued that while the courts of Virginia were constitutionally obliged to prefer "the supreme law of the land," as set out in the supremacy clause, over conflicting state constitutional provisions and laws, it was only by their own interpretation of the supreme law that they as courts of a sovereign State were bound. Furthermore, it was contended that cases did not "arise" under the Constitution unless they were brought in the first instance by someone claiming such a right, from which it followed that "the judicial power of the United States" did not "extend" to such cases unless they were brought in the first instance in the courts of the United States. But answered Chief Justice Marshall: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the

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[635] E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 75-78 (1914); Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitution Theory in the State, 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

[636] 2 W. Crosskey, supra at 989. *See* the famous remark of Holmes: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." O. HOLMES, COLLECTED LEGAL PAPERS 295-296 (1921).

[637] 1 Stat. 73, 85, quoted supra.

[638] Ware v. Hylton, 3 U.S. (3 Dall.) 190 (1796).

[639] Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810). The case came to the Court by appeal from a circuit court and not from a state court under § 25. Famous early cases coming to the Court under § 25 in which state laws were voided included Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[640] 14 U.S. (1 Wheat) 304 (1816).

[641] 19 U.S. (6 Wheat,) 264 (1821).

construction of either."[642] Passing on to the power of the Supreme Court to review such decisions of the state courts, he said: "Let the nature and objects of our Union be considered: let the great fundamental principles on which the fabric stands, be examined: and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the Court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction."[643]

Limitations on the Exercise of Judicial Review

Constitutional Interpretation.—Under a written constitution, which is law and is binding on government, the practice of judicial review raises questions of the relationship between constitutional interpretation and the Constitution—the law which is construed. The legitimacy of construction by an unelected entity in a republican or democratic system becomes an issue whenever the construction is controversial, as it was most recently in the 1960s to the present. Full consideration would carry us far afield, in view of the immense corpus of writing with respect to the proper mode of interpretation during this period.

Scholarly writing has identified six forms of constitutional argument or construction that may be used by courts or others in deciding a constitutional issue.[644] These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential. The historical argument is largely, though not exclusively, associated with the theory of original intent or original understanding, under which constitutional and legal interpretation is limited to attempting to

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[642] 19 U.S. at 379.

[643] 19 U.S. at 422-23. Justice Story traversed much of the same ground in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). In Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), the Wisconsin Supreme Court had declared an act of Congress invalid and disregarded a writ of error from the Supreme Court, raising again the Virginia arguments. Chief Justice Taney emphatically rebuked the assertions on grounds both of dual sovereignty and national supremacy. His emphasis on the indispensability of the federal judicial power to maintain national supremacy, to protect the States from national encroachments, and to make the Constitution and laws of the United States uniform all combine to enhance the federal judicial power to a degree perhaps beyond that envisaged even by Story and Marshall. As late as Williams v. Bruffy, 102 U.S. 248 (1880), the concepts were again thrashed out with the refusal of a Virginia court to enforce a mandate of the Supreme Court. *And see* Cooper v. Aaron, 358 U.S. 1 (1958).

[644] The six forms, or "modalities" as he refers to them, are drawn from P. BOBBITT, CONSTITUTIONAL FATE—THEORY OF THE CONSTITUTION (1982); P. BOBBITT, CONSTITUTIONAL INTERPRETATION (1991). Of course, other scholars may have different categories, but these largely overlap these six forms. *E.g.*, Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV.1189 (1987); Post, *Theories of Constitutional Interpretation*, in LAW AND THE ORDER OF CULTURE 13-41 (R. Post ed., 1991).

discern the original meaning of the words being construed as that meaning is revealed in the intentions of those who created the law or the constitutional provision in question. The textual argument, closely associated in many ways to the doctrine of original intent, concerns whether the judiciary or another is bound by the text of the Constitution and the intentions revealed by that language, or whether it may go beyond the four corners of the constitutional document to ascertain the meaning, a dispute encumbered by the awkward constructions, interpretivism and noninterpretivism.[645] Using a structural argument, one seeks to infer structural rules from the relationships that the Constitution mandates.[646] The remaining three modes sound in reasoning not necessarily tied to original intent, text, or structure, though they may have some relationship. Doctrinal arguments proceed from the application of precedents. Prudential arguments seek to balance the costs and benefits of a particular rule. Ethical arguments derive rules from those moral commitments of the American ethos that are reflected in the Constitution.

Although the scholarly writing ranges widely, a much more narrow scope is seen in the actual political-judicial debate. Rare is the judge who will proclaim a devotion to ethical guidelines, such, for example, as natural-law precepts. The usual debate ranges from those adherents of strict construction and original intent to those with loose construction and adaptation of text to modern-day conditions.[647] However, it is with regard to more general rules of prudence and self-restraint that one usually finds the enunciation and application of limitations on the exercise of constitutional judicial review.

Prudential Considerations.—Implicit in the argument of *Marbury v. Madison*[648] is the thought that with regard to cases

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[645] Among the vast writing, *see, e.g.*, R. BORK, THE TEMPTING OF AMERICA (1990); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); L. TRIBE & M. DORF, ON READING THE CONSTITUTION (1991); H. WELLINGTON, INTERPRETING THE CONSTITUTION (1990); Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N. Y. U. L. REV. 259 (1981); Symposium, *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 43 (1983); Symposium, *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981); Symposium, *Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991). *See also* Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

[646] This mode is most strongly association with C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[647] *E.g.*, Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV.701 (1985); Addresses—Construing the Constitution, 19 U. C. DAVIS L. REV. 1 (1985), containing addresses by Justice Brennan, id. at 2, Justice Stevens, id. at 15, and Attorney General Meese. Id. at 22. *See also* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[648] 5 U.S. (1 Cr.) 137 (1803).

meeting jurisdictional standards, the Court is obligated to take and decide them. Chief Justice Marshall spelled the thought out in *Cohens v. Virginia*:[649] "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." As the comment recognizes, because judicial review grows out of the fiction that courts only declare what the law is in specific cases[650] and are without will or discretion,[651] its exercise is surrounded by the inherent limitations of the judicial process, most basically, of course, by the necessity of a case or controversy and the strands of the doctrine comprising the concept of justiciability.[652] But, although there are hints of Chief Justice Marshall's activism in some modern cases,[653] the Court has always adhered, at times more strictly than at other times, to several discretionary rules or concepts of restraint in the exercise of judicial review, the practice of which is very much contrary to the quoted dicta from *Cohens*. These rules, it should be noted, are in addition to the vast discretionary power which the Supreme Court has to grant or deny review of judgements in lower courts, a discretion fully authorized with *certiorari* jurisdiction but also evident with some appeals.[654]

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[649] 19 U.S. (6 Wheat.) 264, 404, (1821).

[650] *See, e.g.*, Justice Sutherland in Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923), and Justice Roberts in United States v. Butler, 297 U.S. 1, 62 (1936).

[651] "Judicial power, as contradistinguished from the powers of the law, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Chief Justice Marshall). *See also* Justice Roberts in United States v. Butler, 297 U.S. 1, 62-63 (1936).

[652] The political question doctrine is another limitation arising in part out of inherent restrictions and in part from prudential considerations. For a discussion of limitations utilizing both stands, *see* Ashwander v. TVA, 297 U.S. 288, 346-356 (1936) (Justice Brandeis concurring).

[653] Powell v. McCormack, 395 U.S. 486, 548-549 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962); Zwickler v. Koota, 389 U.S. 241, 248 (1967).

[654] 28 U.S.C. §§ 1254-1257. *See* F. Frankfurter & J. Landis, supra at ch. 7. "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case .... If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present ques-

At various times, the Court has followed more strictly than other times the prudential theorems for avoidance of decision-making when it deemed restraint to be more desirable than activism.[655]

The Doctrine of "Strict Necessity".—The Court has repeatedly declared that it will decide constitutional issues only if strict necessity compels it to do so. Thus, constitutional questions will not be decided in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case, nor at the instance of one who has availed himself of the benefit of a statute or who fails to show he is injured by its operation, nor if a construction of the statute is fairly possible by which the question may be fairly avoided.[656]

Speaking of the policy of avoiding the decision of constitutional issues except when necessary, Justice Rutledge wrote: "The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system."[657]

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tions whose resolution will have immediate importance far beyond the particular facts and parties involved." Chief Justice Vinson, *Address on the Work of the Federal Court*, in 69 Sup. Ct. v, vi. It "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on *certiorari*." Chief Justice Warren, quoted in Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954).

[655] *See* Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346 (1936). *And contrast* A. Bickel, supra at 111-198, *with* Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

[656] Rescue Army v. Municipal Court, 331 U.S. 549, 568-575 (1947). *See also* Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Carter v. Carter Coal Co., 298 U.S. 238, 325 (1936); Coffman v. Breeze Corp., 323 U.S. 316, 324-325 (1945); Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944); Alma Motor v. Timken Co., 329 U.S. 129 (1946). Judicial restraint as well as considerations of comity underlie the Court's abstention doctrine when the constitutionality of state laws is challenged.

[657] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

The Doctrine of Clear Mistake.—A precautionary rule early formulated and at the base of the traditional concept of judicial restraint was expressed by Professor James Bradley Thayer to the effect that a statute could be voided as unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[658] Whether phrased this way or phrased so that a statute is not to be voided unless it is unconstitutional beyond all reasonable doubt, the rule is of ancient origin[659] and of modern adherence.[660] In operation, however, the rule is subject to two influences, which seriously impair its efficacy as a limitation. First, the conclusion that there has been a clear mistake or that there is no reasonable doubt is that drawn by five Justices if a full Court sits. If five Justices of learning and detachment to the Constitution are convinced that a statute is invalid and if four others of equal learning and attachment are convinced it is valid, the convictions of the five prevail over the convictions or doubts of the four. Second, the Court has at times made exceptions to the rule in certain categories of cases. Statutory interferences with "liberty of contract" were once presumed to be unconstitutional until proved to be valid;[661] more recently, presumptions of invalidity have expressly or impliedly been applied against statutes alleged to interfere with freedom of expression and of religious freedom, which have been said to occupy a "preferred position" in the constitutional scheme of things.[662]

Exclusion of Extra-Constitutional Tests.—Another maxim of constitutional interpretation is that courts are concerned only with the constitutionality of legislation and not with its motives,

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[658] *The Origin and Scope of the American Doctrine of Constitutional Law*, in J. THAYER, LEGAL ESSAYS 1, 21 (1908).

[659] *See* Justices Chase and Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 395, 399 (1798).

[660] *E.g.*, Flemming v. Nestor, 363 U.S. 603, 611 (1960).

[661] "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Adkins v. Children's Hospital, 261 U.S. 525, 546 (1923).

[662] Kovacs v. Cooper, 336 U.S. 77, 88 (1949). Justice Frankfurter's concurrence, id. at 89-97, is a lengthy critique and review of the "preferred position" cases up to that time. The Court has not used the expression in recent years but the worth it attributes to the values of free expression probably approaches the same result. Today, the Court's insistence on a "compelling state interest" to justify a governmental decision to classify persons by "suspect" categories, such as race, Loving v. Virginia, 388 U.S. 1 (1967), or to restrict the exercise of a "fundamental" interest, such as the right to vote, Kramer v. Union Free School District, 395 U.S. 621 (1969), or the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), clearly imports presumption of unconstitutionality.

policy, or wisdom,[663] or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution.[664] In various forms this maxim has been repeated to such an extent that it has become trite and has increasingly come to be incorporated in cases in which a finding of unconstitutionality has been made as a reassurance of the Court's limited review. And it should be noted that at times the Court has absorbed natural rights doctrines into the text of the Constitution, so that it was able to reject natural law *per se* and still partake of its fruits and the same thing is true of the *laissez faire* principles incorporated in judicial decisions from about 1890 to 1937.[665]

Presumption of Constitutionality.—"It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed," wrote Justice Bushrod Washington, "to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt."[666] A corollary of this maxim is that if the constitutional question turns upon circumstances, courts will presume the existence of a state of facts which would justify the legislation that is challenged.[667] It seems apparent, however, that with regard to laws which trench upon First Amendment freedoms and perhaps other rights guaranteed by the Bill of Rights such deference is far less than it would be toward statutory regulation of economic matters.[668]

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[663] "We fully understand ...the powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern." Noble State Bank v. Haskell, 219 U.S. 575, 580 (1911) (Justice Holmes for the Court). *See also* Trop v. Dulles, 356 U.S. 86, 120 (1958) (Justice Frankfurter dissenting).

A supposedly hallowed tenet is that the Court will not look to the motives of legislators in determining the validity of a statute. Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); United States v. O'Brien, 391 U.S. 367 (1968); Palmer v. Thompson, 403 U.S. 217 (1971). Yet an intent to discriminate is a requisite to finding at least some equal protection violations, Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and a secular or religious purpose is one of the parts of the tripartite test under the establishment clause. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissent). Other constitutional decisions as well have turned upon the Court's assessment of purpose or motive. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); Child Labor Tax Case, 259 U.S. 20 (1922).

[664] *Cf.* Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Justice Black dissenting). But note above the reference to the ethical mode of constitutional argument.

[665] *E.g.*, Lochner v. New York, 198 U.S. 45 (1905); United States v. Butler, 297 U.S. 1 (1936).

[666] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827). *See also* Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1871).

[667] Munn v. Illinois, 94 U.S. 113, 132 (1877); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935).

[668] *E.g.*, United States v. Robel, 389 U.S. 258 (1967); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). *But see* McGowan v. Maryland, 366

Disallowance by Statutory Interpretation.—If it is possible to construe a statute so that its validity can be sustained against a constitutional attack, a rule of prudence is that it should be so construed,[669] even though in some instances this maxim has caused the Court to read a statute in a manner which defeats or impairs the legislative purpose.[670] Of course, the Court stresses that "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question."[671] The maxim is not followed if the provision would survive constitutional attack or if the text is clear.[672] Closely related to this principle is the maxim that when part of a statute is valid and part is void, the courts will separate the valid from the invalid and save as much as possible.[673] Statutes today ordinarily expressly provide for separability, but it remains for the courts in the last resort to determine whether the provisions are separable.[674]

Stare Decisis in Constitutional Law.—Adherence to precedent ordinarily limits and shapes the approach of courts to decision of a presented question. "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right .... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error so fruitful in the physical sciences, is appropriate also in

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U.S. 420, 426 (1961). The development of the "compelling state interest" test in certain areas of equal protection litigation also bespeaks less deference to the legislative judgment.

[669] Rust v. Sullivan, 500 U.S. 173, 190-191 (1991); Public Citizen v. Department of Justice, 491 U.S. 440, 465-467 (1989) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[670] *E.g.*, Michaelson v. United States, 266 U.S. 42 (1924) (narrow construction of Clayton Act contempt provisions to avoid constitutional questions): United States v. Harriss, 347 U.S. 612 (1954) (lobbying act): United States v. Seeger, 380 U.S. 163 (1965): Welsh v. United States, 398 U.S. 333 (1970) (both involving conscientious objection statute).

[671] United States v. Locke, 471 U.S. 84, 96 (1985) (quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933)).

[672] Rust v. Sullivan, 500 U.S. 173, 191 (1991); *but compare* id. at 204-07 (Justice Blackmun dissenting), and 223-225 (Justice O'Connor dissenting). *See also* Peretz v. United States, 501 U.S. 923, 929-930 (1991).

[673] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895); *but see* Baldwin v. Franks, 120 U.S. 678, 685 (1887), now repudiated. Griffin v. Breckenridge, 403 U.S. 88, 104 (1971).

[674] Carter v. Carter Coal Co., 298 U.S. 238, 312-16 (1936). *See also*, id. at 321-24 (Chief Justice Hughes dissenting).

the judicial function."[675] *Stare decisis* is a principle of policy, not a mechanical formula of adherence to the latest decision "however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."[676] The limitation of *stare decisis* seems to have been progressively weakened since the Court proceeded to correct "a century of error" in *Pollock v. Farmers' Loan & Trust Co.*[677] Since then, more than 200 decisions have been overturned,[678] and the merits of *stare decisis* seem more often

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[675] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-408 (1932) (Justice Brandeis dissenting). For recent arguments with respect to overruling or not overruling previous decisions, *see* the self-consciously elaborate opinion for a plurality in Planned Parenthood v. Casey, 505 U.S. 833, 854-69 (1992) (Justices O'Connor, Kennedy, and Souter) (acknowledging that as an original matter they would not have decided Roe v. Wade, 410 U.S. 113 (1973), as the Court did and that they might consider it wrongly decided, but nonetheless applying the principles of *stare decisis*—they stressed the workability of the case's holding, the fact that no other line of precedent had undermined *Roe*, the vitality of that case's factual underpinnings, the reliance on the precedent in society, and the effect upon the Court's legitimacy of maintaining or overruling the case). *See* id. at 953-66 (Chief Justice Rehnquist concurring in part and dissenting in part), 993-1001 (Justice Scalia concurring in part and dissenting in part). *See also* Payne v. Tennessee, 501 U.S. 808, 827-30 (1991) (suggesting, *inter alia*, that reliance is relevant in contract and property cases), and id. at 835, 842-44 (Justice Souter concurring), 844, 848-56 (Justice Marshall dissenting).

[676] Helvering v. Hallock, 309 U.S. 106, 110 (1940) (Justice Frankfurter for Court). *See also* Coleman v. Alabama, 399 U.S. 1, 22 (1970) (Chief Justice Burger dissenting). *But see* id. at 19 (Justice Harlan concurring in part and dissenting in part); Williams v. Florida, 399 U.S. 78, 117-119 (1970) (Justice Harlan concurring in part and dissenting in part). Recent discussions of and both applications of and refusals to apply *stare decisis* may be found in Hohn v. United States, 524 U.S. 236, 251-52 (1998), and id. at 260-63 (Justice Scalia dissenting); State Oil Co. v. Khan, 522 U.S. 3, 20-2 (1997); Agostini v. Felton, 521 U.S. 203, 235-36 (1997), and id. at 523-54 (Justice Souter dissenting); United States v. IBM Corp., 517 U.S. 843, 854-56 (1996) (noting principles of following precedent and declining to consider overturning an old precedent when parties have not advanced arguments on the point), with which *compare* id. at 863 (Justice Kennedy dissenting) (arguing that the United States had presented the point and that the old case ought to be overturned); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231-35 (1996) (plurality opinion) (discussing *stare decisis*, citing past instances of overrulings, and overruling 1990 decision), with which *compare* the dissents, id. at 242, 264, 271; Seminole Tribe of Florida v. Florida, 517 U.S. 44, 61-73 (1996) (discussing policy of *stare decisis*, why it should not be followed with respect to a 1989 decision, and overruling that precedent), with which *compare* the dissents, id. at 76, 100. Justices Scalia and Thomas have argued for various departures from precedent. *E.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200-01 (1995) (Justice Scalia concurring) (negative commerce jurisprudence); Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604, 631 (1996) (Justice Thomas concurring in part and dissenting in part) (rejecting framework of *Buckley v. Valeo* and calling for overruling of part of case). *Compare* id. at 626 (Court notes those issues not raised or argued).

[677] 157 U.S. 429, 574-579 (1895).

[678] *See* Appendix. The list encompasses both constitutional and statutory interpretation decisions. The Court adheres, at least formally, to the principle that *stare decisis* is a stricter rule for statutory interpretation, Patterson v. McLean Credit Union, 491 U.S. 164, 171-175 (1989), at least in part since Congress may much more

celebrated in dissents than in majority opinions.[679] Of lesser formal effect than outright overruling but with roughly the same result is a Court practice of "distinguishing" precedents, which often leads to an overturning of the principle enunciated in the case while leaving the actual case more or less alive.[680]

Conclusion.—The common denominator of all these maxims of prudence is the concept of judicial restraint, of judge's restraint. "We do not sit," said Justice Frankfurter, "like kadi under a tree, dispensing justice according to considerations of individual expediency."[681] "[A] jurist is not to innovate at pleasure," wrote Jutice Cardozo. "He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life."[682] All Justices will, of course, claim adherence to proper restraint,[683] but in some cases at least, such as Justice Frankfurter's dissent in the *Flag Salute Case*,[684] the practice can be readily observed. The degree, however, of restraint, the degree to which legislative enactments should be subjected to judicial scrutiny, is a matter of uncertain and shifting opinion.

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easily revise those decisions, *but compare* id. at 175 n.1, *with* id. at 190-205 (Justice Brennan concurring in the judgment in part and dissenting in part). *See also* Flood v. Kuhn, 407 U.S. 258 (1972).

[679] *E.g.*, United States v. Rabinowitz, 339 U.S. 56, 86 (1950) (Justice Frankfurter dissenting); Baker v. Carr, 369 U.S. 186, 339-340 (1962) (Justice Harlan dissenting): Gray v. Sanders, 372 U.S. 368, 383 (1963) (Justice Harlan dissenting). *But see* Green v. United States, 356 U.S. 165, 195 (1958) (Justice Black dissenting). *And compare* Justice Harlan's views in Mapp v. Ohio, 367 U.S.643, 674-675 (1961) (dissenting), *with* Glidden v. Zdanok, 370 U.S. 530, 543 (1962) (opinion of the Court).

[680] Notice that in Planned Parenthood v. Casey, 505 U.S. 833 (1992), while the Court purported to uphold and retain the "central meaning" of *Roe v. Wade*, it overruled several aspects of that case's requirements. *And see, e.g.*, the Court's treatment of Pope v. Williams, 193 U.S. 621 (1904), in Dunn v. Blumstein, 405 U.S. 330, 337, n.7 (1972). *And see* id. at 361 (Justice Blackmun concurring.)

[681] Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (dissenting).

[682] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

[683] *Compare* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Justice Douglas), *with* id. at 507 (Justice Black).

[684] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (dissenting).

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

Cases arising under the Constitution are cases that require an interpretation of the Constitution for their correct decision.[685] They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority, usually an act of Congress or of a state legislature, and asks for judicial relief. The clause furnishes the principal textual basis for the implied power of judicial review of the constitutionality of legislation and other official acts.

Development of Federal Question Jurisdiction.—Almost from the beginning, the Convention demonstrated an intent to create "federal question" jurisdiction in the federal courts with regard to federal laws;[686] such cases involving the Constitution and treaties were added fairly late in the Convention as floor amendments.[687] But when Congress enacted the Judiciary Act of 1789, it did not confer general federal question jurisdiction on the inferior federal courts, but left litigants to remedies in state courts with appeals to the United States Supreme Court if judgment went against federal constitutional claims.[688] Although there were a few jurisdictional provisions enacted in the early years,[689] it was not until the period following the Civil War that Congress, in order to protect newly created federal civil rights and in the flush of nationalist sentiment, first created federal jurisdiction in civil rights cases,[690] and then in 1875 conferred general federal question jurisdiction on the lower federal courts.[691] Since that time, the trend generally has been toward conferral of ever-increasing grants of ju-

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[685] Cohens v. Virginia, 19 U.S. (6 Wheat,) 264, 378 (1821).

[686] M. Farrand, supra at 22, 211-212, 220, 244; 2 id. at 146-47, 186-87.

[687] Id. at 423-24, 430, 431.

[688] 1 Stat. 73. The district courts were given cognizance of "suits for penalties and forfeitures incurred, under the laws of the United States" and "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States ...." Id. at 77. Plenary federal question jurisdiction was conferred by the Act of February 13, 1801,§ 11, 2 Stat. 92, but this law was repealed by the Act of March 8, 1802, 2 Stat. 132. On § 25 of the 1789 Act, providing for appeals to the Supreme Court from state court constitutional decisions, *see* supra.

[689] Act of April 10, 1790, § 5, 1 Stat. 111, as amended, Act of February 21, 1793, § 6, 1 Stat. 322 (suits relating to patents). Limited removal provisions were also enacted.

[690] Act of April 9, 1866, § 3, 14 Stat, 27; Act of May 31, 1870, § 8, 16 Stat. 142; Act of February 28, 1871,§ 15, 16 Stat. 438; Act of April 20, 1871, §§ 2, 6, 17 Stat. 14, 15.

[691] Act of March 3, 1875, § 1, 18 Stat. 470, now 28 U.S.C. § 1331(a). The classic treatment of the subject and its history is F. Frankfurter & J. Landis, supra.

risdiction to enforce the guarantees recognized and enacted by Congress.[692]

When a Case Arises Under.—The 1875 statute and its present form both speak of civil suits "arising under the Constitution, laws, or treaties of the United States,"[693] the language of the Constitution. Thus, many of the early cases relied heavily upon Chief Justice Marshall's construction of the constitutional language to interpret the statutory language.[694] The result was probably to accept more jurisdiction than Congress had intended to convey.[695] Later cases take a somewhat more restrictive course.

Determination whether there is federal question jurisdiction is made on the basis of the plaintiff's pleadings and not upon the response or the facts as they may develop.[696] Plaintiffs seeking access to federal courts on this ground must set out a federal claim which is "well-pleaded" and the claim must be real and substantial and may not be without color of merit.[697] Plaintiffs may not anticipate that defendants will raise a federal question in answer to the action.[698] But what exactly must be pleaded to establish a federal question is a matter of considerable uncertainty in many cases. It is no longer the rule that, when federal law is an ingredient of the claim, there is a federal question.[699]

Many suits will present federal questions because a federal law creates the action.[700] Perhaps Justice Cardozo presented the most

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[692] For a brief summary, *see* Hart & Wechsler, supra at 960-66.

[693] 28 U.S.C. § 1331(a). The original Act was worded slightly differently.

[694] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821).

[695] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 17 (4th ed. 1983).

[696] *See generally* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

[697] Newburyport Water Co. v. City of Newburyport, 193 U.S. 561, 576 (1904); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); Binderup v. Pathe Exchange, 263 U.S. 291, 305-308 (1923). If the complaint states a case arising under the Constitution or federal law, federal jurisdiction exists even though on the merits the party may have no federal right. In such a case, the proper course for the court is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction. Bell v. Hood, 327 U.S. 678 (1946). Of course, dismissal for lack of jurisdiction is proper if the federal claim is frivolous or obviously insubstantial. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933).

[698] Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974).

[699] Such was the rule derived from Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See* Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

[700] American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). *Compare* Albright v. Teas, 106 U.S. 613 (1883), *with* People of Puerto Rico v. Russell

understandable line of definition, while cautioning that "[t]o define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards [approaching futility]."[701] How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.... The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.... A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto....[702]

It was long evident, though the courts were not very specific about it, that the federal question jurisdictional statute is and always was narrower than the constitutional "arising under" jurisdictional standard.[703] Chief Justice Marshall in *Osborn* was interpreting the Article III language to its utmost extent, but the courts sometimes construed the statute equivalently, with doubtful results.[704]

Removal From State Court to Federal Court.—A limited right to "remove" certain cases from state courts to federal courts was granted to defendants in the Judiciary Act of 1789,[705] and from then to 1872 Congress enacted several specific removal statutes, most of them prompted by instances of state resistance to the enforcement of federal laws through harassment of federal officers.[706] The 1875 Act conferring general federal question jurisdiction on the federal courts provided for removal of such cases by ei-

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& Co., 288 U.S. 476 (1933), with Feibelman v. Packard, 109 U.S. 421 (1883), and The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913).

[701] Gully v. First National Bank in Meridian, 299 U.S. 109, 117 (1936).

[702] 299 U.S. at 112-13. *Compare* Wheeldin v. Wheeler, 373 U.S. 647 (1963), *with* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See also* J. I. Case Co. v. Borak, 377 U.S. 426 (1964): Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[703] For an express acknowledgment, *see* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983). *See also* Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 n. 51 (1959).

[704] *E.g.*, Pacific Railroad Removal Cases, 115 U.S. 1 (1885), *and see* id. at 24 (Chief Justice Waite dissenting).

[705] § 12, 1 Stat. 79.

[706] The first was the Act of February 4, 1815, § 8, 3 Stat. 198. The series of statutes is briefly reviewed in Willingham v. Morgan, 395 U.S. 402, 405-406 (1969), and in H. Hart & H. Wechsler, supra at 1192-94. *See* 28 U.S.C. §§ 1442, 1442a.

ther party, subject only to the jurisdictional amount limitation.[707] The present statute provides for the removal by a defendant of any civil action which could have been brought originally in a federal district court, with no diversity of citizenship required in "federal question" cases.[708] A special civil rights removal statute permits removal of any civil or criminal action by a defendant who is denied or cannot enforce in the state court a right under any law providing for equal civil rights of persons or who is being proceeded against for any act under color of authority derived from any law providing for equal rights.[709]

The constitutionality of congressional provisions for removal was challenged and readily sustained. Justice Story analogized removal to a form of exercise of appellate jurisdiction,[710] and a later Court saw it as an indirect mode of exercising original jurisdiction and upheld its constitutionality.[711] In *Tennessee v. Davis*,[712] which involved a state attempt to prosecute a federal internal revenue agent who had killed a man while seeking to seize an illicit distilling apparatus, the Court invoked the right of the National Government to defend itself against state harassment and restraint. The power to provide for removal was discerned in the necessary and proper clause authorization to Congress to pass laws to carry into execution the powers vested in any other department or officer, here the judiciary.[713] The judicial power of the United States, said the Court, embraces alike civil and criminal cases arising under the Constitution and laws and the power asserted in civil cases may be asserted in criminal cases. A case arising under the Constitution and laws "is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the

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[707] Act of March 3, 1875, § 2, 18 Stat. 471. The present pattern of removal jurisdiction was established by the Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

[708] 28 U.S.C. § 1441.

[709] 28 U.S.C. § 1443.

[710] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-351 (1816). Story was not here concerned with the constitutionality of removal but with the constitutionality of Supreme Court review of state judgments.

[711] Chicago & N.W. Ry. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1872). Removal here was based on diversity of citizenship. *See also* The Moses Taylor, 71 U.S. (4 Wall.) 411, 429-430 (1867); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1868).

[712] 100 U.S. 257 (1880).

[713] 100 U.S. at 263-64.

legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. . . ."

"The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared."[714] The Court has broadly construed the modern version of the removal statute at issue in this case so that it covers all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.[715] Other removal statutes, notably the civil rights removal statute, have not been so broadly interpreted.[716]

Corporations Chartered by Congress.—In *Osborn v. Bank of the United States*,[717] Chief Justice Marshall seized upon the authorization for the Bank to sue and be sued as a grant by Congress to the federal courts of jurisdiction in all cases to which the bank was a party.[718] Consequently, upon enactment of the 1875 law, the door was open to other federally chartered corporations to seek relief in federal courts. This opportunity was made actual when the Court in the *Pacific Railroad Removal Cases*[719] held that tort actions against railroads with federal charters could be removed to federal courts solely on the basis of federal incorporation. In a se-

[714] 100 U.S. at 264-65.

[715] Willingham v. Morgan, 395 U.S. 402 (1969). *See also* Maryland v. Soper, 270 U.S. 9 (1926). Removal by a federal officer must be predicated on the allegation of a colorable federal defense. Mesa v. California, 489 U.S. 121 (1989). However, a federal agency is not permitted to remove under the statute's plain meaning. International Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72 (1991).

[716] Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Johnson v. Mississippi, 421 U.S. 213 (1975).

[717] 22 U.S. (9 Wheat.) 738 (1824).

[718] The First Bank could not sue because it was not so authorized. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809). The language, which Marshall interpreted as conveying jurisdiction, was long construed simply to give a party the right to sue and be sued without itself creating jurisdiction,. Bankers Trust Co. v. Texas & P. Ry., 241 U.S. 295 (1916), but in American National Red Cross v. S. G., 505 U.S. 247 (1992), a 5-to-4 decision, the Court held that when a federal statutory charter expressly mentions the federal courts in its "sue and be sued" provision the charter creates original federal-question jurisdiction as well, although a general authorization to sue and be sued in courts of general jurisdiction, including federal courts, without expressly mentioning them, does not confer jurisdiction.

[719] 115 U.S. 1 (1885).

ries of acts, Congress deprived national banks of the right to sue in federal court solely on the basis of federal incorporation in 1882,[720] deprived railroads holding federal charters of this right in 1915,[721] and finally in 1925 removed from federal jurisdiction all suits brought by federally chartered corporations on the sole basis of such incorporation, except where the United States holds at least half of the stock.[722]

Federal Questions Resulting from Special Jurisdictional Grants.—In the Labor-Management Relations Act of 1947, Congress authorized federal courts to entertain suits for violation of collective bargaining agreements without respect to the amount in controversy or the citizenship of the parties.[723] Although it is likely that Congress meant no more than that labor unions could be suable in law or equity, in distinction from the usual rule, the Court construed the grant of jurisdiction to be more than procedural and to empower federal courts to apply substantive federal law, divined and fashioned from the policy of national labor laws, in such suits.[724] State courts are not disabled from hearing actions brought under the section,[725] but they must apply federal law.[726] Developments under this section illustrate the substantive importance of many jurisdictional grants and indicate how the workload of the federal courts may be increased by unexpected interpretations of such grants.[727]

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[720] § 4, 22 Stat. 162.

[721] § 5, 38 Stat. 803.

[722] *See* 28 U.S.C. § 1349.

[723] § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185.

[724] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Earlier the Court had given the section a restricted reading in Association of Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955), at least in part because of constitutional doubts that § 301 cases in the absence of diversity of citizenship presented a federal question sufficient for federal jurisdiction. Id. at 449-52, 459-61 (opinion of Justice Frankfurter). In *Lincoln Mills*, the Court resolved this difficulty by ruling that federal law was at issue in § 301 suits and thus cases arising under § 301 presented federal questions. 353 U.S. at 457. The particular holding of *Westinghouse*, that no jurisdiction exists under § 301 for suits to enforce personal rights of employees claiming unpaid wages, was overturned in Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

[725] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[726] Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). State law is not, however, to be totally disregarded. "State law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy .... Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

[727] For example, when federal regulatory statutes create new duties without explicitly creating private federal remedies for their violation, the readiness or unreadiness of the federal courts to infer private causes of action is highly significant. While inference is an acceptable means of judicial enforcement of statutes, *e.g.*, Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916), the Court began broadly to con-

Civil Rights Act Jurisdiction.—Perhaps the most important of the special federal question jurisdictional statutes is that conferring jurisdiction on federal district courts to hear suits challenging the deprivation under color of state law or custom of any right, privilege, or immunity secured by the Constitution or by any act of Congress providing for equal rights.[728] Because it contains no ju-

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strue statutes to infer private actions only with J. I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* Cort v. Ash, 422 U.S. 66 (1975). More recently, influenced by a separation of powers critique of implication by Justice Powell, the Court drew back and asserted it will imply an action only in instances of fairly clear congressional intent. Cannon v. University of Chicago, 441 U.S. 677 (1979); California v. Sierra Club, 451 U.S. 287 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Merrill, Lynch v. Curran, 456 U.S. 353 (1982); Thompson v. Thompson, 484 U.S. 174 (1988); Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527 (1989).

The Court appeared more ready to infer private causes of action for constitutional violations, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980), but it has retreated here as well, hesitating to find implied actions. *E.g.*, Chappell v. Wallace, 462 U.S. 296 (1983); Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicki, 487 U.S. 412 (1988). *See also* Correction Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (declining to extend Bivens to allow recovery against a private contractor of a halfway house). "Federal common law" may exist in a number of areas where federal interests are involved and federal courts may take cognizance of such suits under their "arising under" jurisdiction. *E.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972); International Paper Co. v. Ouellette, 479 U.S. 481 (1987). *And see* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 236-240 (1985); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). The Court is, however, somewhat wary of finding "federal common law" in the absence of some congressional authorization to formulate substantive rules, Texas Industries v. Radcliff Materials, 451 U.S. 630 (1981), and Congress may always statutorily displace the judicially created law. City of Milwaukee v. Illinois, 451 U.S. 304 (1981). Finally, federal courts have federal question jurisdiction of claims created by state law if there exists an important necessity for an interpretation of an act of Congress. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[728] 28 U.S.C. § 1343(3). The cause of action to which this jurisdictional grant applies is 42 U.S.C. § 1983, making liable and subject to other redress any person who, acting under color of state law, deprives any person of any rights, privileges, or immunities secured by the Constitution and laws of the United States. For discussion of the history and development of these two statutes, *see* Monroe v. Pape, 365 U.S. 167 (1961); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Maine v. Thiboutot, 448 U.S. 1 (1980). Although the two statutes originally had the same wording in respect to "the Constitution and laws of the United States," when the substantive and jurisdictional aspects were separated and codified, § 1983 retained the all-inclusive "laws" provision, while § 1343(3) read "any Act of Congress providing for equal rights." The Court has interpreted the language of the two statutes literally, so that while claims under laws of the United States need not relate to equal rights but may encompass welfare and regulatory laws, *Maine v. Thiboutot*; *but see* Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1 (1981), such suits if they do not spring from an act providing for equal rights may not be brought under § 1343(3). Chapman v. Houston Welfare Rights Org., supra. This was important when there was a jurisdictional amount provision in the federal question statute, but is of little significance today.

risdictional amount provision [729] (while the general federal question statute until recently did) [730] and because the Court has held inapplicable the judicially-created requirement that a litigant exhaust his state remedies before bringing federal action, [731] the statute has been heavily utilized, resulting in a formidable caseload, by plaintiffs attacking racial discrimination, malapportionment and suffrage restrictions, illegal and unconstitutional police practices, state restrictions on access to welfare and other public assistance, and a variety of other state and local governmental practices. [732] Congress has encouraged utilization of the two statutes by providing for attorneys' fees under § 1983, [733] and by enacting related and specialized complementary statutes. [734] The Court in recent years has generally interpreted § 1983 and its jurisdictional statute broadly but it has also sought to restrict to some extent the kinds of claims that may be brought in federal courts. [735] It should be noted that § 1983 and § 1343(3) need not always go together, inasmuch as § 1983 actions may be brought in state courts. [736]

Pendent Jurisdiction.—Once jurisdiction has been acquired through allegation of a federal question not plainly wanting in substance, [737] a federal court may decide any issue necessary to the disposition of a case, notwithstanding that other non-federal ques-

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[729] *See* Hague v. CIO, 307 U.S. 496 (1939). Following *Hague*, it was argued that only cases involving personal rights, that could not be valued in dollars, could be brought under § 1343(3), and that cases involving property rights, which could be so valued, had to be brought under the federal question statute. This attempted distinction was rejected in Lynch v. Household Finance Corp., 405 U.S. 538, 546-548 (1972). On the valuation of constitutional rights, *see* Carey v. Piphus, 435 U.S. 247 (1978). *And see* Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (compensatory damages must be based on injury to the plaintiff, not on some abstract valuation of constitutional rights).

[730] 28 U.S.C. § 1331 was amended in 1976 and 1980 to eliminate the jurisdictional amount requirement. Pub. L. 94-574, 90 Stat. 2721; Pub. L. 96-486, 94 Stat. 2369.

[731] Patsy v. Board of Regents, 457 U.S. 496 (1982). This had been the rule since at least McNeese v. Board of Education, 373 U.S. 668 (1963). *See also* Felder v. Casey, 487 U.S. 131 (1988) (state notice of claim statute, requiring notice and waiting period before bringing suit in state court under § 1983, is preempted).

[732] Thus, such notable cases as Brown v. Board of Education, 347 U.S. 483 (1954), and Baker v. Carr, 369 U.S. 186 (1962), arose under the statutes.

[733] Civil Rights Attorneys' Fees Award Act of 1976, Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988. *See* Hutto v. Finney, 437 U.S. 678 (1978); Maine v. Thiboutot, 448 U.S. 1 (1980).

[734] Civil Rights of Institutionalized Persons Act, Pub. L. 96-247, 94 Stat. 349 (1980), 42 U.S.C. § 1997 *et seq*.

[735] *E.g.*, Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977).

[736] Maine v. Thiboutot, 448 U.S. 1 (1980).

[737] Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); Hagans v. Lavine, 415 U.S. 528, 534-543 (1974).

tions of fact and law may be involved therein.[738] "Pendent jurisdiction," as this form is commonly called, exists whenever the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[739] Ordinarily, it is a rule of prudence that federal courts should not pass on federal constitutional claims if they may avoid it and should rest their conclusions upon principles of state law where possible.[740] But the federal court has discretion whether to hear the pendent state claims in the proper case. Thus, the trial court should look to "considerations of judicial economy, convenience and fairness to litigants" in exercising its discretion and should avoid needless decisions of state law. If the federal claim, though substantial enough to confer jurisdiction, was dismissed before trial, or if the state claim substantially predominated, the court would be justified in dismissing the state claim.[741]

A variant of pendent jurisdiction, sometimes called "ancillary jurisdiction," is the doctrine allowing federal courts to acquire jurisdiction entirely of a case presenting two federal issues, although it might properly not have had jurisdiction of one of the issues if it had been independently presented.[742] Thus, in an action under a federal statute, a compulsory counterclaim not involving a federal question is properly before the court and should be decided.[743] The concept has been applied to a claim otherwise cognizable only in admiralty when joined with a related claim on the law side of the federal court, and in this way to give an injured seaman a right to jury trial on all of his claims when ordinarily the claim cog-

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[738] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822-28 (1824); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909); Hurn v. Oursler, 289 U.S. 238 (1933); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[739] Osborn v. Bank, 22 U.S. at 725. This test replaced a difficult-to-apply test of Hurn v. Oursler, 289 U.S. 238, 245-46 (1933). *See also* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994); Peacock v. Thomas, 516 U.S. 349 (1996) (both cases using the new vernacular of "ancillary jurisdiction").

[740] Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1917); Hagans v. Lavine, 415 U.S. 528, 546-550 (1974). In fact, it may be an abuse of discretion for a federal court to fail to decide on an available state law ground instead of reaching the federal constitutional question. Schmidt v. Oakland Unified School Dist., 457 U.S. 594 (1982) (*per curiam*). However, narrowing previous law, the Court held in Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), held that when a pendent claim of state law involves a claim that is against a State for purposes of the Eleventh Amendment federal courts may not adjudicate it.

[741] United Mine Workers v. Gibbs, 383 U.S. 715, 726-727 (1966).

[742] The initial decision was Freeman v. Howe, 65 U.S. (24 How.) 450 (1861), in which federal jurisdiction was founded on diversity of citizenship.

[743] Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

nizable only in admiralty would be tried without a jury.[744] And a colorable constitutional claim has been held to support jurisdiction over a federal statutory claim arguably not within federal jurisdiction.[745]

Still another variant is the doctrine of "pendent parties," under which a federal court could take jurisdiction of a state claim against one party if it were related closely enough to a federal claim against another party, even though there was no independent jurisdictional base for the state claim.[746] While the Supreme Court at first tentatively found some merit in the idea,[747] in *Finley v. United States*,[748] by a 5-to-4 vote the Court firmly disapproved of the pendent party concept and cast considerable doubt on the other prongs of pendent jurisdiction as well. Pendent party jurisdiction, Justice Scalia wrote for the Court, was within the constitutional grant of judicial power, but to be operable it must be affirmatively granted by congressional enactment.[749] Within the year, Congress supplied the affirmative grant, adopting not only pendent party jurisdiction but also codifying pendent jurisdiction and ancillary jurisdiction under the name of "supplemental jurisdiction."[750]

Thus, these interrelated doctrinal standards now seem well-grounded.

Protective Jurisdiction.—A conceptually difficult doctrine, which approaches the verge of a serious constitutional gap, is the concept of protective jurisdiction. Under this doctrine, it is argued that in instances in which Congress has legislative jurisdiction, it can confer federal jurisdiction, with the jurisdictional statute itself being the "law of the United States" within the meaning of Article III, even though Congress has enacted no substantive rule of decision and state law is to be applied. Put forward in controversial cases,[751] the doctrine has neither been rejected nor accepted by the

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[744] Romero v. International Terminal Operating Co., 358 U.S. 354, 380-381 (1959); Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963).

[745] Rosado v. Wyman, 397 U.S. 397, 400-405 (1970).

[746] Judge Friendly originated the concept in Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971).

[747] Aldinger v. Howard, 427 U.S. 1 (1976).

[748] 490 U.S. 545 (1989).

[749] 490 U.S. at 553, 556.

[750] Act of Dec. 1, 1990, P. L. 101-650, 104 Stat. 5089, § 310, 28 U.S.C. § 1367. In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1998), the Court, despite the absence of language making § 1367 applicable, held that the statute gave district courts jurisdiction over state-law claims in cases originating in state court and then removed to federal court.

[751] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); *and see* the bankruptcy cases,

Supreme Court. In *Verlinden B. V. v. Central Bank of Nigeria*,[752] the Court reviewed a congressional grant of jurisdiction to federal courts to hear suits by an alien against a foreign state, jurisdiction not within the "arising under" provision of article III. Federal substantive law was not applicable, that resting either on state or international law. Refusing to consider protective jurisdiction, the Court found that the statute regulated foreign commerce by promulgating rules governing sovereign immunity from suit and was a law requiring interpretation as a federal-question matter. That the doctrine does raise constitutional doubts is perhaps grounds enough to avoid reaching it.[753]

Supreme Court Review of State Court Decisions.—In addition to the constitutional issues presented by § 25 of the Judiciary Act of 1789 and subsequent enactments,[754] questions have continued to arise concerning review of state court judgments which go directly to the nature and extent of the Supreme Court's appellate jurisdiction. Because of the sensitivity of federal-state relations and the delicate nature of the matters presented in litigation touching upon them, jurisdiction to review decisions of a state court is dependent in its exercise not only upon ascertainment of the existence of a federal question but upon a showing of exhaustion of state remedies and of the finality of the state judgment. Because the application of these standards to concrete facts is neither mechanical nor nondiscretionary, the Justices have often been divided over whether these requisites to the exercise of jurisdiction have been met in specific cases submitted for review by the Court.

The Court is empowered to review the judgments of "the highest court of a State in which a decision could be had."[755] This will

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Schumacher v. Beeler, 293 U.S. 367 (1934); Williams v. Austrian, 331 U.S. 642 (1947).

[752] 461 U.S. 480 (1983).

[753] *E.g.*, Mesa v. California, 489 U.S. 121, 136-137 (1989) (would present grave constitutional problems).

[754] On § 25, *see* supra, "Judicial Review and National Supremacy". The present statute is 28 U.S.C. § 1257(a), which provides that review by writ of *certiorari* is available where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. Prior to 1988, there was a right to mandatory appeal in cases in which a state court had found invalid a federal statute or treaty or in which a state court had upheld a state statute contested under the Constitution, a treaty, or a statute of the United States. *See* the Act of June 25, 1948, 62 Stat. 929. The distinction between *certiorari* and appeal was abolished by the Act of June 27, 1988, Pub. L. 100-352, § 3, 102 Stat. 662.

[755] 28 U.S.C. § 1257(a). *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE ch. 3 (6th ed. 1986).

ordinarily be the State's court of last resort, but it could well be an intermediate appellate court or even a trial court if its judgment is final under state law and cannot be reviewed by any state appellate court.[756] The review is of a final judgment below. "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."[757] The object of this rule is to avoid piecemeal interference with state court proceedings; it promotes harmony by preventing federal assumption of a role in a controversy until the state court efforts are finally resolved.[758] For similar reasons, the Court requires that a party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and she must have raised the issue at the appropriate time below.[759]

When the judgment of a state court rests on an adequate, independent determination of state law, the Court will not review the resolution of the federal questions decided, even though the resolution may be in error.[760] "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not

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[756] Grovey v. Townsend, 295 U.S. 45, 47 (1935); Talley v. California, 362 U.S. 60, 62 (1960); Thompson v. City of Louisville, 362 U.S. 199, 202 (1960); Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960); Powell v. Texas, 392 U.S. 514, 516, 517 (1968); Koon v. Aiken, 480 U.S. 943 (1987). In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the judgment reviewed was that of the Quarterly Session Court for the Borough of Norfolk, Virginia.

[757] Market Street R.R. v. Railroad Comm'n, 324 U.S. 548, 551 (1945). *See also* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Flynt v. Ohio, 451 U.S. 619 (1981); Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981); Florida v. Thomas, 532 U.S. 774 (2001). In recent years, however, the Court has developed a series of exceptions permitting review when the federal issue in the case has been finally determined but there are still proceedings to come in the lower state courts. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-487 (1975). *See also* Fort Wayne Books v. Indiana, 489 U.S. 46, 53-57 (1989); Duquesne Light Co. v. Barasch, 488 U.S. 299, 304 (1989); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 n.42 (1982).

[758] Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67-69 (1948); Radio Station WOW v. Johnson, 326 U.S. 120, 123-124 (1945).

[759] New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); *See also* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77 (1988); Webb v. Webb, 451 U.S. 493, 501 (1981). The same rule applies on *habeas corpus* petitions. *E.g.*, Picard v. Connor, 404 U.S. 270 (1972).

[760] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874); Black v. Cutter Laboratories, 351 U.S. 292 (1956); Wilson v. Loew's, Inc., 355 U.S. 597 (1958).

to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."[761] The Court is faced with two interrelated decisions: whether the state court judgment is based upon a nonfederal ground and whether the nonfederal ground is adequate to support the state court judgment. It is, of course, the responsibility of the Court to determine for itself the answer to both questions.[762]

The first question may be raised by several factual situations. A state court may have based its decision on two grounds, one federal, one nonfederal.[763] It may have based its decision solely on a nonfederal ground but the federal ground may have been clearly raised.[764] Both federal and nonfederal grounds may have been raised but the state court judgment is ambiguous or is without written opinion stating the ground relied on.[765] Or the state court may have decided the federal question although it could have based its ruling on an adequate, independent nonfederal ground.[766] In any event, it is essential for purposes of review by the Supreme Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, that the federal question was actually decided or that the judgment could not have been rendered without deciding it.[767]

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[761] Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

[762] *E.g.*, Howlett v. Rose, 496 U.S. 356, 366 (1990); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 455 (1958).

[763] Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[764] Wood v. Chesborough, 228 U.S. 672, 676-680 (1913).

[765] Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55 (1934); Williams v. Kaiser, 323 U.S. 471, 477 (1945); Durley v. Mayo, 351 U.S. 277, 281 (1956); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872); *cf.* Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

[766] Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 375-376 (1968).

[767] Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206 (1938); Raley v. Ohio, 360 U.S. 423, 434-437 (1959). When there is uncertainty about what the state court did, the usual practice was to remand for clarification. Minnesota v. National Tea Co., 309 U.S. 551 (1940); California v. Krivda, 409 U.S. 33 (1972). *See* California Dept. of Motor Vehicles v. Rios, 410 U.S. 425 (1973). Now, however, in a controversial decision, the Court has adopted a presumption that when a state court decision fairly appears to rest on federal law or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court will accept as the most reasonable explanation that the state court decided the case as it did because it believed that federal law required it to do so. If the state court wishes to avoid the presumption it must make clear by a plain statement in its judgment or opinion that discussed federal law did not compel the result, that state law was dispositive. Michigan v. Long, 463 U.S. 1032 (1983). *See* Harris v. Reed, 489 U.S. 255, 261 n. 7 (1989) (collecting cases); Coleman v. Thompson, 501 U.S. 722 (1991) (applying the rule in a *habeas* case).

With regard to the second question, in order to preclude Supreme Court review, the nonfederal ground must be broad enough, without reference to the federal question, to sustain the state court judgment,[768] the nonfederal ground must be independent of the federal question,[769] and the nonfederal ground must be a tenable one.[770] Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude Supreme Court review as an adequate independent state ground,[771] so long as the local procedure does not discriminate against the raising of federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights.[772]

Suits Affecting Ambassadors, Other Public Ministers, and Consuls

The earliest interpretation of the grant of original jurisdiction to the Supreme Court came in the Judiciary Act of 1789, which conferred on the federal district courts jurisdiction of suits to which a consul might be a party. This legislative interpretation was sustained in 1793 in a circuit court case in which the judges held the Congress might vest concurrent jurisdiction involving consuls in the inferior courts, and sustained an indictment against a consul.[773] Many years later, the Supreme Court held that consuls could be sued in the federal courts,[774] and in another case in the same year declared sweepingly that Congress could grant concurrent jurisdiction to the inferior courts in cases where the Supreme Court has been invested with original jurisdiction.[775] Nor does the grant of original jurisdiction to the Supreme Court in cases affect-

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[768] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1874). A new state rule cannot be invented for the occasion in order to defeat the federal claim. *E.g.*, Ford v. Georgia, 498 U.S. 411, 420-425 (1991)

[769] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 290 (1958).

[770] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ward v. Love County, 253 U.S. 17, 22 (1920); Staub v. Baxley, 355 U.S. 313, 319-320 (1958).

[771] Nickel v. Cole, 256 U.S. 222, 225 (1921); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). *But see* Davis v. Wechsler, 263 U.S. 22 (1923); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).

[772] Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 455-458 (1958); Barr v. City of Columbia, 378 U.S. 146, 149 (1964). This rationale probably explains Henry v. Mississippi, 379 U.S. 443 (1965). *See also* in the criminal area, Edelman v. California, 344 U.S. 357, 362 (1953) (dissenting opinion); Brown v. Allen, 344 U.S. 443, 554 (1953) (dissenting opinion); Williams v. Georgia, 349 U.S. 375, 383 (1955); Monger v. Florida, 405 U.S. 958 (1972) (dissenting opinion).

[773] United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C. Pa. 1793).

[774] Bors v. Preston, 111 U.S. 252 (1884).

[775] Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 469 (1884).

ing ambassadors and consuls of itself preclude suits in state courts against consular officials. The leading case is *Ohio ex rel. Popovici v. Agler*,[776] in which a Rumanian vice-consul contested an Ohio judgment against him for divorce and alimony.

A number of incidental questions arise in connection with the phrase "affecting ambassadors and consuls." Does the ambassador or consul to be affected have to be a party in interest, or is a mere indirect interest in the outcome of the proceeding sufficient? In *United States v. Ortega*,[777] the Court ruled that a prosecution of a person for violating international law and the laws of the United States by offering violence to the person of a foreign minister was not a suit "affecting" the minister but a public prosecution for vindication of the laws of nations and the United States. Another question concerns the official status of a person claiming to be an ambassador or consul.

The Court has refused to review the decision of the Executive with respect to the public character of a person claiming to be a public minister and has laid down the rule that it has the right to accept a certificate from the Department of State on such a question.[778] A third question was whether the clause included ambassadors and consuls accredited by the United States to foreign governments. The Court held that it includes only persons accredited to the United States by foreign governments.[779] However, in matters of especial delicacy, such as suits against ambassadors and public ministers or their servants, where the law of nations permits such suits, and in all controversies of a civil nature in which a State is a party, Congress until recently made the original jurisdiction of the Supreme Court exclusive of that of other courts.[780] By its compliance with the congressional distribution of exclusive and concurrent original jurisdiction, the Court has tacitly sanctioned the power of Congress to make such jurisdiction exclusive or concurrent as it may choose.

Cases of Admiralty and Maritime Jurisdiction

The admiralty and maritime jurisdiction of the federal courts had its origins in the jurisdiction vested in the courts of the Admiral of the English Navy. Prior to independence, vice-admiralty courts were created in the Colonies by commissions from the

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[776] 280 U.S. 379, 383, 384 (1930). Now precluded by 28 U.S.C. § 1351.

[777] 24 U.S. (11 Wheat.) 467 (1826).

[778] In re Baiz, 135 U.S. 403, 432 (1890).

[779] Ex parte Gruber, 269 U.S. 302 (1925).

[780] 1 Stat. 80-81 (1789). Jurisdiction in the Supreme Court since 1978 has been original but not exclusive. Pub. L. 95-393, § 8(b), 92 Stat. 810, 28 U.S.C. § 1251(b)(1).

English High Court of Admiralty. After independence, the States established admiralty courts, from which at a later date appeals could be taken to a court of appeals set up by Congress under the Articles of Confederation.[781] Since one of the objectives of the Philadelphia Convention was the promotion of commerce through removal of obstacles occasioned by the diverse local rules of the States, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over admiralty and maritime cases.[782]

The Constitution uses the terms "admiralty and maritime jurisdiction" without defining them. Though closely related, the words are not synonyms. In England the word "maritime" referred to the cases arising upon the high seas, whereas "admiralty" meant primarily cases of a local nature involving police regulations of shipping, harbors, fishing, and the like. A long struggle between the admiralty and common law courts had, however, in the course of time resulted in a considerable curtailment of English admiralty jurisdiction. A much broader conception of admiralty and maritime jurisdiction existed in the United States at the time of the framing of the Constitution than in the Mother Country.[783] At the very beginning of government under the Constitution, Congress conferred on the federal district courts exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; . . . ."[784] This broad legislative interpretation of admiralty and maritime jurisdiction soon won the

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[781] G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY ch. 1 (1957).

[782] Nothing really appears in the records of the Convention which sheds light on the Framers' views about admiralty. The present clause was contained in the draft of the Committee on Detail. 2 M. Farrand, supra at 186-187. None of the plans presented to the Convention, with the exception of an apparently authentic Charles Pinckney plan, 3 id. at 601-04, 608, had mentioned an admiralty jurisdiction in national courts. *See* Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925).

[783] G. Gilmore & C. Black, supra at ch. 1. In DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass 1815), Justice Story delivered a powerful historical and jurisprudential argument against the then-restrictive English system. *See also* Waring v. Clarke, 46 U.S. (5 How.) 441, 451-459 (1847); New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 34, 385-390 (1848).

[784] § 9, 1 Stat. 77 (1789), now 28 U.S.C. § 1333 in only slightly changed fashion. For the classic exposition, *see* Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950).

approval of the federal circuit courts, which ruled that the extent of admiralty and maritime jurisdiction was not to be determined by English law but by the principles of maritime law as respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe.[785]

Although a number of Supreme Court decisions had earlier sustained the broader admiralty jurisdiction on specific issues,[786] it was not until 1848 that the Court ruled squarely in its favor, which it did by declaring that "whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed."[787] The Court thereupon proceeded to hold that admiralty had jurisdiction *in personam* as well as *in rem* over controversies arising out of contracts of affreightment between New York and Providence.

Power of Congress To Modify Maritime Law.—The Constitution does not identify the source of the substantive law to be applied in the federal courts in cases of admiralty and maritime jurisdiction. Nevertheless, the grant of power to the federal courts in Article III necessarily implies the existence of a substantive maritime law which, if they are required to do so, the federal courts can fashion for themselves.[788] But what of the power of Congress in this area? In *The Lottawanna*,[789] Justice Bradley undertook a definitive exposition of the subject. No doubt, the opinion of the Court notes, there exists "a great mass of maritime law which is the same in all commercial countries," still "the maritime law is only so far

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[785] *E.g.*, DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); The Seneca, 21 Fed. Cas. 1801 (No. 12670) C.C.E.D.Pa. 1829)(Justice Washington).

[786] The Vengeance, 3 U.S. (3 Dall.) 297 (1796); The Schooner Sally, 6 U.S. (2 Cr.) 406 (1805): The Schooner Betsy, 8 U.S. (4 Cr.) 443 (1808); The Samuel, 14 U.S. (1 Wheat.) 9 (1816); The Octavig, 14 U.S. (1 Wheat.) 20 (1816).

[787] New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 334, 386 (1848); *see also* Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[788] Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684, 690, 691 (1950); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952); Romero v. International Terminal Operating Co., 358 U.S. 354, 360-361 (1959). For a recent example, *see* Moragne v. States Marine Lines, 398 U.S. 375 (1970); United States v. Reliable Transfer Co., 421 U.S. 397 (1975). *Compare* The Lottawanna, 88 U.S. (21 Wall.) 558, 576-577 (1875) ("But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department"). States can no more override rules of judicial origin than they can override acts of Congress. Wilburn Boat Co. v. Firemen's Fund Ins. Co., 348 U.S. 310, 314 (1955).

[789] 88 U.S. (21 Wall.) 558 (1875).

operative as law in any country as it is adopted by the laws and usages of that country."[790] "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it . . . ."

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."[791]

"It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."[792] That Congress' power to enact substantive maritime law was conferred by the commerce clause was assumed in numerous opinions,[793] but later opinions by Justice Bradley firmly established that the source of power was the admiralty grant itself, as supplemented by the second prong of the necessary and proper clause.[794] Thus, "[a]s the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures."[795] Rejecting an attack on a maritime statute as an infringment of intrastate commerce, Justice Bradley wrote: "It is unnecessary to invoke the power given the

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[790] 88 U.S. at 572.

[791] 88 U.S. at 574-75.

[792] 88 U.S. at 577.

[793] *E.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1871); Moore v. American Transp. Co., 65 U.S. (24 How.) 1, 39 (1861); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883); The Robert W. Parsons, 191 U.S. 17 (1903).

[794] Butler v. Boston & S. S.S. Co., 130 U.S. 527 (1889); In re Garnett, 141 U.S. 1 (1891). The second prong of the necessary and proper clause is the authorization to Congress to enact laws to carry into execution the powers vested in other departments of the Federal Government. *See* Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42 (1934).

[795] Butler v. Boston & S. S.S. Co., 130 U.S. 527, 557 (1889).

Congress to regulate commerce in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."[796]

The law administered by federal courts in admiralty is therefore an amalgam of the general maritime law insofar as it is acceptable to the courts, modifications of that law by congressional amendment, the common law of torts and contracts as modified to the extent constitutionally possible by state legislation, and international prize law. This body of law is at all times subject to modification by the paramount authority of Congress acting in pursuance of its powers under the admiralty and maritime clause and the necessary and proper clause and, no doubt, the commerce clause, now that the Court's interpretation of that clause has become so expansive. Of this power there has been uniform agreement among the Justices of the Court.[797]

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[796] In re Garnett, 141 U.S. 1, 12 (1891). *See also* Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920); Crowell v. Benson, 285 U.S. 22, 55 (1932). The Jones Act, under which injured seamen may maintain an action at law for damages, has been reviewed as an exercise of legislative power deducible from the admiralty clause. Panama R.R. v. Johnson, 264 U.S. 375, 386, 388, 391 (1924); Romero v. International Terminal Operating Co., 358 U.S. 354, 360-361 (1959). On the limits to the congressional power, *see* Panama R.R. v. Johnson, 264 U.S. at 386-387; Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43-44 (1934).

[797] Thus, Justice McReynolds' assertion of the paramountcy of congressional power in Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917), was not disputed by the four dissenters in that case and is confirmed in subsequent cases critical of Jensen which in effect invite congressional modification of maritime law. *E.g.*, Davis v. Department of Labor and Industries, 317 U.S. 249 (1942). The nature of maritime law has excited some relevant controversy. In American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 516, 545 (1828), Chief Justice Marshall declared that admiralty cases do not "arise under the Constitution or laws of the United States" but "are as old as navigation itself; and the law, admiralty and maritime as it has existed for ages, is applied by our Courts to the cases as they arise." In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), the plaintiff sought a jury trial in federal court on a seaman's suit for personal injury on an admiralty claim, contending that cases arising under the general maritime law are "civil actions" that arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Five Justices in an opinion by Justice Frankfurter disagreed. Maritime cases do not arise under the Constitution or laws of the United States for federal question purposes and must, absent diversity, be instituted in admiralty where there is no jury trial. The dissenting four, Justice Brennan for himself and Chief Justice Warren and Justices Black and Douglas, contended that maritime law, although originally derived from international sources, is operative within the United States only by virtue of having been accepted and adopted pursuant to Article III, and accordingly judicially originated rules formulated under authority derived from that Article are "laws" of the United States to the same extent as those enacted by Congress.

Admiralty and Maritime Cases.—Admiralty and maritime jurisdiction comprises two types of cases: (1) those involving acts committed on the high seas or other navigable waters, and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first category, which includes prize cases and torts, injuries, and crimes committed on the high seas, jurisdiction is determined by the locality of the act, while in the second category subject matter is the primary determinative factor.[798] Specifically, contract cases include suits by seamen for wages,[799] cases arising out of marine insurance policies,[800] actions for towage[801] or pilotage[802] charges, actions on bottomry or respondentia bonds,[803] actions for repairs on a vessel

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[798] DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[799] Sheppard v. Taylor, 30 U.S. (5 Pet.) 675, 710 (1831). A seaman employed by the Government making a claim for wages cannot proceed in admiralty but must bring his action under the Tucker Act in the Court of Claims or in the district court if his claim does not exceed $10,000. Amell v. United States, 384 U.S. 158 (1966). In Kossick v. United Fruit Co., 365 U.S. 731 (1961), an oral agreement between a seaman and a shipowner whereby the latter in consideration of the seaman's forbearance to press his maritime right to maintenance and cure promised to assume the consequences of improper treatment of the seaman at a Public Health Service Hospital was held to be a maritime contract. *See also* Archawski v. Hanioti, 350 U.S. 532 (1956).

[800] Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 31 (1871); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). Whether admiralty jurisdiction exists if the vessel is not engaged in navigation or commerce when the insurance claim arises is open to question. Jeffcott v. Aetna Ins. Co., 129 F.2d 582 (2d Cir.), *cert. denied*, 317 U.S. 663 (1942). Contracts and agreements to procure marine insurance are outside the admiralty jurisdiction. Compagnie Francaise De Navigation A Vapeur v. Bonnasse, 19 F.2d 777 (2d Cir. 1927).

[801] Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1900). For recent Court difficulties with exculpatory features of such contracts, *see* Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955); United States v. Nielson, 349 U.S. 129 (1955); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Dixilyn Drilling Corp. v. Crescent Towage & Salvage Co., 372 U.S. 697 (1963).

[802] Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1875); Ex parte McNiel, 80 U.S. (13 Wall.) 236 (1872). *See also* Sun Oil v. Dalzell Towing Co., 287 U.S. 291 (1932).

[803] The Grapeshot, 76 U.S. (9 Wall.) 129 (1870); O'Brien v. Miller, 168 U.S. 287 (1897); The Aurora, 14 U.S. (1 Wheat.) 94 (1816); Delaware Mut. Safety Ins. Co. v. Gossler, 96 U.S. 645 (1877). But ordinary mortgages even though the securing property is a vessel, its gear, or cargo are not considered maritime contracts. Bogart v. The Steamboat John Jay, 58 U.S. (17 How.) 399 (1854); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 32 (1934).

already used in navigation,[804] contracts of affreightment,[805] compensation for temporary wharfage,[806] agreements of consortship between the masters of two vessels engaged in wrecking,[807] and surveys of damaged vessels.[808] That is, admiralty jurisdiction "extends to all contracts, claims and services essentially maritime."[809] But the courts have never enunciated an unambiguous test which would enable one to determine in advance whether a given case is a maritime one or not.[810] "The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract. . . ."[811]

Maritime torts include injuries to persons,[812] damages to property arising out of collisions or other negligent acts,[813] and violent dispossession of property.[814] The Court has expresed a willingness to "recogniz[e] products liability, including strict liability, as part of the general maritime law."[815] Unlike contract cases, maritime tort jurisdiction historically depended exclusively upon the commission

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[804] New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96 (1922); The General Smith, 17 U.S. (4 Wheat.) 438 (1819). There is admiralty jurisdiction even though the repairs are not be be made in navigable waters but, perhaps, in dry dock. North Pacific SS. Co. v. Hall Brothers Marine R. & S. Co., 249 U.S. 119 (1919). But contracts and agreements pertaining to the original construction of vessels are not within admiralty jurisdiction. Peoples Ferry Co. v. Joseph Beers, 61 U.S. (20 How.) 393 (1858); North Pacific S.S. Co., 249 U.S. at 127.

[805] New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344 (1848).

[806] Ex parte Easton, 95 U.S. 68 (1877).

[807] Andrews v. Wall, 44 U.S. (3 How.) 568 (1845).

[808] Janney v. Columbia Ins. Co., 23 U.S. (10 Wheat.) 411, 412, 415, 418 (1825); The Tilton, 23 Fed. Cas. 1277 (No. 14054) (C.C.D. Mass. 1830) (Justice Story).

[809] Ex parte Easton, 95 U.S. 68, 72 (1877). *See*, for a clearing away of some conceptual obstructions to the principle, Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991).

[810] *E.g.*, DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175, 183 (1837); The People's Ferry Co. v. Joseph Beers, 61 U.S. (20 How.) 393, 401 (1858); New England Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 26 (1870); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 48 (1934).

[811] Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961).

[812] The City of Panama, 101 U.S. 453 (1880). Reversing a long-standing rule, the Court allowed recovery under general maritime law for the wrongful death of a seaman. Moragne v. States Marine Lines, 398 U.S. 375 (1970); Miles v. Apex Marine Corp., 498 U.S. 19 (1991).

[813] The Raithmoor, 241 U.S. 166 (1916); Erie R.R. v. Erie Transportation Co., 204 U.S. 220 (1907)

[814] L'Invincible, 14 U.S. (1 Wheat.) 238 (1816); In re Fassett, 142 U.S. 479 (1892).

[815] East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858 (1986) (holding, however, that there is no products liability action in admiralty for purely economic injury to the product itself, unaccompanied by personal injury, and that such actions should be based on the contract law of warranty).

of the wrongful act upon navigable waters, regardless of any connection or lack of connection with shipping or commerce.[816] The Court has now held, however, that in addition to the requisite situs a significant relationship to traditional maritime activity must exist in order for the admiralty jurisdiction of the federal courts to be invoked.[817] Both the Court and Congress have created exceptions to the situs test for maritime tort jurisdiction to extend landward the occasions for certain connected persons or events to come within admiralty, not without a little controversy.[818]

From the earliest days of the Republic, the federal courts sitting in admiralty have been held to have exclusive jurisdiction of

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[816] DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); Philadelphia, W. & B. R.R. v. Philadelphia & Havre De Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 215 (1859); The Plymouth, 70 U.S. (3 Wall.) 20, 33-34 (1865); Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 476 (1922).

[817] Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972) (plane crash in which plane landed wholly fortuitously in navigable waters off the airport runway not in admiralty jurisdiction). However, so long as there is maritime activity and a general maritime commercial nexus, admiralty jurisdiction exists. Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (collision of two pleasure boats on navigable waters is within admiralty juridiction); Sisson v. Ruby, 497 U.S. 358 (1990) (fire on pleasure boat docked at marina on navigable water). *And see* Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), a tort claim arising out of damages allegedly caused by negligently driving piles from a barge into the riverbed, which weakened a freight tunnel that allowed flooding of the tunnel and the basements of numerous buildings along the Chicago River. The Court found that admiralty jurisdiction could be invoked. The location test was satisfied, because the barge, even though fastened to the river bottom, was a "vessel" for admiralty tort purposes; the two-part connection test was also satisfied, inasmuch as the incident had a potential to disrupt maritime commerce and the conduct giving rise to the incident had a substantial relationship to traditional maritime activity.

[818] Thus, the courts have enforced seamen's claims for maintenance and cure for injuries incurred on land. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 41-42 (1943). The Court has applied the doctrine of seaworthiness to permit claims by longshoremen injured on land because of some condition of the vessel or its cargo. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *But see* Victory Carriers v. Law, 404 U.S. 202 (1971). In the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, Congress gave seamen, or their personal representatives, the right to seek compensation from their employers for personal injuries arising out of their maritime employment. Respecting who is a seaman for Jones Act purposes, *see* Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991); McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991). The rights exist even if the injury occurred on land. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. at 43; Swanson v. Mara Brothers, 328 U.S. 1, 4 (1946). In the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740, Congress provided an avenue of relief for persons injured in themselves or their property by action of a vessel on navigable water which is consummated on land, as by the collision of a ship with a bridge. By the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1251, amending 33 U.S.C. §§ 901-950, Congress broadened the definition of "navigable waters" to include in certain cases adjoining piers, wharfs, etc., and modified the definition of "employee" to mean any worker "engaged in maritime employment" within the prescribed meanings, thus extending the Act shoreward and changing the test of eligibility from "situs" alone to the "situs" of the injury and the "status" of the injured.

prize cases.[819] Also, in contrast to other phases of admiralty jurisdiction, prize law as applied by the British courts continued to provide the basis of American law so far as practicable,[820] and so far as it was not modified by subsequent legislation, treaties, or executive proclamations. Finally, admiralty and maritime jurisdiction includes the seizure and forfeiture of vessels engaged in activities in violation of the laws of nations or municipal law, such as illicit trade,[821] infraction of revenue laws,[822] and the like.[823]

Admiralty Proceedings.—Procedure in admiralty jurisdiction differs in few respects from procedure in actions at law, but the differences that do exist are significant.[824] Suits in admiralty traditionally took the form of a proceeding *in rem* against the vessel, and, with exceptions to be noted, such proceedings *in rem* are confined exclusively to federal admiralty courts, because the grant of exclusive jurisdiction to the federal courts by the Judiciary Act of 1789 has been interpreted as referring to the traditional admiralty action, the *in rem* action, which was unknown to the common law.[825] The savings clause in that Act under which a state court may entertain actions by suitors seeking a common-law remedy preserves to the state tribunals the right to hear actions at law where a common-law remedy or a new remedy analogous to a common-law remedy exists.[826] Concurrent jurisdiction thus exists for the adjudication of *in personam* maritime causes of action against

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[819] Jennings v. Carson, 8 U.S. (4 Cr.) 2 (1807); Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858).

[820] Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cr.) 191 (1815); The Siren, 80 U.S. (13 Wall.) 389, 393 (1871).

[821] Hudson v. Guestier, 8 U.S. (4 Cr.) 293 (1808).

[822] The Vengeance, 3 U.S. (3 Dall.) 297 (1796); Church v. Hubbard, 6 U.S. (2 Cr.) 187 (1804); The Schooner Sally, 6 U.S. (2 Cr.) 406 (1805).

[823] The Brig Ann, 13 U.S. (9 Cr.) 289 (1815); The Sarah, 21 U.S. (8 Wheat.) 391 (1823); Maul v. United States, 274 U.S. 501 (1927).

[824] Gilmore & Black, supra at 30-33. There are no longer separate rules of procedure governing admiralty, unification of civil admiralty procedures being achieved in 1966. 7 A J. Moore's Federal Practice § .01 *et seq* (New York: 1971).

[825] The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867). *But see* Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858). In Madruga v. Superior Court, 346 U.S. 556 (1954), the jurisdiction of a state court over a partition suit at the instance of the majority shipowners was upheld on the ground that the cause of action affected only the interest of the defendant minority shipowners and therefore was *in personam*. Justice Frankfurter's dissent argued: "If this is not an action against the thing, in the sense which that has meaning in the law, then the concepts of a *res* and an *in rem* proceeding have an esoteric meaning that I do not understand." Id. at 564.

[826] After conferring "exclusive" jurisdiction in admiralty and maritime cases on the federal courts, § 9 of the Judiciary Act of 1789, 1 Stat. 77, added "saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it; . . ." Fixing the concurrent federal-state line has frequently been a source of conflict within the court. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

the owner of the vessel, and a plaintiff may ordinarily choose whether to bring his action in a state court or a federal court.

Forfeiture to the crown for violation of the laws of the sovereign was in English law an exception to the rule that admiralty has exclusive jurisdiction over *in rem* maritime actions and was thus considered a common-law remedy. Although the Supreme Court sometimes has used language that would confine all proceedings *in rem* to admiralty courts,[827] such actions in state courts have been sustained in cases of forfeiture arising out of violations of state law.[828]

Perhaps the most significant admiralty court difference in procedure from civil courts is the absence of a jury trial in admiralty actions, with the admiralty judge trying issues of fact as well as of law.[829] Indeed, the absence of a jury in admiralty proceedings appears to have been one of the principal reasons why the English government vested a broad admiralty jurisdiction in the colonial vice-admiralty courts, since they provided a forum where the English authorities could enforce the Navigation Laws without "the obstinate resistance of American juries."[830]

Territorial Extent of Admiralty and Maritime Jurisdiction.—Although he was a vigorous exponent of the expansion of admiralty jurisdiction, Justice Story for the Court in *The Steamboat Thomas Jefferson*[831] adopted a restrictive English rule confining admiralty jurisdiction to the high seas and upon rivers as far as the ebb and flow of the tide extended.[832] The demands of commerce on western waters led Congress to enact a statute extending admiralty jurisdiction over the Great Lakes and connecting wa-

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[827] The Moses Taylor, 71 U.S. (4 Wall.) 411, 431 (1867).

[828] C. J. Henry Co. v. Moore, 318 U.S. 133 (1943).

[829] The Vengeance, 3 U.S. (3 Dall.) 297 (1796); The Schooner Sally, 6 U.S. (2 Cr.) 406 (1805); The Schooner Betsy, 8 U.S. (4 Cr.) 443 (1808); The Whelan, 11 U.S. (7 Cr.) 112 (1812); The Samuel, 14 U.S. (1 Wheat.) 9 (1816). If diversity of citizenship and the requisite jurisdictional amounts are present, a suitor may sue on the "law side" of the federal court and obtain a jury. Romero v. International Terminal Operating Co., 358 U.S. 354, 362-363 (1959). Jones Act claims, 41 Stat. 1007 (1920), 46 U.S.C. § 688, may be brought on the "law side" with a jury, Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924), and other admiralty claims joined with a Jones Act claim may be submitted to a jury. *Romero*, supra; Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963). There is no constitutional barrier to congressional provision of jury trials in admiralty. Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Fitzgerald, 374 U.S. at 20.

[830] C. J. Henry Co. v. Moore, 318 U.S. 133, 141 (1943).

[831] 23 U.S. (10 Wheat.) 428 (1825). On the political background of this decision, *see* 1 C. Warren, supra at 633-35.

[832] The tidal ebb and flow limitation was strained in some of its applications. Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

ters,[833] and in *The Genessee Chief v. Fitzhugh*[834] Chief Justice Taney overruled *The Thomas Jefferson* and dropped the tidal ebb and flow requirement. This ruling laid the basis for subsequent judicial extension of jurisdiction over all waters, salt or fresh, tidal or not, which are navigable in fact.[835] Some of the older cases contain language limiting jurisdiction to navigable waters which form some link in an interstate or international waterway or some link in commerce,[836] but these date from the time when it was thought the commerce power furnished the support for congressional legislation in this field.

Admiralty and Federalism.—Extension of admiralty and maritime jurisdiction to navigable waters within a State does not, however, of its own force include general or political powers of government. Thus, in the absence of legislation by Congress, the States through their courts may punish offenses upon their navigable waters and upon the sea within one marine league of the shore.[837]

Determination of the boundaries of admiralty jurisdiction is a judicial function, and "no State law can enlarge it, nor can an act of Congress or a rule of court make it broader than the judicial power may determine to be its true limits."[838] But, as with other jurisdictions of the federal courts, admiralty jurisdiction can only be exercised under acts of Congress vesting it in federal courts.[839]

The boundaries of federal and state competence, both legislative and judicial, in this area remain imprecise, and federal judicial determinations have notably failed to supply definiteness. During the last century, the Supreme Court generally permitted two overlapping systems of law to coexist in an uneasy relationship. The

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[833] 5 Stat. 726 (1845).

[834] 53 U.S. (12 How.) 443 (1851).

[835] Some of the early cases include The Magnolia, 61 U.S. (20 How.) 296 (1857); The Eagle, 75 U.S. (8 Wall.) 15 (1868); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871). The fact that the body of water is artificial presents no barrier to admiralty jurisdiction. Ex parte Boyer, 109 U.S. 629 (1884); The Robert W. Parsons, 191 U.S. 17 (1903). In United States v. Appalachian Power Co., 311 U.S. 377 (1940), it was made clear that maritime jurisdiction extends to include waterways which by reasonable improvement can be made navigable. "It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country." Southern S.S. Co. v. NLRB, 316 U.S. 31, 41 (1942).

[836] *E.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); The Montello, 87 U.S. (20 Wall.) 430, 441-442 (1874).

[837] United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818); Manchester v. Massachusetts, 139 U.S. 240 (1891).

[838] The Steamer St. Lawrence, 66 U.S. (1 Bl.) 522, 527 (1862).

[839] Janney v. Columbia Ins. Co., 23 U.S. (10 Wheat.) 411, 418 (1825); The Lottawanna, 88 U.S. (21 Wall.) 558, 576 (1875).

federal courts in admiralty applied the general maritime law,[840] supplemented in some instances by state law which created and defined certain causes of action.[841] Because the Judiciary Act of 1789 saved to suitors common-law remedies, persons suing in state courts or in federal courts in diversity of citizenship actions could look to common-law and statutory doctrines for relief in maritime-related cases in which the actions were noticeable.[842] In *Southern Pacific Co. v. Jensen*,[843] a sharply divided Court held that New York could not constitutionally apply its workmen's compensation system to employees injured or killed on navigable waters. For the Court, Justice McReynolds reasoned "that the general maritime law, as accepted by the federal courts, constituted part of our national law, applicable to matters within the admiralty and maritime jurisdiction."[844] Recognizing that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation," still it was certain that "no such legislation is valid if it works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations."[845] The "savings to suitors" clause was unavailing because the workmen's compensation statute created a remedy "of a character wholly unknown to the common law, incapable of enforcement by the ordinary process of any court, and is not saved to suitors from the grant of exclusive jurisdiction."[846]

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[840] *E.g.*, New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344 (1848); The Steamboat New York v. Rea, 59 U.S. (18 How.) 223 (1856); The China, 74 U.S. (7 Wall.) 53 (1868); Ex parte McNiel, 80 U.S. (13 Wall.) 236 (1872); La Bourgogne, 210 U.S. 95 (1908).

[841] The General Smith, 17 U.S. (4 Wheat.) 438 (1819); The Lottawanna, 88 U.S. (21 Wall.) 558 (1875) (enforcing state laws giving suppliers and repairmen liens on ships supplied and repaired). Another example concerns state created wrongful death actions. The Hamilton, 207 U.S. 398 (1907).

[842] *E.g.*, Hazard's Administrator v. New England Marine Ins. Co., 33 U.S. (8 Pet.) 557 (1834); The Belfast, 74 U.S. (7 Wall.) 624 (1869); American Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872); Quebec Steamship Co. v. Merchant, 133 U.S. 375 (1890); Belden v. Chase, 150 U.S. 674 (1893); Homer Ramsdell Transp. Co. v. La Compagnie Gen. Transatlantique, 182 U.S. 406 (1901).

[843] 244 U.S. 205 (1917). The worker here had been killed, but the same result was reached in a case of nonfatal injury. Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917). In Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918), the *Jensen* holding was applied to preclude recovery in a negligence action against the injured party's employer under state law. Under The Osceola, 189 U.S. 158 (1903), the employee had a maritime right to wages, maintenance, and cure.

[844] Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917).

[845] 244 U.S. at 216.

[846] 244 U.S. at 218. There were four dissenters, Justices Holmes, Brandeis, Clarke, and Pitney. The *Jensen* dissent featured such Holmesian epigrams as: "Judges do and must legislate, but they can do so only interstitially: they are confined from molar to molecular motions," id. at 221, and the famous statement sup-

Congress required three opportunities to legislate to meet the problem created by the decision, the lack of remedy for maritime workers to recover for injuries resulting from the negligence of their employers. First, Congress enacted a statute saving to claimants their rights and remedies under state workmen's compensation laws.[847] The Court invalidated it as an unconstitutional delegation of legislative power to the States. "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations."[848] Second, Congress reenacted the law but excluded masters and crew members of vessels from those who might claim compensation for maritime injuries.[849]

The Court found this effort unconstitutional as well, since "the manifest purpose [of the statute] was to permit any state to alter the maritime law, and thereby introduce conflicting requirements."[850] Finally, Congress passed the Longshoremen's and Harbor Workers' Compensation Act, which provided accident compensation for injuries, including those resulting in death, sustained on navigable waters by employees, other than members of the crew, whenever "recovery . . . may not validly be provided by State law."[851]

With certain exceptions,[852] the federal-state conflict since *Jensen* has taken place with regard to three areas: (1) the interpreta-

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porting the assertion that supplementation of maritime law had to come from state law inasmuch as "the common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. It always is the law of some state." Id. at 222.

[847] 40 Stat. 395 (1917).

[848] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920). The decision was again five-to-four with the same dissenters.

[849] 42 Stat. 634 (1922).

[850] Washington v. Dawson & Co., 264 U.S. 219, 228 (1924). Holmes and Brandeis remained of the four dissenters and again dissented.

[851] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-950.

[852] *E.g.*, Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) (state direct action statute applies against insurers implicated in a marine accident); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) (state statute determines effect of breach of warranty in marine insurance contract); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) (federal rather than state law determines effect of exculpatory provisions in towage contracts); Kossick v. United Fruit Co., 365 U.S. 731

tion of federal and state bases of relief for injuries and death as affected by the Longshoremen's and Harbor Workers' Compensation Act; (2) the interpretation of federal and state bases of relief for personal injuries by maritime workers as affected by the Jones Act; and (3) the application of state law to permit recovery in maritime wrongful death cases in which until recently there was no federal maritime right to recover.[853]

(1) The principal difficulty here was that after *Jensen* the Supreme Court did not maintain the line between permissible and impermissible state-authorized recovery at the water's edge, but created a "maritime but local" exception, by which some injuries incurred in or on navigable waters could be compensated under state workmen's compensation laws or state negligence laws.[854] "The application of the State Workmen's Compensation Acts has been sustained where the work of the employee has been deemed to have no direct relation to navigation or commerce and the operation of the local law 'would work no material prejudice to the essential features of the general maritime law.'"[855] Because Congress provided in the Longshoremen's and Harbor Workers' Compensation Act for recovery under the Act "if recovery . . . may not validly be provided by State law,"[856] it was held that the "maritime but local" exception had been statutorily perpetuated,[857] thus creating the danger for injured workers or their survivors that they might choose to seek relief by the wrong avenue to their prejudice. This danger was susequently removed by the Court when it recognized that there

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(1961) (state statute of frauds inapplicable to oral contract for medical care between seaman and employer).

[853] *Jensen*, though much criticized, is still the touchstone of the decisional process in this area with its emphasis on the general maritime law. *E.g.*, Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). In Askew v. American Waterways Operators, 411 U.S. 325, 337-344 (1973), the Court, in holding that the States may constitutionally exercise their police powers respecting maritime activities concurrently with the Federal Government, such as by providing for liability for oil spill damages, noted that *Jensen* and its progeny, while still possessing vitality, have been confined to their facts; thus, it is only with regard "to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews" that state law is proscribed. Id. at 344. *See also* Sun Ship v. Pennsylvania, 447 U.S. 715 (1980).

[854] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); State Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922); Miller's Indemnity Underwriters v. Braud, 270 U.S. 59 (1926). The exception continued to be applied following enactment of the Longshoremen's and Harbor Workers' Compensation Act. *See* cases cited in Davis v. Department of Labor and Industries, 317 U.S. 249, 253-254 (1942).

[855] Crowell v. Benson, 285 U.S. 22, 39 n. 3 (1932). The internal quotation is from Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).

[856] § 3(a), 44 Stat. 1424 (1927), 33 U.S.C. § 903(a).

[857] Crowell v. Benson, 284 U.S. 22, 39, (1932); Davis v. Department of Labor and Industries, 317 U.S. 249, 252-253 (1942).

was a "twilight zone," a "shadowy area," in which recovery under either the federal law or a state law could be justified, and held that in such a "twilight zone" the injured party should be enabled to recover under either.[858] Then, in *Calbeck v. Travelers Ins. Co.*,[859] the Court virtually read out of the Act its inapplicability when compensation would be afforded by state law and held that Congress' intent in enacting the statute was to extend coverage to all workers who sustain injuries while on navigable waters of the United States whether or not a particular injury was also within the constitutional reach of a state workmen's compensation law or other law. By the 1972 amendments to the LHWCA, Congress extended the law shoreward by refining the tests of "employee" and "navigable waters," so as to reach piers, wharfs, and the like in certain circumstances.[860]

(2) The passage of the Jones Act[861] gave seamen a statutory right of recovery for negligently inflicted injuries on which they could sue in state or federal courts. Because injured parties could obtain a jury trial in Jones Act suits, there was little attempted recourse under the savings clause[862] to state law claims and thus no need to explore the line between applicable and inapplicable state law. But in the 1940s personal injury actions based on unseaworthiness[863] were given new life by Court decisions for seamen;[864] and the right was soon extended to longshoremen who were injured while on board ship or while working on the dock if the injury could be attributed either to the ship's gear or its

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[858] Davis v. Dept of Labor and Industries, 317 U.S. 249 (1942). The quoted phrases appear at id. at 253, 256. *See also* Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959).

[859] 370 U.S. 114 (1962). In the 1972 amendments, § 2, 86 Stat. 1251, amending 33 U.S.C. § 903(a), Congress ratified Calbeck by striking out "if recovery . . . may not validly be provided by State law."

[860] 86 Stat. 1251, § 2, amending 33 U.S.C. § 902. The Court had narrowly turned back an effort to achieve this result through construction in Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). *See also* Victory Carriers v. Law, 404 U.S. 202 (1971). On the interpretation of the amendments, *see* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); Director, Office of Workers Compensation Programs v. Perini, 459 U.S. 297 (1983).

[861] 41 Stat. 1007 (1920), 46 U.S.C. § 688. For the prior-Jones Act law, *see* The Osceola, 189 U.S. 158 (1903)

[862] Supra, "Cases of Admiralty and Maritime Jurisdiction".

[863] Unseaworthiness "is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . [T]he owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." Mitchell v. Trawler Racer, 362 U.S. 539, 549 (1960).

[864] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *See also* Mitchell v. Trawler Racer, 362 U.S. 539 (1960); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960); Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967).

cargo.[865] While these actions could have been brought in state court, federal law supplanted state law even with regard to injuries sustained in state territorial waters.[866] The 1972 LHWCA amendments, however, eliminated unseaworthiness recoveries by persons covered by the Act and substituted a recovery for injuries caused by negligence under the LHWCA itself.[867]

(3) In *The Harrisburg*,[868] the Court held that maritime law did not afford an action for wrongful death, a position to which the Court adhered until 1970.[869] The Jones Act,[870] the Death on the High Seas Act,[871] and the Longshoremen's and Harbor Workers' Compensation Act[872] created causes of action for wrongful death, but for cases not falling within one of these laws the federal courts looked to state wrongful death and survival statutes.[873] Thus, in *The Tungus v. Skovgaard*,[874] the Court held that a state wrongful death statute encompassed claims both for negligence and unseaworthiness in the instance of a land-based worker killed when on board ship in navigable water; the Court divided five-to-four, however, in holding that the standards of the duties to furnish a seaworthy vessel and to use due care were created by the state law as well and not furnished by general maritime con-

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[865] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Alaska S.S. Co. v. Patterson, 347 U.S. 396 (1954); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); *But see* Usner v. Luckenback Overseas Corp., 400 U.S. 494 (1971); Victory Carriers v. Law, 404 U.S. 202 (1971).

[866] Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

[867] 86 Stat. 1263, § 18, amending 33 U.S.C. § 905. On the negligence standards under the amendment, *see* Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156 (1981).

[868] 119 U.S. 199 (1886). Subsequent cases are collected in Moragne v. States Marine Lines, 398 U.S. 375 (1970).

[869] Moragne v. States Marine Lines, 398 U.S. 375 (1970).

[870] 41 Stat. 1007 (1920). 46 U.S.C. § 688. Recovery could be had if death resulted from injuries because of negligence but not from unseaworthiness.

[871] 41 Stat. 537 (1920), 46 U.S.C. § 761 et seq. The Act applies to deaths caused by negligence occurring on the high seas beyond a marine league from the shore of any State. In Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), a unanimous Court held that this Act did not apply in cases of deaths on the artificial islands created on the continental shelf for oil drilling purposes but that the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C.§ 1331 et seq., incorporated the laws of the adjacent State, so that Louisiana law governed. *See also* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). However, in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), the Court held that the Act is the exclusive wrongful death remedy in the case of OCS platform workers killed in a helicopter crash 35 miles off shore en route to shore from a platform.

[872] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-950.

[873] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Just v. Chambers, 312 U.S. 383 (1941); Levinson v. Deupree, 345 U.S. 648 (1953).

[874] 358 U.S. 588 (1959).

cepts.[875] And in *Hess v. United States*,[876] embracing a suit under the Federal Tort Claims Act for recovery for a death by drowning in a navigable Oregon river of an employee of a contractor engaged in repairing the federally-owned Bonneville Dam, a divided Court held that liability was to be measured by the standard of care expressed in state law, notwithstanding that the standard was higher than that required by maritime law. One area existed, however, in which beneficiaries of a deceased seaman were denied recovery.

The Jones Act provided a remedy for wrongful death resulting from negligence, but not for one caused by unseaworthiness alone; in *Gillespie v. United States Steel Corp.*,[877] the Court held that the survivors of a seaman drowned while working on a ship docked in an Ohio port could not recover under the state wrongful death statute even though the act recognized unseaworthiness as a basis for recovery, the Jones Act having superseded state laws.

Thus did matters stand until 1970, when the Court, in a unanimous opinion in *Moragne v. States Marine Lines*,[878] overruled its earlier cases and held that a right of recovery for wrongful death is sanctioned by general maritime law and that no statute is needed to bring the right into being. The Court was careful to note that the cause of action created in *Moragne* would not, like the state wrongful death statutes in *Gillespie*, be held precluded by the Jones Act, so that the survivor of a seaman killed in navigable waters within a State would have a cause of action for negligence under the Jones Act or for unseaworthiness under the general maritime law.[879]

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[875] Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, argued that the extent of the duties owed the decedent while on board ship should be governed by federal maritime law, though the cause of action originated in a state statute, just as would have been the result had decedent survived his injuries. *See also* United N.Y. & N.J. Sandy Hooks Pilot Ass'n v. Halecki, 358 U.S. 613 (1959).

[876] 361 U.S. 314 (1960). The four *Tungus* dissenters joined two of the *Tungus* majority solely "under compulsion" of the *Tungus* ruling; the other three majority Justices dissented on the ground that application of the state statute unacceptably disrupted the uniformity of maritime law.

[877] 379 U.S. 148 (1964). The decision was based on dictum in Lindgren v. United States, 281 U.S. 38 (1930), to the effect that the Jones Act remedy was exclusive.

[878] 398 U.S. 375 (1970).

[879] 398 U.S. at 396 n.12. For development of the law under *Moragne*, *see* Sea-Land Services v. Gaudet, 414 U.S. 573 (1974); Miles v. Apex Marine Corp., 498 U.S. 19 (1990); and Norfolk Shipbuilding and Drydock Co. v. Garris, 532 U.S. 811 (2001) (maritime cause of action for death caused by violation of the duty of seaworthiness is equally applicable to death resulting from negligence). But, in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), a case involving a death in territorial waters from a jet ski accident, the Court held that *Moragne* does not provide the exclusive remedy in cases involving the death in territorial waters of a "nonseafarer"—a person who is neither a seaman covered by the Jones Act nor a longshore worker covered by the LHWCA.

Cases to Which the United States Is a Party

Right of the United States to Sue.—In the first edition of his *Treatise*, Justice Story noted that while "an express power is no where given in the constitution," the right of the United States to sue in its own courts "is clearly implied in that part respecting the judicial power. . . . Indeed, all the usual incidents appertaining to a *personal* sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns."[880] As early as 1818, the Supreme Court ruled that the United States could sue in its own name in all cases of contract without congressional authorization of such suits.[881] Later, this rule was extended to other types of actions. In the absence of statutory provisions to the contrary, such suits are initiated by the Attorney General in the name of the United States.[882]

By the Judiciary Act of 1789, and subsequent amendments thereof, Congress has vested in the federal district courts jurisdiction to hear all suits of a civil nature at law or in equity brought by the United States as party plaintiff.[883] As in other judicial proceedings, the United States, like any party plaintiff, must have an interest in the subject matter and a legal right to the remedy sought.[884] Under the long settled principle that the courts have the power to abate public nuisances at the suit of the Government, the provision in § 208(2) of the Labor Management Relations Act of 1949, authorizing federal courts to enjoin strikes which imperil national health or safety was upheld for the reason that the statute entrusts the courts with the determination of a "case or con-

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[880] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1274 (1833), (emphasis in original).

[881] Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818).

[882] United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); United States v. Beebe, 127 U.S. 338 (1888); United States v. Bell Telephone Co., 128 U.S. 315 (1888). Whether without statutory authorization the United States may sue to protect the constitutional rights of its citizens has occasioned conflict. *Compare* United States v. Brand Jewelers, 318 F. Supp. 1293 (S.D.N.Y. 1970), *and* United States v. Brittain, 319 F. Supp. 1658 (S.D.Ala. 1970), *with* United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979), and United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977). The result in *Mattson* and *Solomon* was altered by specific authorization in the Civil Rights of Institutionalized Persons Act, Pub. L. 96-247, 94 Stat. 349 (1980), 42 U.S.C. § 1997 *et seq*. *And see* United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) (no standing to sue to correct allegedly unconstitutional police practices).

[883] 28 U.S.C. § 1345. By virtue of the fact that the original jurisdiction of the Supreme Court extends only to those cases enumerated in the Constitution, jurisdiction over suits brought by the United States against persons or corporations is vested in the lower federal courts. But suits by the United States against a State may be brought in the Supreme Court's original jurisdiction, 28 U.S.C. § 1251(b)(2), but may as well be brought in the district court. Case v. Bowles, 327 U.S. 92, 97 (1946).

[884] United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).

troversy" on which the judicial power can operate and does not impose any legislative, executive, or non-judicial function. Moreover, the fact that the rights sought to be protected were those of the public in unimpeded production in industries vital to public health, as distinguished from the private rights of labor and management, was held not to alter the adversary ("case or controversy") nature of the litigation instituted by the United States as the guardian of the aforementioned rights.[885] Also, by reason of the highest public interest in the fulfillment of all constitutional guarantees, "including those that bear . . . directly on private rights, . . . it [is] perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief."[886]

Suits Against States.—Controversies to which the United States is a party include suits brought against States as party defendants. The first such suit occurred in *United States v. North Carolina*,[887] which was an action by the United States to recover upon bonds issued by North Carolina. Although no question of jurisdiction was raised, in deciding the case on its merits in favor of the State, the Court tacitly assumed that it had jurisdiction of such cases. The issue of jurisdiction was directly raised by Texas a few years later in a bill in equity brought by the United States to determine the boundary between Texas and the Territory of Oklahoma, and the Court sustained its jurisdiction over strong arguments by Texas to the effect that it could not be sued by the United States without its consent and that the Supreme Court's original jurisdiction did not extend to cases to which the United States is a party.[888] Stressing the inclusion within the judicial power of cases to which the United States and a State are parties, the elder Justice Harlan pointed out that the Constitution made no exception of suits brought by the United States. In effect, therefore, consent to be sued by the United States "was given by Texas when admitted to the Union upon an equal footing in all respects with the other States."[889]

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[885] United Steelworkers v. United States, 361 U.S. 39, 43-44 (1960), citing In re Debs, 158 U.S. 564 (1895).

[886] United States v. Raines, 362 U.S. 17, 27 (1960), upholding jurisdiction of the federal court as to an action to enjoin state officials from discriminating against African-American citizens seeking to vote in state elections. *See also* Oregon v. Mitchell, 400 U.S. 112 (1970), in which two of the four cases considered were actions by the United States to enjoin state compliance with the Voting Rights Act Amendments of 1970.

[887] 136 U.S. 211 (1890).

[888] United States v. Texas, 143 U.S. 621 (1892).

[889] 143 U.S. at 642-46. This suit, it may be noted, was specifically authorized by the Act of Congress of May 2, 1890, providing for a temporary government for the Oklahoma territory to determine the ownership of Greer County. 26 Stat. 81, 92, § 25. *See also* United States v. Louisiana, 339 U.S. 699, 701-02 (1950).

Suits brought by the United States have, however, been infrequent. All of them have arisen since 1889, and they have become somewhat more common since 1926. That year the Supreme Court decided a dispute between the United States and Minnesota over land patents issued to the State by the United States in breach of its trust obligations to the Indian.[890] In *United States v. West Virginia*,[891] the Court refused to take jurisdiction of a suit in equity brought by the United States to determine the navigability of the New and Kanawha Rivers on the ground that the jurisdiction in such suits is limited to cases and controversies and does not extend to the adjudication of mere differences of opinion between the officials of the two governments. A few years earlier, however, it had taken jurisdiction of a suit by the United States against Utah to quiet title to land forming the beds of certain sections of the Colorado River and its tributaries with the States.[892] Similarly, it took jurisdiction of a suit brought by the United States against California to determine the ownership of and paramount rights over the submerged land and the oil and gas thereunder off the coast of California between the low-water mark and the three-mile limit.[893] Like suits were decided against Louisiana and Texas in 1950.[894]

Immunity of the United States From Suit.—Pursuant to the general rule that a sovereign cannot be sued in its own courts, it follows that the judicial power does not extend to suits against the United States unless Congress by general or special enactment consents to suits against the Government. This rule first emanated in embryonic form in an *obiter dictum* by Chief Justice Jay in *Chisholm v. Georgia*, where he indicated that a suit would not lie against the United States because "there is no power which the courts can call to their aid."[895] In *Cohens v. Virginia*,[896] also by way of dictum, Chief Justice Marshall asserted, "the universally received opinion is that no suit can be commenced or prosecuted against the United States." The issue was more directly in question in *United States v. Clarke*,[897] where Chief Justice Marshall stated that as the United States is "not suable of common right, the party who institutes such suit must bring his case within the authority

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[890] United States v. Minnesota, 270 U.S. 181 (1926). For an earlier suit against a State by the United States, *see* United States v. Michigan, 190 U.S. 379 (1903).

[891] 295 U.S. 463 (1935).

[892] United States v. Utah, 283 U.S. 64 (1931).

[893] United States v. California, 332 U.S. 19 (1947).

[894] United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). *See also* United States v. Maine, 420 U.S. 515 (1975)

[895] 2 U.S. (2 Dall.) 419, 478 (1793).

[896] 19 U.S. (6 Wheat.) 264, 412 (1821).

[897] 33 U.S. (8 Pet.) 436, 444 (1834).

of some act of Congress, or the court cannot exercise jurisdiction over it." He thereupon ruled that the act of May 26, 1830, for the final settlement of land claims in Florida condoned the suit. The doctrine of the exemption of the United States from suit was repeated in various subsequent cases, without discussion or examination.[898] Indeed, it was not until *United States v. Lee*[899] that the Court examined the rule and the reasons for it, and limited its application accordingly.

Since suits against the United States can be maintained only by permission, it follows that they can be brought only in the manner prescribed by Congress and subject to the restrictions imposed.[900] Only Congress can take the necessary steps to waive the immunity of the United States from liability for claims, and hence officers of the United States are powerless by their actions either

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[898] United States v. McLemore, 45 U.S. (4 How.) 286 (1846); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); De Groot v. United States, 72 U.S. (5 Wall.) 419, 431 (1867); United States v. Eckford, 73 U.S. (6 Wall.) 484, 488 (1868); The Siren, 74 U.S. (7 Wall.) 152, 154 (1869); Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1869); The Davis, 77 U.S. (10 Wall.) 15, 20 (1870); Carr v. United States, 98 U.S. 433, 437-439 (1879). It is also clear that the Federal Government, in the absence of its consent, is not liable in tort for the negligence of its agents or employees. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1869); Peabody v. United States, 231 U.S. 530, 539 (1913); Koekuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 127 (1922). The reason for such immunity as stated by Mr. Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), is because "there can be no legal right as against the authority that makes the law on which the right depends." *See also* the Western Maid, 257 U.S. 419, 433 (1922). As the Housing Act does not purport to authorize suits against the United States as such, the question is whether the Authority—which is clearly an agency of the United States—partakes of this sovereign immunity. The answer must be sought in the intention of the Congress. Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549, 570 (1922); Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935). This involves a consideration of the extent to which other Government-owned corporations have been held liable for their wrongful acts. 39 Ops. Atty. Gen. 559, 562 (1938).

[899] 106 U.S. 196 (1882).

[900] Lonergan v. United States, 303 U.S. 33 (1938). Waivers of immunity must be express. Library of Congress v. Shaw, 461 U.S. 273 (1983) (Civil Rights Act provision that "the United States shall be liable for costs the same as a private person" insufficient to waive immunity from awards of interest). The result in Shaw was overturned by a specific waiver. Civil Rights Act of 1991, Pub. L. 102-166, 106 Stat. 1079, § 113, amending 42 U.S.C. § 2000e-16. Immunity was waived, with limitations, for contracts and takings claims in the Tucker Act, 28 U.S.C. § 1346(a)(2). Immunity of the United States for the negligence of its employees was waived, again with limitations, in the Federal Tort Claims Act. 28 U.S.C. §1346(b). For recent waivers of sovereign immunity, *see* Pub. L. 94-574, § 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (waiver for nonstatutory review in all cases save for suits for money damages); Pub. L. 87-748, § 1(a), 76 Stat. 744 (1962), 28 U.S.C. § 1361 (giving district courts jurisdiction of mandamus actions to compel an officer or employee of the United States to perform a duty owed to plaintiff); Westfall Act, 102 Stat. 4563, 28 U.S.C. § 2679(d) (torts of federal employees acting officially). *See* FDIC v. Meyer, 510 U.S. 471 (1994) (FSLIC's "sue-and-be-sued" clause waives sovereign immunity; but a Bivens implied cause of action for constitutional torts cannot be used directly against FSLIC).

to waive such immunity or to confer jurisdiction on a federal court.[901] Even when authorized, suits can be brought only in designated courts.[902] These rules apply equally to suits by States against the United States.[903] Although an officer acting as a public instrumentality is liable for his own torts, Congress may grant or withhold immunity from suit on behalf of government corporations.[904]

Suits Against United States Officials.—*United States v. Lee*, a five-to-four decision, qualified earlier holdings that a judgment affecting the property of the United States was in effect against the United States, by ruling that title to the Arlington estate of the Lee family, then being used as a national cemetery, was not legally vested in the United States but was being held illegally by army officers under an unlawful order of the President. In its examination of the sources and application of the rule of sovereign immunity, the Court concluded that the rule "if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the rights of plaintiff when the United States is not a defendant or a necessary party to the suit."[905] Except, nevertheless, for an occasional case like *Kansas v. United States*,[906] which held that a State cannot sue the United States, most of the cases involving sovereign immunity from suit since 1883 have been cases against officers, agencies, or corporations of the United States where the United States has not been named as a party defendant. Thus, it has been held that a suit against the Secretary of the Treasury to review his decision on the rate of duty to be exacted on imported sugar would disturb the whole revenue system of the Government and would in effect be a suit against the United States.[907] Even

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[901] United States v. New York Rayon Co., 329 U.S. 654 (1947).

[902] United States v. Shaw, 309 U.S. 495 (1940). Any consent to be sued will not be held to embrace action in the federal courts unless the language giving consent is clear. Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

The earlier narrow interpretation of the exceptions to the waiver of immunity set forth in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), gradually has given way to a liberal construction. *Compare* Dalehite v. United States, 346 U.S. 15 (1953), *with* Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[903] Minnesota v. United States, 305 U.S. 382 (1939). The United States was held here to be an indispensable party defendant in a condemnation proceeding brought by a State to acquire a right of way over lands owned by the United States and held in trust for Indian allottees. *See also* Block v. North Dakota, 461 U.S. 273 (1983).

[904] Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943).

[905] United States v. Lee, 106 U.S. 196, 207-208 (1882). The Tucker Act, 20 U.S.C. § 1346(a)(2), now displaces the specific rule of the case, inasmuch as it provides jurisdiction against the United States for takings claims.

[906] 204 U.S. 331 (1907).

[907] Louisiana v. McAdoo, 234 U.S. 627, 628 (1914).

more significant is *Stanley v. Schwalby*,[908] which resembled without paralleling *United States v. Lee*, where it was held that an action of trespass against an army officer to try title in a parcel of land occupied by the United States as a military reservation was a suit against the United States because a judgment in favor of the plaintiffs would have been a judgment against the United States.

Subsequent cases repeat and reaffirm the rule of *United States v. Lee* that where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[909] Contrariwise, the rule that a suit in which the judgment would affect the United States or its property is a suit against the United States has also been repeatedly approved and reaffirmed.[910] But, as the Court has pointed out, it is not "an easy matter to reconcile all of the decisions of the court in this class of cases,"[911] and, as Justice Frankfurter quite justifiably stated in a dissent, "the subject is not free from casuistry."[912] Justice Douglas' characterization of *Land v. Dollar*, "this is the type of case where the question of *jurisdiction* is dependent on decision of the *merits*,"[913] is frequently applicable.

The case of *Larson v. Domestic & Foreign Corp.*,[914] illuminates these obscurities somewhat. A private company sought to enjoin the Administrator of the War Assets in his official capacity from selling surplus coal to others than the plaintiff who had originally bought the coal, only to have the sale cancelled by the Administrator because of the company's failure to make an advance payment. Chief Justice Vinson and a majority of the Court looked upon the suit as one brought against the Administrator in his official capacity, acting under a valid statute and therefore a suit against the United States. It held that although an officer in such a situation

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[908] 162 U.S. 255 (1896). Justice Gray endeavored to distinguish between this case and Lee. Id. at 271. It was Justice Gray who spoke for the dissenters in Lee.

[909] Land v. Dollar, 330 U.S. 731, 737 (1947).

[910] Oregon v. Hitchcock, 202 U.S. 60 (1906); Louisiana v. Garfield, 211 U.S. 70 (1908); New Mexico v. Lane, 243 U.S. 52 (1917); Wells v. Roper, 246 U.S. 335 (1918); Morrison v. Work, 266 U.S. 481 (1925); Minnesota v. United States, 305 U.S.. 382 (1939); Mine Safety Co. v. Forrestal, 326 U.S. 371 (1945). *See also* Minnesota v. Hitchcock, 185 U.S. 373 (1902).

[911] Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 451 (1883), quoted by Chief Justice Vinson in the opinion of the Court in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 698 (1949).

[912] *Larson*, 337 U.S. at 708. Justice Frankfurter's dissent also contains a useful classification of immunity cases and an appendix listing them.

[913] 330 U.S. 731, 735 (1947) (emphasis added).

[914] 337 U.S. 682 (1949).

is not immune from suits for his own torts, yet his official action, though tortious, cannot be enjoined or diverted, since it is also the action of the sovereign.[915] The Court then proceeded to repeat the rule that "the action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff's property) can be regarded as so individual only if it is not within the officer's statutory powers, or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void."[916] The Court rejected the contention that the doctrine of sovereign immunity should be relaxed as inapplicable to suits for specific relief as distinguished from damage suits, saying: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[917]

Suits against officers involving the doctrine of sovereign immunity have been classified by Justice Frankfurter in a dissenting opinion into four general groups. First, there are those cases in which the plaintiff seeks an interest in property which belongs to

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[915] 337 U.S. at 689-97.

[916] 337 U.S. at 701-02. This rule was applied in Goldberg v. Daniels, 231 U.S. 218 (1913), which also involved a sale of government surplus property. After the Secretary of the Navy rejected the highest bid, plaintiff sought mandamus to compel delivery. This suit was held to be against the United States. *See also* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), which held that prospective bidders for contracts derive no enforceable rights against a federal official for an alleged misinterpretation of his government's authority on the ground that an agent is answerable only to his principal for misconstruction of instructions, given for the sole benefit of the principal. In *Larson* the Court not only refused to follow Goltra v. Weeks, 271 U.S. 536 (1926), but in effect overruled it. The *Goltra* case involved an attempt of the Government to repossess barges which it had leased under a contract reserving the right to repossess in certain circumstances. A suit to enjoin repossession was held not to be a suit against the United States on the ground that the actions were personal and in the nature of a trespass. Also decided in harmony with the *Larson* decision are the following, wherein the suit was barred as being against the United States: (1) Malone v. Bowdoin, 369 U.S. 643 (1962), a suit to eject a Forest Service Officer from land occupied by him in his official capacity under a claim of title from the United States; and (2) Hawaii v. Gordon, 373 U.S. 57 (1963), an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that State. In Dugan v. Rank, 372 U.S. 609 (1963), the Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an action against the United States, for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. Damages were recoverable in a suit under the Tucker Act. 28 U.S.C. § 1346.

[917] 337 U.S. at 703-704. Justice Frankfurter, dissenting, would have applied the rule of the Lee case. *See* Pub. L. 94-574, 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (action seeking relief, except for money damages, against officer, employee, or agency not to be dismissed as action against United States).

the Government or calls "for an assertion of what is unquestionably official authority."[918] Such suits, of course, cannot be maintained.[919] Second, cases in which action adverse to the interests of a plaintiff is taken under an unconstitutional statute or one alleged to be so. In general these suits are maintainable.[920] Third, cases involving injury to a plaintiff because the official has exceeded his statutory authority. In general these suits are maintainable.[921] Fourth, cases in which an officer seeks immunity behind statutory authority or some other sovereign command for the commission of a common law tort.[922] This category of cases presents the greatest difficulties since these suits can as readily be classified as falling into the first group if the action directly or indirectly is one for specific performance or if the judgment would affect the United States.

Suits Against Government Corporations.—The multiplication of government corporations during periods of war and depression has provided one motivation for limiting the doctrine of sovereign immunity. In *Keifer & Keifer v. RFC*,[923] the Court held that the Government does not become a conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. Nor does the creation of a government corporation confer upon it legal immunity. Whether Congress endows a public corporation with governmental immunity in a specific instance is a matter of ascertaining the congressional will. Moreover, it has been held that waivers of governmental immunity in the case of federal instrumentalities and corporations should be construed liberally.[924] On the other hand, Indian nations are exempt from suit without further congressional authorization; it is as though their former im-

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[918] Larson v. Domestic & Foreign Corp., 337 U.S. 682, 709-710 (1949).

[919] Oregon v. Hitchcock, 202 U.S. 60 (1906); Louisiana v. McAdoo, 234 U.S. 627 (1914); Wells v. Roper, 246 U.S. 335 (1918). *See also* Belknap v. Schild, 161 U.S. 10 (1896); International Postal Supply Co. v. Bruce, 194 U.S. 601 (1904).

[920] Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939) (holding that one threatened with direct and special injury by the act of an agent of the Government under a statute may challenge the constitutionality of the statute in a suit against the agent).

[921] Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Waite v. Macy, 246 U.S. 606 (1918).

[922] United States v. Lee, 106 U.S. 196 (1882); Goltra v. Weeks, 271 U.S. 536 (1926); Ickes v. Fox, 300 U.S. 82 (1937); Land v. Dollar, 330 U.S. 731 (1947). *See also* Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959). An emerging variant is the constitutional tort case, which springs from Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and which involves different standards of immunity for officers. Butz v. Economou, 438 U.S. 478 (1978); Carlson v. Green, 446 U.S. 14 (1980); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[923] 306 U.S. 381 (1939).

[924] FHA v. Burr, 309 U.S. 242 (1940). Nonetheless, the Court held that a congressional waiver of immunity in the case of a governmental corporation did not mean that funds or property of the United States can be levied on to pay a judgment obtained against such a corporation as the result of waiver of immunity.

munity as sovereigns passed to the United States for their benefit, as did their tribal properties.[925]

Suits Between Two or More States

The extension of federal judicial power to controversies between States and the vesting of original jurisdiction in the Supreme Court of suits to which a State is a party had its origin in experience. Prior to independence, disputes between colonies claiming charter rights to territory were settled by the Privy Council. Under the Articles of Confederation, Congress was made "the last resort on appeal" to resolve "all disputes and differences ... between two or more States concerning boundary, jurisdiction, or any other cause whatever," and to constitute what in effect were *ad hoc* arbitral courts for determining such disputes and rendering a final judgment therein. When the Philadelphia Convention met in 1787, serious disputes over boundaries, lands, and river rights involved ten States.[926] It is hardly surprising, therefore, that during its first sixty years the only state disputes coming to the Supreme Court were boundary disputes[927] or that such disputes constitute the largest single number of suits between States. Since 1900, however, as the result of the increasing mobility of population and wealth and the effects of technology and industrialization, other types of cases have occurred with increasing frequency.

Boundary Disputes: The Law Applied.—Of the earlier examples of suits between States, that between New Jersey and New York[928] is significant for the application of the rule laid down earlier in *Chisholm v. Georgia* that the Supreme Court may proceed *ex parte* if a State refuses to appear when duly summoned. The long drawn out litigation between Rhode Island and Massachusetts is of even greater significance for its rulings, after the case had been pending for seven years, that though the Constitution does not extend the judicial power to all controversies between States, yet it does not exclude any,[929] that a boundary dispute is a justiciable and not a political question,[930] and that a prescribed rule of decision is unnecessary in such cases. On the last point, Justice

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[925] United States v. United States Fidelity Co., 309 U.S. 506 (1940).

[926] Warren, *The Supreme Court and Disputes Between States*, 34 BULL. OF WILLIAM AND MARY, NO. 4 (1940), 7-11. For a more comprehensive treatment of background as well as the general subject, *see* C. WARREN, THE SUPREME COURT AND THE SOVEREIGN STATES (1924).

[927] Id. at 13. However, only three such suits were brought in this period, 1789-1849. During the next 90 years, 1849-1939, at least twenty-nine such suits were brought. Id. at 13, 14.

[928] New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1931).

[929] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

[930] 37 U.S. at 736-37.

Baldwin stated: "The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo*, *sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires."[931]

Modern Types of Suits Between States.—Beginning with *Missouri v. Illinois & Chicago District*,[932] which sustained jurisdiction to entertain an injunction suit to restrain the discharge of sewage into the Mississippi River, water rights, the use of water resources, and the like, have become an increasing source of suits between States. Such suits have been especially frequent in the western States, where water is even more of a treasure than elsewhere, but they have not been confined to any one region. In *Kansas v. Colorado*,[933] the Court established the principle of the equitable division of river or water resources between conflicting state interests. In *New Jersey v. New York*,[934] where New Jersey sought to enjoin the diversion of waters into the Hudson River watershed for New York in such a way as to diminish the flow of the Delaware River in New Jersey, injure its shad fisheries, and increase harmfully the saline contents of the Delaware, Justice Holmes stated for the Court: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not

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[931] 37 U.S. at 737. Chief Justice Taney dissented because of his belief that the issue was not one of property in the soil, but of sovereignty and jurisdiction, and hence political. Id. at 752-53. For different reasons, it should be noted, a suit between private parties respecting soil or jurisdiction of two States, to which neither State is a party, does not come within the original jurisdiction of the Supreme Court. Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799). For recent boundary cases, *see* United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985); United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93 (1985); United States v. Maine, 475 U.S. 89 (1986); Georgia v. South Carolina, 497 U.S. 336 (1990); Mississippi v. Louisiana, 506 U.S. 73 (1992).

[932] 180 U.S. 208 (1901).

[933] 206 U.S. 46 (1907). *See also* Idaho ex rel. Evans v. Oregon and Washington, 444 U.S. 380 (1980).

[934] 283 U.S. 336 (1931).

be tolerated. And, on the other hand, equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the river that must be reconciled as best they may be." [935]

Other types of interstate disputes of which the Court has taken jurisdiction include suits by a State as the donee of the bonds of another to collect thereon, [936] by Virginia against West Virginia to determine the proportion of the public debt of the original State of Virginia which the latter owed the former, [937] by Arkansas to enjoin Texas from interfering with the performance of a contract by a Texas foundation to contribute to the construction of a new hospital in the medical center of the University of Arkansas, [938] of one State against another to enforce a contract between the two, [939] of a suit in equity between States for the determination of a decedent's domicile for inheritance tax purposes, [940] and of a suit by two States to restrain a third from enforcing a natural gas measure which purported to restrict the interstate flow of natural gas from the State in the event of a shortage. [941]

In *Texas v. New Jersey*, [942] the Court adjudicated a multistate dispute about which State should be allowed to escheat intangible property consisting of uncollected small debts held by a corpora-

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[935] 283 U.S. at 342. *See also* Nebraska v. Wyoming, 325 U.S. 589 (1945); Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983). In Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court held it had jurisdiction of a suit by a State against citizens of other States to abate a nuisance allegedly caused by the dumping of mercury into streams that ultimately run into Lake Erie, but it declined to permit the filing because the presence of complex scientific issues made the case more appropriate for first resolution in a district court. *See also* Texas v. New Mexico, 462 U.S. 554 (1983); Nevada v. United States, 463 U.S. 110 (1983).

[936] South Dakota v. North Carolina, 192 U.S. 286 (1904).

[937] Virginia v. West Virginia, 220 U.S. 1 (1911).

[938] Arkansas v. Texas, 346 U.S. 368 (1953).

[939] Kentucky v. Indiana, 281 U.S. 163 (1930).

[940] Texas v. Florida, 306 U.S. 398 (1939). In California v. Texas, 437 U.S. 601 (1978), the Court denied a State leave to file an original action against another State to determine the contested domicile of a decedent for death tax purposes, with several Justices of the view that Texas v. Florida had either been wrongly decided or was questionable. But after determining that an interpleader action by the administrator of the estate for a determination of domicile was barred by the Eleventh Amendment, Cory v. White, 457 U.S. 85 (1982), the Court over dissent permitted filing of the original action. California v. Texas, 457 U.S. 164 (1982).

[941] Pennsylvania v. West Virginia, 262 U.S. 553 (1923). The Court, in Maryland v. Louisiana, 451 U.S. 725 (1981), over strong dissent, relied on this case in permitting suit contesting a tax imposed on natural gas, the incidence of which fell on the suing State's consuming citizens. And in Wyoming v. Oklahoma, 502 U.S. 437 (1992), the Court permitted a State to sue another to contest a law requiring that all in-state utilities burn a mixture containing at least 10% in-state coal, the plaintiff State having previously supplied 100% of the coal to those utilities and thus suffering a loss of coal-severance tax revenues.

[942] 379 U.S. 674 (1965). *See also* Pennsylvania v. New York, 406 U.S. 206 (1972).

tion. Emphasizing that the States could not constitutionally provide a rule of settlement and that no federal statute governed the matter, the Court evaluated the possible rules and chose the one easiest to apply and least likely to lead to continuing disputes.

In general, in taking jurisdiction of these suits, along with those involving boundaries and the diversion or pollution of water resources, the Supreme Court proceeded upon the liberal construction of the term "controversies between two or more States" enunciated in *Rhode Island v. Massachusetts*,[943] and fortified by Chief Justice Marshall's dictum in *Cohens v. Virginia*,[944] concerning jurisdiction because of the parties to a case, that "it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."[945]

Cases of Which the Court Has Declined Jurisdiction.—In other cases, however, the Court, centering its attention upon the elements of a case or controversy, has declined jurisdiction. Thus, in *Alabama v. Arizona*,[946] where Alabama sought to enjoin nineteen States from regulating or prohibiting the sale of convict-made goods, the Court went far beyond holding that it had no jurisdiction, and indicated that jurisdiction of suits between States will be exercised only when absolutely necessary, that the equity requirements in a suit between States are more exacting than in a suit between private persons, that the threatened injury to a plaintiff State must be of great magnitude and imminent, and that the burden on the plaintiff State to establish all the elements of a case is greater than that generally required by a petitioner seeking an injunction suit in cases between private parties.

Pursuing a similar line of reasoning, the Court declined to take jurisdiction of a suit brought by Massachusetts against Missouri and certain of its citizens to prevent Missouri from levying inheritance taxes upon intangibles held in trust in Missouri by resident

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[943] 37 U.S. (12 Pet.) 657 (1838).

[944] 19 U.S. (6 Wheat.) 264 (1821).

[945] 19 U.S. at 378. *See* Western Union Co. v. Pennsylvania, 368 U.S. 71, 79-80 (1961); Texas v. New Jersey, 379 U.S. 674, 677 (1965); Pennsylvania v. New York, 407 U.S. 206 (1972).

[946] 291 U.S. 286 (1934). The Court in recent years, with a significant caseload problem, has been loath to permit filings of original actions where the parties might be able to resolve their disputes in other courts, even in cases in which the jurisdiction over the particular dispute is exclusively original. Arizona v. New Mexico, 425 U.S. 794 (1976) (dispute subject of state court case brought by private parties); California v. West Virginia, 454 U.S. 1027 (1981). But in Mississippi v. Louisiana, 506 U.S. 73 (1992), the Court's reluctance to exercise original jurisdiction ran afoul of the "uncompromising language" of 28 U.S.C. § 1251(a) giving the Court "original and *exclusive* jurisdiction" of these kinds of suits.

trustees. In holding that the complaint presented no justiciable controversy, the Court declared that to constitute such a controversy, the complainant State must show that it "has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to ... the common law or equity systems of jurisprudence."[947] The fact that the trust property was sufficient to satisfy the claims of both States and that recovery by either would not impair any rights of the other distinguished the case from *Texas v. Florida*,[948] where the contrary situation obtained. Furthermore, the Missouri statute providing for reciprocal privileges in levying inheritance taxes did not confer upon Massachusetts any contractual right. The Court then proceeded to reiterate its earlier rule that a State may not invoke the original jurisdiction of the Supreme Court for the benefit of its residents or to enforce the individual rights of its citizens.[949] Moreover, Massachusetts could not invoke the original jurisdiction of the Court by the expedient of making citizens of Missouri parties to a suit not otherwise maintainable.[950] Accordingly, Massachusetts was held not to be without an adequate remedy in Missouri's courts or in a federal district court in Missouri.

The Problem of Enforcement: Virginia v. West Virginia.— A very important issue in interstate litigation is the enforcement of the Court's decree, once it has been entered. In some types of suits, this issue may not arise, and if it does, it may be easily met. Thus, a judgment putting a State in possession of disputed territory is ordinarily self-executing. But if the losing State should oppose execution, refractory state officials, as individuals, would be liable to civil suits or criminal prosecutions in the federal courts. Likewise an injunction may be enforced against state officials as individuals by civil or criminal proceedings. Those judgments, on the other hand, which require a State in its governmental capacity to perform some positive act present the issue of enforcement in more serious form. The issue arose directly in the long and much litigated case between Virginia and West Virginia over the propor-

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[947] Massachusetts v. Missouri, 308 U.S. 1, 15-16, (1939), citing Florida v. Mellon, 273 U.S. 12 (1927).

[948] 306 U.S. 398 (1939).

[949] 308 U.S. at 17, citing Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277, 286 (1911), and Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 394 (1938). *See also* New Hampshire v. Louisiana and New York v. Louisiana, 108 U.S. 76 (1883), which held that a State cannot bring a suit on behalf of its citizens to collect on bonds issued by another State, and Louisiana v. Texas, 176 U.S. 1 (1900), which held that a State cannot sue another to prevent maladministration of quarantine laws.

[950] 308 U.S. at 17, 19.

tion of the state debt of original Virginia owed by West Virginia after its separate admission to the Union under a compact which provided that West Virginia assume a share of the debt.

The suit was begun in 1906, and a judgment was rendered against West Virginia in 1915. Finally, in 1917, Virginia filed a suit against West Virginia to show cause why, in default of payment of the judgment, an order should not be entered directing the West Virginia legislature to levy a tax for payment of the judgment.[951] Starting with the rule that the judicial power essentially involves the right to enforce the results of its exertion,[952] the Court proceeded to hold that it applied with the same force to States as to other litigants[953] and to consider appropriate remedies for the enforcement of its authority. In this connection, Chief Justice White declared: "As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the federal government, judicial, legislative, or executive, which may be appropriately exercised."[954] The Court, however, left open the question of its power to enforce the judgment under existing legislation and scheduled the case for reargument at the next term, but in the meantime West Virginia accepted the Court's judgment and entered into an agreement with Virginia to pay it.[955]

Controversies Between a State and Citizens of Another State

The decision in *Chisholm v. Georgia*[956] that this category of cases included those where a State was a party defendant provoked the proposal and ratification of the Eleventh Amendment, and since then controversies between a State and citizens of another State have included only those cases where the State has been a party plaintiff or has consented to be sued.[957] As a party plaintiff, a State may bring actions against citizens of other States to protect its legal rights or in some instances as *parens patriae* to protect the health and welfare of its citizens. In general, the Court has tended to construe strictly this grant of judicial power, which simulta-

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[951] The various litigations of Virginia v. West Virginia are to be found in 206 U.S. 290 (1907); 209 U.S. 514 (1908); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S. 531 (1916); 246 U.S. 565 (1918).

[952] 246 U.S. at 591.

[953] 246 U.S. at 600.

[954] 246 U.S. at 601.

[955] C. WARREN, THE SUPREME COURT AND SOVEREIGN STATES 78-79 (1924).

[956] 2 U.S. (2 Dall.) 419 (1793).

[957] *See* the discussion under the Eleventh Amendment.

neously comes within its original jurisdiction, by perhaps an even more rigorous application of the concepts of cases and controversies than that in cases between private parties.[958] This it does by holding rigorously to the rule that all the party defendants be citizens of other States[959] and by adhering to congressional distribution of its original jurisdiction concurrently with that of other federal courts.[960]

Jurisdiction Confined to Civil Cases.—In *Cohens v. Virginia*,[961] there is a dictum to the effect that the original jurisdiction of the Supreme Court does not include suits between a State and its own citizens. Long afterwards, the Supreme Court dismissed an action for want of jurisdiction because the record did not show that the corporation against which the suit was brought was chartered in another State.[962] Subsequently, the Court has ruled that it will not entertain an action by a State to which its citizens are either parties of record or would have to be joined because of the effect of a judgment upon them.[963] In his dictum in *Cohens v. Virginia*, Chief Justice Marshall also indicated that perhaps no jurisdiction existed over suits by States to enforce their penal laws.[964] Sixty-seven years later, the Court wrote this dictum into law in *Wisconsin v. Pelican Ins. Co.*[965] Wisconsin sued a Louisiana corporation to recover a judgment rendered in its favor by one of its own courts. Relying partly on the rule of international law that the courts of no country execute the penal laws of another, partly upon the 13th section of the Judiciary Act of 1789, which vested the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a State is a party, and partly on Justice Iredell's dissent in *Chisholm v. Georgia*,[966] where he confined the term "controversies" to civil suits, Justice Gray ruled for the Court that for purposes of original jurisdiction, "controversies between a State and citizens of another State" are confined to civil suits.[967]

The State's Real Interest.—Ordinarily, a State may not sue in its name unless it is the real party in interest with real inter-

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[958] Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); New Jersey v. Sargent, 269 U.S. 328 (1926).

[959] Pennsylvania v. Quicksilver Co., 77 U.S. (10 Wall.) 553 (1871); California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[960] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[961] 19 U.S. (6 Wheat.) 264, 398-399 (1821).

[962] Pennsylvania v. Quicksilver Mining Co., 77 U.S. (10 Wall.) 553 (1871).

[963] California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[964] 19 U.S. (6 Wheat.) at 398-399.

[965] 127 U.S. 265 (1888).

[966] 2 U.S. (2 Dall.) 419, 431-432 (1793).

[967] 127 U.S. at 289-300.

ests. It can sue to protect its own property interests,[968] and if it sues for its own interest as owner of another State's bonds, rather than as an assignee for collection, jurisdiction exists.[969] Where a State in order to avoid the limitation of the Eleventh Amendment by statute provided for suit in the name of the State to collect on the bonds of another State held by one of its citizens, it was refused the right to sue.[970] Nor can a State sue on behalf of its own citizens the citizens of other States to collect claims.[971]

The State as Parens Patriae.—The distinction between suits brought by States to protect the welfare of its citizens as a whole and suits to protect the private interests of individual citizens is not easily drawn. Thus, in *Oklahoma v. Atchison, T. & S.F. Ry.*,[972] the State was refused permission to sue to enjoin unreasonable rate charges by a railroad on the shipment of specified commodities, inasmuch as the State was not engaged in shipping these commodities and had no proprietary interest in them. But in *Georgia v. Pennsylvania R.R.*,[973] a closely divided Court accepted a suit by the State, suing as *parens patriae* and in its proprietary capacity, the latter being treated by the Court as something of a makeweight, seeking injunctive relief against twenty railroads on allegations that the rates were discriminatory against the State and its citizens and their economic interests and that the rates had been fixed through coercive action by the northern roads against the southern lines in violation of the Clayton Antitrust Act. For the Court, Justice Douglas observed that the interests of a State for purposes of invoking the original jurisdiction of the Court were not to be confined to those which are proprietary but rather "embrace the so called 'quasi-sovereign' interests which . . . are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'"[974]

Discriminatory freight rates, the Justice continued, may cause a blight no less serious than noxious gases in that they may arrest

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[968] Pennsylvania v. Wheeling & B. Bridge Co., 54 U.S. (13 How.) 518, 559 (1852); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); Georgia v. Evans, 316 U.S. 159 (1942).

[969] South Dakota v. North Carolina, 192 U.S. 286 (1904).

[970] New Hampshire v. Louisiana, 108 U.S. 76 (1883).

[971] Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938).

[972] 220 U.S. 277 (1911).

[973] 324 U.S. 439 (1945).

[974] 324 U.S. at 447-48 (quoting from Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), in which the State was permitted to sue *parens patriae* to enjoin defendant from emitting noxious gases from its works in Tennessee which caused substantial damage in nearby areas of Georgia). In Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607-608 (1982), the Court attempted to enunciate the standards by which to recognize permissible *parens patriae* assertions. *See also* Maryland v. Louisiana, 451 U.S. 725, 737-739 (1981).

the development of a State and put it at a competitive disadvantage. "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction."[975]

The continuing vitality of this case is in some doubt, inasmuch as the Court has limited it in a similar case.[976] But the ability of States to act as *parens patriae* for their citizens in environmental pollution cases seems established, although as a matter of the Supreme Court's original jurisdiction such suits are not in favor.[977]

One clear limitation had seemed to be solidly established until recent litigation cast doubt on its foundation. It is no part of a State's "duty or power," said the Court in *Massachusetts v. Mellon*,[978] "to enforce [her citizens'] rights in respect to their relations with the Federal Government. In that field, it is the United States and not the State which represents them as *parens patriae* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as

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[975] Georgia v. Pennsylvania R. R. Co., 324 U.S. 439, 468 (1945). Chief Justice Stone and Justices Roberts, Frankfurter, and Jackson dissented.

[976] In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Court, five-to-two, held that the State could not maintain an action for damages *parens patriae* under the Clayton Act and limited the previous case to instances in which injunctive relief is sought. Hawaii had brought its action in federal district court. The result in Hawaii was altered by Pub. L. 94-435, 90 Stat. 1383 (1976), 15 U.S.C. § 15c *et seq.*, but the decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), reduced in importance the significance of the law.

[977] Most of the cases, *but see* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), concern suits by one State against another. Missouri v. Illinois, 180 U.S. 208 (1901); New York v. New Jersey, 256 U.S. 296 (1921); North Dakota v. Minnesota, 263 U.S. 365 (1923). While recognizing that original jurisdiction exists when a State sues a political subdivision of another State or a private party as *parens patriae* for its citizens and on its own proprietary interests to abate environmental pollution, the Court has held that because of the technical complexities of the issues and the inconvenience of adjudicating them on its original docket the cases should be brought in the federal district court under federal question jurisdiction founded on the federal common law. Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Washington v. General Motors Corp., 406 U.S. 109 (1972). The Court had earlier thought the cases must be brought in state court. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

[978] 262 U.S. 447, 486 (1923).

flow from that status." But in *South Carolina v. Katzenbach*,[979] while holding that the State lacked standing under *Massachusetts v. Mellon* to attack the constitutionality of the Voting Rights Act of 1965[980] under the Fifth Amendment's due-process clause and under the bill-of-attainder clause of Article I,[981] the Court proceeded to decide on the merits the State's claim that Congress had exceeded its powers under the Fifteenth Amendment.[982] Was the Court here *sub silentio* permitting it to assert its interest in the execution of its own laws, rather than those enacted by Congress, or its interest in having Congress enact only constitutional laws for application to its citizens, an assertion which is contrary to a number of supposedly venerated cases.[983] Either alternative possibility would be significant in a number of respects.[984]

Controversies Between Citizens of Different States

The records of the Federal Convention are silent with regard to the reasons the Framers included in the judiciary article jurisdiction in the federal courts of controversies between citizens of dif-

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[979] 383 U.S. 301 (1966). The State sued the Attorney General of the United States as a citizen of New Jersey, thus creating the requisite jurisdiction, and avoiding the problem that the States may not sue the United States without its consent. Minnesota v. Hitchcock, 185 U.S. 373 (1902); Oregon v. Hitchcock, 202 U.S. 60 (1906); Kansas v. United States, 204 U.S. 331 (1907). The expedient is, of course, the same device as is used to avoid the Eleventh Amendment prohibition against suing a State by suing its officers. Ex parte Young, 209 U.S. 123 (1908).

[980] 79 Stat. 437 (1965), 42 U.S.C. § 1973 *et seq*.

[981] The Court first held that neither of these provisions were restraints on what the Federal Government might do with regard to a State. It then added: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parents patriae of every American citizen." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[982] The Court did not indicate on what basis South Carolina could raise the issue. At the beginning of its opinion, the Court did note the "[o]riginal jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the constitution. *See* Georgia v. Pennsylvania R. R. Co., 324 U.S. 439." Id. at 307 But surely this did not have reference to that case's *parens patriae* holding.

[983] *See* Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); Jones ex rel. Louisiana v. Bowles, 322 U.S. 707 (1944). *See especially* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867). In Oregon v. Mitchell, 400 U.S. 112 (1970), four original actions were consolidated and decided. Two were actions by the United States against States, but the other two were suits by States against the Attorney General, as a citizen of New York, seeking to have the Voting Rights Act Amendments of 1970 voided as unconstitutional. *South Carolina v. Katzenbach* was uniformly relied on by all parties as decisive of the jurisdictional question, and in announcing the judgment of the Court Justice Black simply noted that no one raised jurisdictional or justiciability questions. Id. at 117 n.1. *And see* id. at 152 n.1 (Justice Harlan concurring in part and dissenting in part). *See also* South Carolina v. Baker, 485 U.S. 505 (1988); South Carolina v. Regan, 465 U.S. 367 (1984).

[984] Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 80-93.

ferent States,[985] but since the Judiciary Act of 1789 "diversity jurisdiction" has been bestowed statutorily on the federal courts.[986] The traditional explanation remains that offered by Chief Justice Marshall. "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."[987] Other explanations have been offered and controverted,[988] but diversity cases constitute a large bulk of cases on the dockets of the federal courts today, though serious proposals for restricting access to federal courts in such cases have been before Congress for some time.[989] The essential difficulty with this type of jurisdiction is that it requires federal judges to decide issues of local import on the basis of their reading of how state judges would decide them, an oftentimes laborious process, which detracts from the time and labor needed to resolve issues of federal import.

The Meaning of "State" and the District of Columbia Problem.—In *Hepburn v. Ellzey*,[990] Chief Justice Marshall for the Court confined the meaning of the word "State" as used in the Constitution to "the members of the American confederacy" and ruled that a citizen of the District of Columbia could not sue a citizen of Virginia on the basis of diversity of citizenship. Marshall noted that it was "extraordinary that the courts of the United States,

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[985] Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

[986] 1 Stat. 78, 11. The statute also created alienage jurisdiction of suits between a citizen of a State and an alien. *See* Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY L. REV. 547 (1989). Subject to a jurisdictional amount, now $50,000, 28 U.S.C. § 1332, the statute conferred diversity jurisdiction when the suit was between a citizen of the State in which the suit was brought and a citizen of another State. The Act of March 3, 1875, § 1. 18 Stat. 470, first established the language in the present statute, 28 U.S.C. § 1332(a)(1), merely requiring diverse citizenship, so that a citizen of Maryland could sue a citizen of Delaware in federal court in New Jersey. Snyder v. Harris, 394 U.S. 332 (1969), held that in a class action in diversity the individual claims could not be aggregated to meet the jurisdictional amount. Zahn v. International Paper Co., 414 U.S. 291 (1974), extended Snyder in holding that even though the named plaintiffs had claims of more than $10,000 they could not represent a class in which many of the members had claims for less than $10,000.

[987] Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61, 87 (1809).

[988] Summarized and discussed in C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 23 (4th ed. 1983); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-110, 458-464 (1969).

[989] The principal proposals are those of the American Law Institute. Id. at 123-34.

[990] 6 U.S. (2 Cr.) 445 (1805).

which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration."[991] The same rule was subsequently applied to citizens of the territories of the United States.[992]

Whether the Chief Justice had in mind a constitutional amendment or a statute when he spoke of legislative consideration remains unclear. Not until 1940, however, did Congress attempt to meet the problem by statutorily conferring on federal district courts jurisdiction of civil actions, not involving federal questions, "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any State or Territory."[993] In *National Mutual Ins. Co. v. Tidewater Transfer Co.*,[994] this act was upheld in a five-to-four decision but for widely divergent reasons by a coalition of Justices. Two Justices thought that Chief Justice Marshall's 1804 decision should be overruled, but the other seven Justices disagreed; however, three of the seven thought the statute could be sustained under Congress' power to enact legislation for the inhabitants of the District of Columbia, but the remaining four plus the other two rejected this theory. The statute was upheld because a total of five Justices voted to sustain it, although of the two theories relied on, seven Justices rejected one and six the other. The result, attributable to "conflicting minorities in combination,"[995] means that *Hepburn v. Ellzey* is still good law insofar as it holds that the District of Columbia is not a State, but is overruled insofar as it holds that District citizens may not utilize federal diversity jurisdiction.[996]

Citizenship of Natural Persons.—For purposes of diversity jurisdiction, state citizenship is determined by the concept of domicile[997] rather than of mere residence.[998] That is, while the Court's definition has varied throughout the cases,[999] a person is a citizen of the State in which he has his true, fixed, and permanent home and principal establishment and to which he intends to return

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[991] 6 U.S. at 453.

[992] City of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816).

[993] 54 Stat. 143 (1940), as revised, 28 U.S.C. § 1332(d).

[994] 337 U.S. 582 (1948).

[995] 337 U.S. at 655 (Justice Frankfurter dissenting).

[996] The statute's provision allowing citizens of Puerto Rico to sue in diversity was sustained in Americana of Puerto Rico v. Kaplus, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967), under Congress' power to make rules and regulations for United States territories. *Cf.* Examining Board v. Flores de Otero, 426 U.S. 572, 580-597 (1976) (discussing congressional acts with respect to Puerto Rico).

[997] Chicago & N.W.R.R. v. Ohle, 117 U.S. 123 (1886).

[998] Sun Printing & Pub. Ass'n v. Edwards, 194 U.S. 377 (1904).

[999] Knox v. Greenleaf, 4 U.S. (4 Dall.) 360 (1802); Shelton v. Tiffin, 47 U.S. (6 How.) 163 (1848); Williamson v. Osenton, 232 U.S. 619 (1914).

whenever he is absent from it.[1000] Acts may disclose intention more clearly and decisively than declarations.[1001] One may change his domicile in an instant by taking up residence in the new place and by intending to remain there indefinitely and one may obtain the benefit of diversity jurisdiction by so changing for that reason alone,[1002] provided the change is more than a temporary expedient.[1003]

If the plaintiff and the defendant are citizens of different States, diversity jurisdiction exists regardless of the State in which suit is brought.[1004] Chief Justice Marshall early established that in multiparty litigation, there must be complete diversity, that is, that no party on one side could be a citizen of any State of which any party on the other side was a citizen.[1005] It has now apparently been decided that this requirement flows from the statute on diversity rather than from the constitutional grant and that therefore minimal diversity is sufficient.[1006] The Court has also placed some issues beyond litigation in federal courts in diversity cases, apparently solely on policy grounds.[1007]

Citizenship of Corporations.—In *Bank of the United States v. Deveaux*,[1008] Chief Justice Marshall declared: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate

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[1000] Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

[1001] Shelton v. Tiffin, 47 U.S. (6 How.) 163 (1848).

[1002] Williamson v. Osenton, 232 U.S. 619 (1914).

[1003] Jones v. League, 59 U.S. (18 How.) 76 (1855).

[1004] 28 U.S.C. § 1332(a)(1).

[1005] Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).

[1006] In State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-531 (1967), holding that congressional provision in the interpleader statute of minimal diversity, 28 U.S.C. § 1335(a)(1), was valid, the Court said of *Strawbridge*. "Chief Justice Marshall there purported to construe only 'The words of the act of Congress,' not the Constitution itself. And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." Of course, the diversity jurisdictional statute not having been changed, complete diversity of citizenship, outside the interpleader situation, is still required. In class actions, only the citizenship of the named representatives is considered and other members of the class can be citizens of the same State as one or more of the parties on the other side. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Snyder v. Harris, 394 U.S. 332, 340 (1969).

[1007] In domestic relations cases and probate matters, the federal courts will not act, though diversity exists. Barber v. Barber, 62 U.S. (21 How.) 582 (1858); Ex parte Burrus, 136 U.S. 586 (1890); In re Broderick's Will, 88 U.S. (21 Wall.) 503 (1875). These cases merely enunciated the rule, without justifying it; when the Court squarely faced the issue quite recently, it adhered to the rule, citing justifications. Ankenbrandt v. Richards, 504 U.S. 689 (1992).

[1008] 9 U.S. (5 Cr.) 61, 86 (1809).

name." The Court upheld diversity jurisdiction because the members of the bank as a corporation were citizens of one State and Deveaux was a citizen of another. The holding was reaffirmed a generation later,[1009] but the pressures were building for change, because of the increased economic role of the corporation and because the *Strawbridge* rule[1010] would have soon closed the doors of the federal courts to the larger corporations with stockholders in many States.

Deveaux was overruled in 1844, when after elaborate argument a divided Court held that "a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person."[1011] Ten years later, the Court abandoned this rationale, but it achieved the same result by creating a conclusive presumption that all of the stockholders of a corporation are citizens of the State of incorporation.[1012] Through this fiction, substantially unchanged today,[1013] the Court was able to hold that a corporation cannot be a citizen for diversity purposes and that the citizenship of its stockholders controls but to provide corporations access to federal courts in diversity in every State except the one in which it is incorporated.[1014] The right of foreign corporations to resort to federal courts in diversity is not one which the States may condition as a qualification for doing business in the State.[1015]

Unincorporated associations, such as partnerships, joint stock companies, labor unions, governing boards of institutions, and the like, do not enjoy the same privilege as a corporation; the actual

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[1009] Commercial & Railroad Bank v. Slocomb, 39 U.S. (14 Pet.) 60 (1840).

[1010] Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).

[1011] Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

[1012] Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314 (1854). *See* Muller v. Dows, 94 U.S. 444 (1877); St. Louis & S.F. Ry. v. James, 161 U.S. 545 (1896). The Court has more than once pronounced that the Marshall position is settled. *E.g.*, United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145, 147 (1965); Carden v. Arkoma Associates, 494 U.S. 185, 189 (1990).

[1013] § 2, 72 Stat. 415 (1958), amending 28 U.S.C. § 1332(c), provided that a corporation is to be deemed a citizen of any State in which it has been incorporated and of the State in which it has its principal place of business. 78 Stat. 445 (1964), amending 28 U.S.C. § 1332(c), was enacted to correct the problem revealed by Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48 (1954).

[1014] *See* United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 148 (1965).

[1015] In Terral v. Burke Construction Co., 257 U.S. 529 (1922), the Court resolved two conflicting lines of cases and voided a state statute which required the cancellation of the license of a foreign corporation to do business in the State upon notice that the corporation had removed a case to a federal court.

citizenship of each of its members must be considered in determining whether diversity exists.[1016]

Manufactured Diversity.—One who because of diversity of citizenship can choose whether to sue in state or federal court will properly consider where the advantages and disadvantages balance; one who perceives the balance clearly favoring the federal forum where no diversity exists will no doubt often attempt to create diversity. In the Judiciary Act of 1789, Congress exempted from diversity jurisdiction suits on choses of action in favor of an assignee unless the suit could have been brought in federal court if no assignment had been made.[1017] One could create diversity by a *bona fide* change of domicile even with the sole motive of creating domicile.[1018] Similarly, one could create diversity, or defeat it, by choosing a personal representative of the requisite citizenship.[1019] By far, the greatest number of attempts to manufacture or create diversity have concerned corporations. A corporation cannot get into federal court by transferring its claim to a subsidiary incorporated in another State,[1020] and for a time the Supreme Court tended to look askance at collusory incorporations and the creation of dummy corporations for purposes of creating diversity.[1021] But in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[1022] it became highly important to the plaintiff company to bring its suit in federal court rather than in a state court. Thus, Black & White, a Kentucky corporation, dissolved itself and obtained a charter as a Tennessee corporation; the only change made was the State of incorporation, the name, officers, shareholders, and location of the business remaining the same. A majority of the Court, over a strong dissent by Justice Holmes,[1023]

[1016] Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900); Chapman v. Barney, 129 U.S. 677 (1889); Thomas v. Board of Trustees, 195 U.S. 207 (1904); United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965); Carden v. Arkoma Associates, 494 U.S. 185 (1990). *But compare* Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980), distinguished in *Carden*, 494 U.S. at 195-197.

[1017] § 11, 1 Stat. 78, sustained in Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799), and Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). The present statute, 28 U.S.C. § 1359, provides that no jurisdiction exists in a civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *See* Kramer v. Carribean Mills, 394 U.S. 823 (1969).

[1018] Williamson v. Osenton, 232 U.S. 619 (1914); Morris v. Gilmer, 129 U.S. 315 (1889).

[1019] Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931).

[1020] Miller & Lux v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908).

[1021] *E.g.*, Southern Realty Co. v. Walker, 211 U.S. 603 (1909).

[1022] 276 U.S. 518 (1928).

[1023] 276 U.S. at 532 (joined by Justices Brandeis and Stone). Justice Holmes here presented his view that Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), had been wrongly decided, but he preferred not to overrule it, merely "not allow it to spread . . . into new fields." 276 U.S. at 535.

saw no collusion and upheld diversity, meaning that the company won whereas it would have lost had it sued in the state court. *Black & White Taxicab* probably more than anything led to a reexamination of the decision on the choice of law to be applied in diversity litigation.

The Law Applied in Diversity Cases.—By virtue of § 34 of the Judiciary Act of 1789,[1024] state law expressed in constitutional and statutory form was regularly applied in federal courts in diversity actions to govern the disposition of such cases. But in *Swift v. Tyson*,[1025] Justice Story for the Court ruled that state court decisions were not laws within the meaning of § 34 and though entitled to respect were not binding on federal judges, except with regard to matters of a "local nature," such as statutes and interpretations thereof pertaining to real estate and other immovables, in contrast to questions of general commercial law as to which the answers were dependent not on "the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[1026] The course of decision over the period of almost one hundred years was toward an expansion of the areas in which federal judges were free to construct a federal common law and a concomitant contraction of the definition of "local" laws.[1027] Although

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[1024] The section provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92. With only insubstantial changes, the section now appears as 28 U.S.C. § 1652. For a concise review of the entire issue, *see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS ch. 9 (4th ed. 1983).

[1025] 41 U.S. (16 Pet.) 1 (1842). The issue in the case was whether a pre-existing debt was good consideration for an indorsement of a bill of exchange so that the endorsee would be a holder in due course.

[1026] 41 U.S. at 19. The Justice concluded this portion of the opinion: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world. *Nun erit alia lex Romae, alia Athenis; alia munc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtenebit.*" Id. The thought that the same law should prevail in Rome as in Athens was used by Justice Story in DeLovio v. Boit, 7 Fed. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815). For a modern utilization, *see* United States v. Jefferson County Board of Education, 372 F.2d 836, 861 (5th Cir. 1966); 380 F.2d 385, 398 (5th Cir. 1967) (dissenting opinion).

[1027] The expansions included: Lane v. Vick, 44 U.S. (3 How.) 464 (1845) (wills); City of Chicago v. Robbins, 67 U.S. (2 Bl.) 418 (1862), and Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893) (torts); Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1870) (real estate titles and rights of riparian owners); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) (mineral conveyances); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847) (contracts); Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893). It was strongly contended that uniformity, the goal of Justice Story's formulation, was not being achieved, in great part because state courts followed their own rules of decision even when prior federal decisions were contrary. Frankfurter, *Distribution of Judicial Power Between Federal and State Courts*, 13 CORNELL L.Q. 499, 529 n.

dissatisfaction with *Swift v. Tyson* was almost always present, within and without the Court,[1028] it was the Court's decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[1029] which brought disagreement to the strongest point and perhaps precipitated the overruling of *Swift v. Tyson* in *Erie Railroad Co. v. Tompkins*.[1030]

"It is impossible to overstate the importance of the *Erie* decision. It announces no technical doctrine of procedure or jursidiction, but goes to the heart of the relations between the federal government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government."[1031] *Erie* was remarkable in a number of ways aside from the doctrine it announced. It reversed a 96-year-old precedent, which counsel had specifically not questioned, it reached a constitu-

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150 (1928). Moreover, the Court held that while state court interpretations of state statutes or constitutions were to be followed, federal courts could ignore them if they conflicted with earlier federal constructions of the same statute or constitutional provision, Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847), or if they had been rendered after the case had been tried in federal court, Burgess v. Seligman, 107 U.S. 20 (1883), thus promoting lack of uniformity. *See also* Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Pease v. Peck, 59 U.S. (18 How.) 595 (1856); Watson v. Tarpley, 59 U.S. (18 How.) 517 (1856).

[1028] Extensions of the scope of *Tyson* frequently were rendered by a divided Court over the strong protests of dissenters. *E.g.*, Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Lane v. Vick, 44 U.S. (3 How.) 463 (1845); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910). In Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401-404 (1893), Justice Field dissented in an opinion in which he expressed the view that Supreme Court disregarding of state court decisions was unconstitutional, a view endorsed by Justice Holmes in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (dissenting opinion), and adopted by the Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Numerous proposals were introduced in Congress to change the rule.

[1029] 276 U.S. 518 (1928). B. & W. had contracted with a railroad to provide exclusive taxi service at its station. B. & Y. began operating taxis at the same station and B. & W. wanted to enjoin the operation, but it was a settled rule by judicial decision in Kentucky courts that such exclusive contracts were contrary to public policy and were unenforceable in court. Therefore, B. & W. dissolved itself in Kentucky and reincorporated in Tennessee, solely in order to create diversity of citizenship and enable itself to sue in federal court. It was successful and the Supreme Court ruled that diversity was present and that the injunction should issue. In Mutual Life Ins. Co. v. Johnson, 293 U.S. 335 (1934), the Court, in an opinion by Justice Cardozo, appeared to retreat somewhat from its extensions of *Tyson*, holding that state law should be applied, through a "benign and prudent comity," in a case "balanced with doubt," a concept first used by Justice Bradley in Burgess v. Seligman, 107 U.S. 20 (1883).

[1030] 304 U.S. 64 (1938). Judge Friendly has written: "Having served as the Justice's [Brandeis's] law clerk the year *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson* the happy dispatch he thought it deserved." H. FRIENDLY, BENCHMARKS 20 (1967).

[1031] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 355 (4th ed. 1983). *See* Judge Friendly's exposition, *In Praise of Erie—And of the New Federal Common Law*, in H. FRIENDLY, BENCHMARKS 155 (1967).

tional decision when a statutory interpretation was available though perhaps less desirable, and it marked the only time in United States constitutional history when the Court has held that it had undertaken an unconstitutional action.[1032]

Tompkins was injured by defendant's train while he was walking along the tracks. He was a citizen of Pennsylvania, and the railroad was incorporated in New York. Had he sued in a Pennsylvania court, state decisional law was to the effect that inasmuch as he was a trespasser, the defendant owned him only a duty not to injure him through wanton or willful misconduct;[1033] the general federal law treated him as a licensee who could recover for negligence. Tompkins sued and recovered in federal court in New York and the railroad presented the issue to the Supreme Court as one covered by "local" law within the meaning of *Swift v. Tyson*. Justice Brandeis for himself and four other Justices, however, chose to overrule the early case.

First, it was argued that *Tyson* had failed to bring about uniformity of decision and that its application discriminated against citizens of a State by noncitizens. Justice Brandeis cited recent researches[1034] indicating that § 34 of the 1789 Act included court decisions in the phrase "laws of the several States." "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."[1035] For a number of reasons, it would not have been wise to have overruled *Tyson* on the basis of arguable new discoveries.[1036]

[1032] 304 U.S. at 157-164, 171 n.71.

[1033] This result was obtained in retrial in federal court on the basis of Pennsylvania law. Tompkins v. Erie Railroad Co., 98 F. 49 (3d Cir.), *cert. denied*, 305 U.S. 637 (1938).

[1034] Erie Railroad Co. v. Tompkins, 304 U.S. 64, 72-73 (1938), citing Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 84-88 (1923). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 353 (4th ed. 1983).

[1035] 304 U.S. at 77-78 (footnote citations omitted).

[1036] Congress had re-enacted § 34 as § 721 of the Revised Statutes, citing *Swift v. Tyson* in its annotation, thus presumably accepting the gloss placed on the words by that ruling. But note that Justice Brandeis did not think even the re-enacted statute was unconstitutional. 304 U.S. at 79-80. *See* H. FRIENDLY, BENCHMARKS 161-163 (1967). Perhaps a more compelling reason of policy was that stated by Justice Frankfurter rejecting for the Court a claim that the general grant of federal question jurisdiction to the federal courts in 1875 made maritime suits cognizable on the law side of the federal courts. "Petitioner now asks us to hold that no student of the jurisdiction of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875. In light of such impressive testimony from the past

Second, the decision turned on the lack of power vested in Congress to have prescribed rules for federal courts in state cases. "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. No clause in the Constitution purports to confer such a power upon the federal courts." [1037] But having said this, Justice Brandeis made it clear that the unconstitutional assumption of power had been made not by Congress but by the Court itself. "[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." [1038]

Third, the rule of *Erie* replacing *Tyson* is that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. Whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." [1039]

Since 1938, the effect of *Erie* has first increased and then diminished, as the nature of the problems presented changed. Thus, the Court at first indicated that not only were the decisions of the highest court of a State binding on a federal court in diversity, but also decisions of intermediate appellate courts [1040] and courts of

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the claim of a sudden discovery of a hidden latent meaning in an old technical phrase is surely suspect."

"The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. [Here, the Justice footnotes: 'For reasons that would take us too far afield to discuss, Erie Railroad Co. v. Tompkins, 304 U.S. 64, is no exception.'] The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." Romero v. International Terminal Operating Co., 358 U.S. 354, 370-371 (1959).

[1037] 304 U.S. at 78. Justice Brandeis does not argue the constitutional issue and does not cite either provisions of the Constitution or precedent beyond the views of Justices Holmes and Field. Id. at 78-79. Justice Reed thought that Article III and the necessary and proper clause might contain authority. Id. at 91-92 (Justice Reed concurring in the result). For a formulation of the constitutional argument in favor of the Brandeis position, *see* H. FRIENDLY, BENCHMARKS 167-171 (1967). *See also* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202, 208 (1956); Hanna v. Plumer, 380 U.S. 460, 471-472 (1965).

[1038] 304 U.S. at 79-80.

[1039] 304 U.S. at 78. *Erie* applies in equity as well as in law. Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

[1040] West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940); Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940).

first instance,[1041] even where the decisions bound no other state judge except as they were persuasive on their merits. It has now retreated from this position, concluding that federal judges are to give careful consideration to lower state court decisions and to old, perhaps outmoded decisions, but that they must find for themselves the state law if the State's highest court has not spoken definitively within a period which would raise no questions about the continued viability of the decision.[1042] In the event of a state supreme court reversal of an earlier decision, the federal courts are, of course, bound by the later decision, and a judgment of a federal district court, correct when rendered, must be reversed on appeal if the State's highest court in the meantime has changed the applicable law.[1043] In diversity cases which present conflicts of law problems, the Court has reiterated that the district court is to apply the law of the State in which it sits, so that in a case in State A in which the law of State B is applicable, perhaps because a contract was made there or a tort was committed there, the federal court is to apply State A's conception of State B's law.[1044]

The greatest difficulty in applying the *Erie* doctrine has been in cases in which issues of procedure were important.[1045] The process was initiated in 1945 when the Court held that a state statute of limitations, which would have barred suit in state court, would bar it in federal court, although as a matter of federal law the case still could have been brought in federal court.[1046] The Court regarded the substance-procedure distinction as immaterial. "[S]ince

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[1041] Fidelity Union Trust Co., v. Field, 311 U.S. 169 (1940).

[1042] King v. Order of Commercial Travelers of America, 333 U.S. 153 (1948); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 205 (1956) (1910 decision must be followed in absence of confusion in state decisions since there were "no developing line of authorities that cast a shadow over established ones, no dicta, doubts or ambiguities . . . , no legislative development that promises to undermine the judicial rule"). *See also* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).

[1043] Vanderbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Huddleston v. Dwyer, 322 U.S. 232 (1944); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

[1044] Klaxon Co. v. Stentor Manufacturing Co., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

[1045] Interestingly enough, 1938 marked what seemed to be a switching of positions *vis-a-vis* federal and state courts of substantive law and procedural law. Under *Tyson*, federal courts in diversity actions were free to formulate a federal common law, while they were required by the Conformity Act, § 5, 17 Stat. 196 (1872), to conform their procedure to that of the State in which the court sat. *Erie* then ruled that state substantive law was to control in federal court diversity actions, while by implication matters of procedure in federal court were subject to congressional governance. Congress authorized the Court to promulgate rules of civil procedure, 48 Stat. 1064 (1934), which it did in 1938, a few months after *Erie* was decided. 302 U.S. 783.

[1046] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."[1047] The standard to be applied was compelled by the "intent" of the *Erie* decision, which "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[1048] The Court's application of this standard created substantial doubt that the Federal Rules of Civil Procedure had any validity in diversity cases.[1049]

But in two later cases, the Court contracted the application of *Erie* in matters governed by the Federal Rules. Thus, in the earlier case, the Court said that "outcome" was no longer the sole determinant and countervailing considerations expressed in federal policy on the conduct of federal trials should be considered; a state rule making it a question for the judge rather than a jury of a particular defense in a tort action had to yield to a federal policy enunciated through the Seventh Amendment of favoring juries.[1050] Some confusion has been injected into consideration of which law to apply—state or federal—in the absence of a federal statute or a Federal Rule of Civil Procedure.[1051] In an action for damages, the federal courts were faced with the issue of the application either of a state statute, which gave the appellate division of the state courts the authority to determine if an award is excessive or inadequate if it *deviates materially* from what would be reasonable compensation, or of a federal judicially-created practice of review of awards as so exorbitant that it shocked the conscience of the court. The Court determined that the state statute was both substantive and procedural, which would result in substantial variations be-

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[1047] 326 U.S. at 108-09.

[1048] 326 U.S. at 109.

[1049] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (state rule making unsuccessful plaintiffs liable for all expenses and requiring security for such expenses as a condition of proceeding applicable in federal court); Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (state statute barring foreign corporation not qualified to do business in State applicable in federal court); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (state rule determinative when an action is begun for purposes of statute of limitations applicable in federal court although a Federal Rule of Civil Procedure states a different rule).

[1050] Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958).

[1051] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). The decision was five-to-four, so that the precedent may or may not be stable for future application.

tween state and federal damage awards depending whether the state or the federal approach was applied; it then followed the mode of analysis exemplified by those cases emphasizing the importance of federal courts reaching the same outcome as would the state courts,[1052] rather than what had been the prevailing standard, in which the Court balanced state and federal interests to determine which law to apply.[1053] Emphasis upon either approach to considerations of applying state or federal law reflects a continuing difficulty of accommodating "the constitutional power of the states to regulate the relations among their citizens . . . [and] the constitutional power of the federal government to determine how its courts are to be operated."[1054] Additional decisions will be required to determine which approach, if either, prevails. The latter ruling simplified the matter greatly. *Erie* is not to be the proper test when the question is the application of one of the Rules of Civil Procedure; if the rule is valid when measured against the Enabling Act and the Constitution, it is to be applied regardless of state law to the contrary.[1055]

Although it seems clear that *Erie* applies in nondiversity cases in which the source of the right sued upon is state law,[1056] it is equally clear that *Erie* is not applicable always in diversity cases whether the nature of the issue be substantive or procedural. Thus, it may be that there is an overriding federal interest which compels national uniformity of rules, such as a case in which the issue is the appropriate rule for determining the liability of a bank which had guaranteed a forged federal check,[1057] in which the issue is the appropriate rule for determining whether a tortfeasor is liable to the United States for hospitalization of a soldier and loss of his

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[1052] *E.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[1053] *E.g.*, Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[1054] 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4511, at 311 (2d ed. 1996).

[1055] Hanna v. Plumer, 380 U.S. 460 (1965).

[1056] Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956). The contrary view was implied in Levinson v. Deupree, 345 U.S. 648, 651 (1953), and by Justice Jackson in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 466-467, 471-472 (1942) (concurring opinion). *See* Wichita Royalty Co. v. City National Bank, 306 U.S. 103 (1939).

[1057] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* National Metropolitan Bank v. United States, 323 U.S. 454 (1945); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); United States v. Standard Rice Co., 323 U.S. 106 (1944); United States v. Acri, 348 U.S. 211 (1955); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956). *But see* United States v. Yazell, 382 U.S. 341 (1966). *But see* O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

services,[1058] and in which the issue is the appropriate rule for determining the validity of a defense raised by a federal officer sued for having libeled one in the course of his official duties.[1059] In such cases, when the issue is found to be controlled by federal law, common or otherwise, the result is binding on state courts as well as on federal.[1060] Despite, then, Justice Brandeis' assurance that there is no "federal general common law," there is a common law existing and developing in the federal courts, even in diversity cases, which will sometimes control decision.[1061]

Controversies Between Citizens of the Same State Claiming Land Under Grants of Different States

The genesis of this clause was in the report of the Committee of Detail which vested the power to resolve such land disputes in the Senate,[1062] but this proposal was defeated in the Convention,[1063] which then added this clause to the jurisdiction of the federal judiciary without reported debate.[1064] The motivation for this clause was the existence of boundary disputes affecting ten States at the time the Convention met. With the adoption of the Northwest Ordinance of 1787, the ultimate settlement of the boundary disputes, and the passing of land grants by the States, this clause, never productive of many cases, became obsolete.[1065]

Controversies Between a State, or the Citizens Thereof, and Foreign States, Citizens, or Subjects

The scope of this jurisdiction has been limited both by judicial decisions and the Eleventh Amendment. By judicial application of the law of nations, a foreign state is immune from suit in the fed-

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[1058] United States v. Standard Oil Co., 332 U.S. 301 (1947). Federal law applies in maritime tort cases brought on the "law side" of the federal courts in diversity cases. Pope & Talbot v. Hawn, 346 U.S. 406 (1953).

[1059] Howard v. Lyons, 360 U.S. 593 (1959). Matters concerned with our foreign relations also are governed by federal law in diversity. Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964). Federal common law also governs a government contractor defense in certain cases. Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[1060] Free v. Bland, 369 U.S. 663 (1962); Yiatchos v. Yiatchos, 376 U.S. 306 (1964).

[1061] The quoted Brandeis phrase is in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). On the same day *Erie* was decided, the Court, in an opinion by Justice Brandeis, held that the issue of apportionment of the waters of an interstate stream between two States "is a question of 'federal common law.'" Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). On the matter, *see* Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

[1062] 2 M. Farrand, supra at 162, 171, 184.

[1063] Id. at 400-401.

[1064] Id. at 431.

[1065] *See* Pawlet v. Clark, 13 U.S. (9 Cr.) 292 (1815). *Cf.* City of Trenton v. New Jersey, 262 U.S. 182 (1923).

eral courts without its consent,[1066] an immunity which extends to suits brought by States of the American Union.[1067] Conversely, the Eleventh Amendment has been construed to bar suits by foreign states against a State of the United States.[1068] Consequently, the jurisdiction conferred by this clause comprehends only suits brought by a State against citizens or subjects of foreign states, by foreign states against American citizens, citizens of a State against the citizens or subjects of a foreign state, and by aliens against citizens of a State.[1069]

Suits by Foreign States.—The privilege of a recognized foreign state to sue in the courts of another state upon the principle of comity is recognized by both international law and American constitutional law.[1070] To deny a sovereign this privilege "would manifest a want of comity and friendly feeling."[1071] Although national sovereignty is continuous, a suit in behalf of a national sovereign can be maintained in the courts of the United States only by a government which has been recognized by the political branches of our own government as the authorized government of the foreign state.[1072] As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit.[1073] Once a foreign government avails itself of the

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[1066] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cr.) 116 (1812); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); Compania Espanola v. The Navemar, 303 U.S. 68 (1938); Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938).

[1067] Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[1068] 292 U.S. at 330.

[1069] But in the absence of a federal question, there is no basis for jurisdiction between the subjects of a foreign State. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). The Foreign Sovereign Immunities Act of 1976, Pub. L. 94-538, 90 Stat. 2891, amending various sections of title 28 U.S.C., comprehensively provided jurisdictional bases for suits by and against foreign states and appears as well to comprehend suits by an alien against a foreign state which would be beyond the constitutional grant. However, in the only case in which that matter has been an issue before it, the Court has construed the Act as creating a species of federal question jurisdiction. Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

[1070] The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1871).

[1071] 78 U.S. at 167 This case also held that a change in the person of the sovereign does not affect the continuity or rights of national sovereignty, including the right to bring suit or to continue one that has been brought.

[1072] Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938), citing Jones v. United States, 137 U.S. 202, 212 (1890); Matter of Lehigh Valley R.R., 265 U.S. 573 (1924). Whether a government is to be regarded as the legal representative of a foreign state is, of course, a political question.

[1073] Ex parte Peru, 318 U.S. 578, 589 (1943), distinguishing Compania Espanola v. The Navemar, 303 U.S. 68 (1938), which held that where the Executive Department neither recognizes nor disallows the claim of immunity, the court is free to examine that question for itself. Under the latter circumstances, however, a claim that a foreign vessel is a public ship and immune from suit must be substantiated to the satisfaction of the federal court.

privilege of suing in the courts of the United States, it subjects itself to the procedure and rules of decision governing those courts and accepts whatever liabilities the court may decide to be a reasonable incident of bringing the suit.[1074] The rule that a foreign nation instituting a suit in a federal district court cannot invoke sovereign immunity as a defense to a counterclaim growing out of the same transaction has been extended to deny a claim of immunity as a defense to a counterclaim extrinsic to the subject matter of the suit but limited to the amount of the sovereign's claim.[1075] Moreover, certain of the benefits extending to a domestic sovereign do not extend to a foreign sovereign suing in the courts of the United States. A foreign state does not receive the benefit of the rule which exempts the United States and its member States from the operation of the statute of limitations, because those considerations of public policy back of the rule are regarded as absent in the case of the foreign sovereign.[1076]

Indian Tribes.—Within the terms of Article III, an Indian tribe is not a foreign state and hence cannot sue in the courts of the United States. This rule was applied in the case of *Cherokee Nation v. Georgia*,[1077] where Chief Justice Marshall conceded that the Cherokee Nation was a state, but not a foreign state, being a part of the United States and dependent upon it. Other passages of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

Narrow Construction of the Jurisdiction.—As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as "late of the district of Maryland," but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.[1078] The meticulous care manifested in this case appeared twenty years later

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[1074] Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938). Among other benefits which the Court cited as not extending to foreign states as litigant included exemption from costs and from giving discovery. Decisions were also cited to the effect that a sovereign plaintiff "should so far as the thing can be done, be put in the same position as a body corporate."

[1075] National Bank v. Republic of China, 348 U.S. 356, 361 (1955), citing 26 Dept. State Bull. 984 (1952), wherein the Department "has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government."

[1076] Guaranty Trust Co. v. United States, 304 U.S. 126, 135, 137 (1938), citing precedents to the effect that a sovereign plaintiff "should be put in the same position as a body corporate."

[1077] 30 U.S. (5 Pet.) 1, 16-20 (1831).

[1078] Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cr.) 303 (1809).

when the Court narrowly construed § 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction when an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.[1079] This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.[1080] These rules, however, do not preclude a suit between citizens of the same State if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[1081]

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT

From the beginning, the Supreme Court has assumed that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.[1082] In *Chisholm v. Georgia*,[1083] the Court entertained an action of assumpsit against Georgia by a citizen of another State. Congress in § 3 of the Judiciary Act of 1789[1084] purported to invest the Court with original jurisdiction in suits between a State and citizens of another State, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of origi-

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[1079] Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[1080] Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1871). *See*, however, Lacassagne v. Chapuis, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

[1081] Browne v. Strode, 9 U.S. (5 Cr.) 303 (1809).

[1082] But in § 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress did so purport to convey the jurisdiction and the statutory conveyance exists today. 28 U.S.C. § 1251. It does not, however, exhaust the listing of the Constitution.

[1083] 2 U.S. (2 Dall.) 419 (1793). In an earlier case, the point of jurisdiction was not raised. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792).

[1084] 1 Stat. 80.

nal jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which States were parties were now limited to States as party plaintiffs, to two or more States disputing, or to United States suits against States.[1085]

By 1861, Chief Justice Taney could confidently enunciate, after review of the precedents, that in all cases where original jusrisdiction is given by the Constitution, the Supreme Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[1086]

Although Chief Justice Marshall apparently assumed the Court had exclusive jurisdiction of cases within its original jurisdiction,[1087] Congress from 1789 on gave the inferior federal courts concurrent jurisdiction in some classes of such cases.[1088] Sustained in the early years on circuit,[1089] this concurrent jurisdiction was finally approved by the Court itself.[1090] The Court has also relied on the first Congress' interpretation of the meaning of Article III in declining original jurisdiction of an action by a State to enforce a judgment for a precuniary penalty awarded by one of its own courts.[1091] Noting that § 13 of the Judiciary Act had referred to "controversies of a civil nature," Justice Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[1092]

[1085] On the Eleventh Amendment, *see* infra.

[1086] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[1087] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 174 (1803).

[1088] In § 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.

[1089] United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C.Pa. 1793).

[1090] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Bors v. Preston, 111 U.S. 252 (1884); Ames v. Kansas ex rel. Johnston, 111 U.S. 449 (1884). Such suits could be brought and maintained in state courts as well, the parties willing. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ohio ex rel. Poporici v. Alger, 280 U.S. 379 (1930).

[1091] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1092] 127 U.S. at 297. *See also* the dictum in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398-99 (1821); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431-32 (1793).

However, another clause of § 13 of the Judiciary Act of 1789 was not accorded the same presumption by Chief Justice Marshall, who, interpreting it as giving the Court power to issue a writ of mandamus on an original proceeding, declared that as Congress could not restrict the original jurisdiction neither could it enlarge it and pronounced the clause void.[1093] While the Chief Justice's interpretation of the meaning of the clause may be questioned, no one has questioned the constitutional principle thereby proclaimed. Although the rule deprives Congress of power to expand or contract the jurisdiction, it allows a considerable latitude of interpretation to the Court itself. In some cases, as in *Missouri v. Holland*,[1094] the Court has manifested a tendency toward a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be invoked sparingly."[1095] Original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."[1096] Exercise of its original jurisdiction is not obligatory on the Court but discretionary, to be determined on a case-by-case basis on grounds of practical necessity.[1097] It is to be honored "only in appropriate cases. And the question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."[1098] But where claims are of suffi-

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[1093] Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803). The Chief Justice declared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. Id. at 174. This exclusive interpretation has been since followed. Ex parte Bollman, 8 U.S. (4 Cr.) 75 (1807); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); Ex parte Barry, 43 U.S. (2 How.) 65 (1844); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 252 (1864); Ex parte Yerger, 75 U.S. (8 Wall.) 85, 98 (1869). In the curious case of Ex parte Levitt, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I. § 6, cl.2. Although it rejected petitioner's application, the Court did not point out that it was being asked to assume original jurisdiction in violation of Marbury v. Madison.

[1094] 252 U.S. 416 (1920). *See also* South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970).

[1095] Utah v. United States, 394 U.S. 89, 95 (1968).

[1096] California v. Southern Pacific Co., 157 U.S. 229, 261 (1895). Indeed, the use of the word "sparingly" in this context is all but ubiquitous. *E.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 450 (1992); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); United States v. Nevada, 412 U.S. 534, 538 (1973).

[1097] Texas v. New Mexico, 462 U.S. 554, 570 (1983).

[1098] Illinois v. City of Milwaukee, 406 U.S. 91, 93-94 (1972). In this case, and in Washington v. General Motors Corp., 406 U.S. 109 (1972), and Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court declined to permit adjudication of environmental pollution cases manifestly within its original jurisdiction because the

cient "seriousness and dignity," in which resolution by the judiciary is of substantial concern, the Court will hear them.[1099]

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory of Plenary Congressional Control

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to "exceptions and regulations" prescribed by Congress, and the jurisdiction of the inferior federal courts is subject to congressional prescription. Additionally, Congress has power to regulate modes and practices of proceeding on the part of the inferior federal courts. Whether there are limitations to the exercise of these congressional powers, and what the limitations may be, are matters that have vexed scholarly and judicial interpretation over the years, inasmuch as congressional displeasure with judicial decisions has sometimes led to successful efforts to "curb" the courts and more frequently to proposed but unsuccessful curbs.[1100] Supreme Court holdings establish clearly the breadth of congressional power, and numerous dicta assert an even broader power, but that Congress may through the exercise of its powers vitiate and overturn constitutional decisions and restrain the exercise of constitutional rights is an assertion often made but not sustained by any decision of the Court.

Appellate Jurisdiction.—In *Wiscart v. D'Auchy*,[1101] the issue was whether the statutory authorization for the Supreme Court to review on writ of error circuit court decisions in "civil actions" gave it power to review admiralty cases.[1102] A majority of the Court de-

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nature of the cases required the resolution of complex, novel, and technical factual questions not suitable for resolution at the Court's level as a matter of initial decision, but which could be brought in the lower federal courts. Not all such cases, however, were barred. Vermont v. New York, 406 U.S. 186 (1972) (granting leave to file complaint). In other instances, notably involving "political questions," *cf.* Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court has simply refused permission for parties to file bills of complaint without hearing them on the issue or producing an opinion. *E.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (constitutionality of United States action in Indochina); Delaware v. New York, 385 U.S. 895 (1966) (constitutionality of electoral college under one-man, one-vote rule).

[1099] Wyoming v. Oklahoma, 502 U.S. 437, 451 (1982). The principles are the same whether the Court's jurisdiction is exclusive or concurrent. Texas v. New Mexico, 462 U.S. 554 (1983); California v. West Virginia, 454 U.S. 1027 (1981); Arizona v. New Mexico, 425 U.S. 794 (1976).

[1100] A classic but now dated study is Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161 (1913). The most comprehensive consideration of the constitutional issue is Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV, L. REV. 1362 (1953), reprinted in Hart & Wechsler, supra.

[1101] 3 U.S. (3 Dall.) 321 (1796).

[1102] Judiciary Act of 1789, § 22, 1 Stat. 84.

cided that admiralty cases were "civil actions" and thus reviewable; in the course of decision, it was said that "[i]f Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." [1103] Much the same thought was soon to be expressed by Chief Justice Marshall, although he seems to have felt that in the absence of congressional authorization, the Court's appellate jurisdiction would have been measured by the constitutional grant. "Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished."

"The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject." [1104] Later Justices viewed the matter differently than had Marshall. "By the constitution of the United States," it was said in one opinion, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress." [1105] In order for a case to come within its appellate jurisdiction, the Court has said, "two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Moreover, "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation." [1106]

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to

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[1103] Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796). The dissent thought that admiralty cases were not "civil actions" and thus that there was no appellate review. Id. at 326-27. *See also* Clarke v. Bazadone, 5 U.S. (1 Cr.) 212 (1803); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).

[1104] Durousseau v. United States, 10 U.S. (6 Cr.) 307, 313-314 (1810). "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." Ex parte Bollman, 8 U.S. (4 Cr.) 75, 93 (1807) (Chief Justice Marshall). Marshall had earlier expressed his *Durousseau* thoughts in United States v. More, 7 U.S. (3 Cr.) 159 (1805).

[1105] Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847) (case held nonreviewable because minimum jurisdictional amount not alleged).

[1106] Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute.)

be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*,[1107] the Court accepted review on *certiorari* of a denial of a petition for a writ of *habeas corpus* by the circuit court; the petition was by a civilian convicted by a military commission of acts obstructing Reconstruction. Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress enacted over the President's veto a provision repealing the act which authorized the appeal McCardle had taken.[1108] Although the Court had already heard argument on the merits, it then dismissed for want of jurisdiction.[1109] "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[1110] Although *McCardle* grew out of the stresses of Reconstruction, the principle there applied has been similarly affirmed and applied in later cases.[1111]

[1107] 73 U.S. (6 Wall.) 318 (1868). That Congress' apprehensions might have had a basis in fact, *see* C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. VI, PT. I—RECONSTRUCTION AND REUNION 1864-88 493-495 (1971). *McCardle* is fully reviewed at pp. 433-514.

[1108] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying *habeas corpus*. Previous to this statute, the Court's jurisdiction to review *habeas corpus* decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. *Compare* United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795), *and* Ex parte Burford, 7 U.S. (3 Cr.) 448 (1806), with Ex parte Bollman, 8 U.S. (4 Cr.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.

[1109] Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). In the course of the opinion, Chief Justice Chase speculated about the Court's power in the absence of any legislation in tones reminiscent of Marshall's comments. Id. at 513.

[1110] 74 U.S. At 514.

[1111] Thus, *see* Justice Frankfurter's remarks in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (dissenting): "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*." In The Francis Wright, 105 U.S. 381, 385-386 (1882), upholding Congress' power to confine Supreme Court review in admiralty cases to questions of law, the Court said: "[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe.... What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects

Jurisdiction of the Inferior Federal Courts.—The Framers, as we have seen,[1112] divided with regard to the necessity of courts inferior to the Supreme Court, simply authorized Congress to create such courts, in which, then, judicial power "shall be vested" and to which nine classes of cases and controversies "shall extend."[1113] While Justice Story deemed it imperative of Congress to create inferior federal courts and, when they had been created, to vest them with all the jurisdiction they were capable of receiving,[1114] the First Congress acted upon a wholly different theory. Inferior courts were created, but jurisdiction generally over cases involving the Constitution, laws, and treaties of the United States was not given them, diversity jurisdiction was limited by a minimal jurisdictional amount requirement and by a prohibition on creation of diversity through assignments, equity jurisdiction was limited to those cases where a "plain, adequate, and complete remedy" could not be had at law.[1115] This care for detail in conferring jurisdiction upon the inferior federal courts bespoke a conviction by Members of Congress that it was within their power to confer or to withhold juris-

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of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not." *See also* Luckenbuch S. S. Co. v. United States, 272 U.S. 533, 537 (1926); American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 378 (1893); United States v. Bitty, 208 U.S. 393 (1908); United States v. Young, 94 U.S. 258 (1876). Numerous restrictions on the exercise of appellate jurisdiction have been upheld. *E.g.*, Congress for a hundred years did not provide for a right of appeal to the Supreme Court in criminal cases, except upon a certification of division by the circuit court: at first appeal was provided in capital cases and then in others. F. Frankfurter & J. Landis, supra at 79, 109-120. Other limitations noted heretofore include minimum jurisdictional amounts, restrictions of review to questions of law and to questions certified from the circuits, and the scope of review of state court decisions of federal constitutional questions. *See* Walker v. Taylor, 46 U.S. (5 How.) 64 (1847). Though *McCardle* is the only case in which Congress successfully forestalled an expected decision by shutting off jurisdiction, other cases have been cut off while pending on appeal, either inadvertently, Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1866), or intentionally, Railroad Co. v. Grant, 98 U.S. 398 (1878), by raising the requirements for jurisdiction without a reservation for pending cases. *See also* Bruner v. United States, 343 U.S. 112 (1952); District of Columbia v. Eslin, 183 U.S. 62 (1901).

[1112] Supra, "One Supreme Court" and "Inferior Courts".

[1113] Article III, § 1, cl. 2.

[1114] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 374 (1816). For an effort to reframe Justice Story's position in modern analytical terms, *see* the writings of Professors Amar and Clinton, supra and infra.

[1115] Judiciary Act of 1789, 1 Stat. 73. *See* Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). A modern study of the first Judiciary Act that demonstrates the congressional belief in discretion to structure jurisdiction is Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B. C. L. REV. 1101 (1985).

diction at their discretion. The cases have generally sustained this view.

Thus, in *Turner v. Bank of North America*,[1116] the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same State but in which the note had been assigned to a citizen of a second State so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789.[1117] Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt[1118] and from Justice Chase a firm rejection. "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant."[1119] Applying § 11, the Court held that the circuit court had lacked jurisdiction.

Chief Justice Marshall himself soon made similar assertions,[1120] and the early decisions of the Court continued to be sprinkled with assumptions that the power of Congress to create inferior federal courts necessarily implied "the power to limit jurisdiction of those Courts to particular objects."[1121] In *Cary v. Curtis*,[1122] a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitu-

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[1116] 4 U.S. (4 Dall.) 8 (1799).

[1117] "[N]or shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

[1118] Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799).

[1119] 4 U.S. at 10.

[1120] In Ex parte Bollman, 8 U.S. (4 Cr.) 75, 93 (1807), Marshall observed that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

[1121] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812). Justice Johnson continued: "All other Courts [beside the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." *See also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721-722 (1838).

[1122] 44 U.S. (3 How.) 236 (1845).

tional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."[1123] Five years later, the validity of the assignee clause of the Judiciary Act of 1789[1124] was placed in issue in *Sheldon v. Sill*,[1125] in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that inasmuch as the right of a citizen of any State to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected these contentions and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies in Article III. The case and the principle has been cited and reaffirmed numerous times,[1126] and has been quite recently applied.[1127]

Congressional Control Over Writs and Processes.—The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding court, even of the Supreme Court, to times of adjournment, appointment of officers, issuance of writs,

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[1123] 44 U.S. at 244-45. Justices McLean and Story dissented, arguing that the right to construe the law in all matters of controversy is of the essence of judicial power. Id. at 264.

[1124] Supra.

[1125] 49 U.S. (8 How.) 441 (1850).

[1126] *E.g.*, Kline v. Burke Construction Co., 260 U.S. 226, 233-234 (1922); Ladew v. Tennessee Copper Co., 218 U.S. 357, 358 (1910); Venner v. Great Northern R. Co., 209 U.S. 24, 35 (1908); Kentucky v. Powers, 201 U.S. 1, 24 (1906); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 513-521 (1898); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 251-252 (1868).

[1127] By the Voting Rights Act of 1965, Congress required covered States that wished to be relieved of coverage to bring actions to this effect in the District Court of the District of Columbia. In South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966), Chief Justice Warren for the Court said: "Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." *See also* Palmore v. United States, 411 U.S. 389, 400-402 (1973); Swain v. Pressley, 430 U.S. 372 (1977). *And see* Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *affd.*, 523 F.2d 75 (9th Cir.), *cert. denied*, 424 U.S. 948 (1976).

citations for contempt, and many other matters which it might be supposed courts had some authority of their own to regulate.[1128] The power to enjoin governmental and private action has frequently been curbed by Congress, especially as the action has involved the power of taxation at either the federal or state level.[1129] Though the courts have variously interpreted these restrictions,[1130] they have not denied the power to impose them.

Reacting to judicial abuse of injunctions in labor disputes,[1131] Congress in 1932 enacted the Norris-La Guardia Act which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and fact-finding process which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be prevented.[1132] The Court seemingly experienced no difficulty upholding the Act,[1133] and it has liberally applied it through the years.[1134]

Congress' power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942[1135] and in the cases arising from it. Fearful that the price control program might be nullified by injunctions, Congress provided for a special court in which persons could challenge the validity of price regulations issued by the Government with appeal from the Emergency Court of Appeals to the Supreme Court. The basic constitutionality of the Act was sustained in *Lockerty v. Phillips*.[1136] In *Yakus v. United States*,[1137] the Court upheld the provision of the Act which conferred exclusive jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such regulation or order as a defense to a criminal

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[1128] 1 Stat. 73. For a comprehensive discussion with itemization, *see* Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

[1129] The Act of March 2, 1867, 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes): Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). *See also* Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state rate-making).

[1130] *Compare* Snyder v. Marks, 109 U.S. 189 (1883), *with* Dodge v. Brady, 240 U.S. 122 (1916); with Allen v. Regents, 304 U.S. 439 (1938).

[1131] F. FRANKFURTER & I. GREENE, THE LABOR INJUNCTION (1930).

[1132] 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115.

[1133] In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court simply declared: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

[1134] *E.g.*, New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Brotherhood of Railroad Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1957); Boys Market v. Retail Clerks Union, 398 U.S. 235 (1970).

[1135] 56 Stat. 23 (1942).

[1136] 319 U.S. 182 (1943).

[1137] 321 U.S. 414 (1944).

proceeding under the Act in the regular district courts. Although Justice Rutledge protested in dissent that this provision conferred jurisdiction on district courts from which essential elements of the judicial power had been abstracted,[1138] Chief Justice Stone for the Court declared that the provision presented no novel constitutional issue.

The Theory Reconsidered

Despite the breadth of the language of many of the previously cited cases, the actual holdings constitute something less than an affirmance of plenary congressional power to do anything desired by manipulation of jurisdiction, and indeed the cases reflect certain limitations. Setting to one side various formulations, such as mandatory vesting of jurisdiction,[1139] inherent judicial power,[1140] and a theory, variously expressed, that the Supreme Court has "essential constitutional functions" of judicial review that Congress may

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[1138] 321 U.S. at 468. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), purportedly in reliance on *Yakus* and other cases, the Court held that a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order had been denied. A statutory scheme similar to that in *Yakus* was before the Court in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. *See esp.* id. at 289 (Justice Powell concurring). *See also* Harrison v. PPG Industries, 446 U.S. 578 (1980), and id. at 594 (Justice Powell concurring).

[1139] This was Justice Story's theory propounded in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329-336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self-executing and accepted the necessity of statutory conferral. White v. Fenner, 29 Fed. Cas. 1015 (No. 17,547) (C.C.D.R.I. 1818) (Justice Story). In the present day, it has been argued that the presence in the jurisdictional-grant provisions of Article III of the word "all" before the subject-matter grants—federal question, admiralty, public ambassadors—mandates federal court review at some level of these cases, whereas congressional discretion exists with respect to party-defined jurisdiction—such as diversity. Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990). Rebuttal articles include Meltzer, The History and Structure of Article III, id. at 1569; Redish, Text, Structure, and Common Sense in the Interpretation of Article III, id. at 1633; and a response by Amar, id. at 1651. An approach similar to Professor Amar's is Clinton, *A Mandatory View of Federal Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Clinton, *Early Implementation and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986). Though perhaps persuasive as an original interpretation, both theories confront a large number of holdings and dicta as well as the understandings of the early Congresses revealed in their actions. *See* Casto, *The First Congress' Understanding of its Authority over the Federal Court's Jurisdiction*, 26 B.C. L. REV. 1101 (1985).

[1140] Justice Brewer in his opinion for the Court in United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. *See also* Paine Lumber Co. v. Neal, 244 U.S. 459, 473, 475-476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, among other decisions, contradicts these assertions.

not impair through jurisdictional limitations,[1141] which lack textual and subsequent judicial support, one can see nonetheless the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function.[1142] Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues, and to construing statutes so as not to deny jurisdiction.[1143]

Ex parte McCardle[1144] marks the farthest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus*, which is marked out with special recognition by the Constitution.[1145]

But how far did *McCardle* actually reach? In concluding its opinion, the Court carefully observed: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was pre-

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[1141] The theory was apparently first developed in Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960). *See also* Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1981-82). The theory was endorsed by Attorney General William French Smith as the view of the Department of Justice. 128 CONG. REC. 9093-9097 (1982) (Letter to Hon. Strom Thurmond).

[1142] An extraordinary amount of writing has been addressed to the issue, only a fraction of which is touched on here. *See* Hart & Wechsler, supra at 362-424.

[1143] Johnson v. Robison, 415 U.S. 361, 366-367 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988). In the last cited case, Justice Scalia attacked the reservation and argued for nearly complete congressional discretion. Id. at 611-15 (concurring).

[1144] 74 U.S. (7 Wall) 506 (1869). For the definitive analysis of the case, *see* Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

[1145] Article I, § 9, cl. 2.

viously exercised."[1146] A year later, in *Ex parte Yerger*,[1147] the Court held that it did have authority under the Judiciary Act of 1789 to review on *certiorari* a denial by a circuit court of a petition for writ of *habeas corpus* on behalf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of *habeas corpus*.[1148]

Another Reconstruction Congress attempt to curb the judiciary failed in *United States v. Klein*,[1149] in which a statute, couched in jurisdictional terms, which attempted to set aside both the effect of a presidential pardon and the judicial effectuation of such a pardon, was voided.[1150] The statute declared that no pardon was to be admissible in evidence in support of any claim against the United

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[1146] Ex parte McCardle, 74 U.S. (7 Wall.) 506, 515 (1869). A restrained reading of *McCardle* is strongly suggested by Felker v. Turpin, 518 U.S. 651 (1996). A 1996 statute giving to federal courts of appeal a "gate-keeping" function over the filing of second or successive *habeas* petitions limited further review, including denying the Supreme Court appellate review of circuit court denials of motions to file second or successive *habeas* petitions. Pub. L. 104-132, § 106, 110 Stat. 1214, 1220, amending 28 U.S.C. § 2244(b). Upholding the limitation, which was nearly identical to the congressional action at issue in *McCardle* and *Yerger*, the Court held that its jurisdiction to hear appellate cases had been denied, but just as in *Yerger* the statute did not annul the Court's jurisdiction to hear *habeas* petitions filed as original matters in the Supreme Court. No constitutional issue was thus presented.

[1147] 75 U.S. (8 Wall.) 85 (1869). *Yerger* is fully reviewed in C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I—RECONSTRUCTION AND REUNION, 1864-88 (New York: 1971), 558-618.

[1148] *Cf.* Eisentrager v. Forrestal, 174 F. 2d 961, 966 (D.C.Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (dissenting opinion): "There is a serious question whether the *McCardle* case could command a majority view today." Justice Harlan, however, cited *McCardle* with apparent approval of its holding, id. at 567-68, while noting that Congress' "authority is not, of course, unlimited." Id. at 568. *McCardle* was cited approvingly in Bruner v. United States, 343 U.S. 112, 117 n.8 (1952), as illustrating the rule "that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."

[1149] 80 U.S. (13 Wall.) 128 (1872). *See* C. Fairman, supra at 558-618. The seminal discussion of *Klein* may be found in Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WISC. L. REV. 1189. While he granted that *Klein* is limited insofar as its bearing on jurisdictional limitation *per se* is concerned, he cited an ambiguous holding in Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1872), as in fact a judicial invalidation of a jurisdictional limitation. Young, id. at 1222-23 n.179.

[1150] Congress by the Act of July 17, 1862, §§ 5, 13, authorized the confiscation of property of those persons in rebellion and authorized the President to issue pardons on such conditions as he deemed expedient, the latter provision being unnecessary in light of Article II, § 2, cl. 1. The President's pardons all provided for restoration of property, except slaves, and in United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870), the Court held the claimant entitled to the return of his property on the basis of his pardon. Congress thereupon enacted the legislation in question. 16 Stat. 235 (1870).

States in the Court of Claims for the return of confiscated property of Confederates nor, if already put in evidence in a pending case, should it be considered on behalf of the claimant by the Court of Claims or by the Supreme Court on appeal. Proof of loyalty was required to be made according to provisions of certain congressional enactments, and when judgment had already been rendered on other proof of loyalty the Supreme Court on appeal should have no further jurisdiction and should dismiss for want of jurisdiction. Moreover, it was provided that the recitation in any pardon which had been received that the claimant had taken part in the rebellion was to be taken as conclusive evidence that the claimant had been disloyal and was not entitled to regain his property.

The Court began by reaffirming that Congress controlled the existence of the inferior federal courts and the jurisdiction vested in them and the appellate jurisdiction of the Supreme Court. "But the language of this provision shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end.... It is evident ... that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[1151] The statute was void for two reasons; it "infring[ed] the constitutional power of the Executive,"[1152] and it "prescrib[ed] a rule for the decision of a cause in a particular way."[1153] *Klein* thus stands for the proposition that Congress may not violate the principle of separation of powers[1154] and that it may not accomplish certain forbidden substantive acts by casting them in jurisdictional terms.[1155]

[1151] United States v. Klein, 80 U.S. (13 Wall.) 128, 145-46 (1872).

[1152] 80 U.S. at 147.

[1153] 80 U.S. at 146.

[1154] 80 U.S. at 147. For an extensive discussion of *Klein*, *see* United States v. Sioux Nation, 448 U.S. 371, 391-405 (1980), and id. at 424, 427-34 (Justice Rehnquist dissenting). *See also* Pope v. United States, 323 U.S. 1, 8-9 (1944); Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962) (Justice Harlan). In Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), the 9th Circuit had held unconstitutional under *Klein* a statute that it construed to deny the federal courts power to construe the law, but the Supreme Court held that Congress had *changed* the law that the courts were to apply. The Court declined to consider whether *Klein* was properly to be read as voiding a law "because it directed decisions in pending cases without amending any law." Id. at 441.

[1155] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872).

Other restraints on congressional power over the federal courts may be gleaned from the opinion in the much-disputed *Crowell v. Benson*.[1156] In an 1856 case, the Court distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and which cannot be withdrawn from judicial cognizance, and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cognizance.[1157] What this might mean was elaborated in *Crowell v. Benson*,[1158] involving the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial *de novo* of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes fused the due process clause of the Fifth Amendment and Article III but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." The answer was stated broadly. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function. . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."[1159]

It is not at all clear that, in this respect, *Crowell v. Benson* remains good law. It has never been overruled, and it has been cited

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[1156] 285 U.S. 22 (1932). *See also* Ng Fung Ho v. White, 259 U.S. 276 (1922); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); St. Joseph Stock Yard Co. v. United States, 298 U.S. 38 (1936).

[1157] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[1158] 285 U.S. 22 (1932). Justices Brandeis, Stone, and Roberts dissented.

[1159] 285 U.S. at 56, 60, 64.

by several Justices approvingly,[1160] but the Court has never applied the principle to control another case.[1161]

Express Constitutional Restrictions on Congress.—"[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution."[1162] The Supreme Court has had no occasion to deal with this principle in the context of Congress' power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act[1163] presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. While some district courts sustained the Act on the basis of the withdrawal of jurisdiction, this action was disapproved by the Courts of Appeals, which indicated that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter was invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[1164]

[1160] *See* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-87 (1982) (plurality opinion), and id. at 100-03, 109-11 (Justice White dissenting) (discussing the due process/Article III basis of *Crowell*). Both the plurality and the dissent agreed that later cases had "undermined" the constitutional/jurisdictional fact analysis. Id. at 82, n. 34; 110 n.12. For other discussions, *see* Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (Justice Brennan announcing judgment of the Court, joined by Justice Goldberg); Pickering v. Board of Education, 391 U.S. 563, 578-79 (1968); Agosto v. INS, 436 U.S. 748, 753 (1978); United States v. Raddatz, 447 U.S. 667, 682-84 (1980), and id. at 707-12 (Justice Marshall dissenting).

[1161] *Compare* Permian Basin Area Rate Cases, 390 U.S. 747, 767, 792 (1968); Cordillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). Justice Frankfurter was extremely critical of *Crowell*. Estep v. United States, 327 U.S. 114, 142 (1946); City of Yonkers v. United States, 320 U.S. 685 (1944).

[1162] Williams v. Rhodes, 393 U.S. 23, 29 (1968) (opinion of the Court.) The elder Justice Harlan perhaps had the same thought in mind when he said that, with regard to Congress' power over jurisdiction, "what such exceptions and regulations should be it is for Congress, in its wisdom to establish, having of course due regard to all the Constitution." United States v. Bitty, 208 U.S. 393, 399-400 (1908).

[1163] 52 Stat. 1060, 29 U.S.C. § 201.

[1164] Battaglia v. General Motors Corp., 169 F. 2d 254, 257 (2d Cir.), *cert. den.* 335 U.S. 887 (1948) (Judge Chase). *See also* Seese v. Bethlehem Steel Co., 168

Conclusion.—There thus remains a measure of doubt that Congress' power over the federal courts is as plenary as some of the Court's language suggests it is. Congress has a vast amount of discretion in conferring and withdrawing and structuring the original and appellate jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court; so much is clear from the practice since 1789 and the holdings of many Court decisions. That its power extends to accomplishing by means of its control over jurisdiction actions which it could not do directly by substantive enactment is by no means clear from the text of the Constitution or from the cases.

FEDERAL-STATE COURT RELATIONS

Problems Raised by Concurrency

The Constitution established a system of government in which total power, sovereignty, was not unequivocally lodged in one level of government. In Chief Justice Marshall's words, "our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union. . . ." Naturally, in such a system, "contests respecting power must arise." [1165] Contests respecting power may frequently arise in a federal system with dual structures of courts exercising concurrent jurisdiction in a number of classes of cases. Too, the possibilities of frictions grow out of the facts that one set of courts may interfere directly or indirectly with the other through injunctive and declaratory processes, through the use of *habeas corpus* and removal to release persons from the custody of the other set, and through the refusal by state courts to be bound by decisions of the United States Supreme Court. The relations between federal and state courts are governed in part by constitutional law, with respect, say, to state court interference with federal courts and state court refusal to comply with the judgments of federal tribunals; in part by statutes, with respect to the federal law generally enjoining federal-court interference with pending state court proceedings; and in part by self-imposed rules of comity and restraint, such as

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F. 2d 58, 65 (4th Cir. 1948) (Chief Judge Parker). For recent dicta, *see* Johnson v. Robison, 415 U.S. 361, 366-367 (1974); Weinberger v. Salfi, 422 U.S. 749, 761-762 (1975); Territory of Guam v. Olsen, 431 U.S. 195, 201-202, 204 (1977); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988); *but see* id. at 611-15 (Justice Scalia dissenting). Note the relevance of United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[1165] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204-05 (1824).

the abstention doctrine, all applied to avoid unseemly conflicts, which, however, have at times occurred.

Subject to congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except suits between States, those to which the United States is a party, those to which a foreign state is a party, and those within the traditional admiralty jurisdiction.[1166] Even within this last category, however, state courts, though unable to prejudice the harmonious operation and uniformity of general maritime law,[1167] have concurrent jurisdiction over cases that occur within the maritime jurisdiction when such litigation assumes the form of a suit at common law.[1168] Review of state court decisions by the United States Supreme Court is intended to protect the federal interest and promote uniformity of law and decision relating to the federal interest.[1169] The first category of conflict surfaces here. The second broader category arises from the fact that state interests, actions, and wishes, all of which may at times be effectuated through state courts, are variously subject to restraint by federal courts. Although the possibility always existed,[1170] it became much more significant and likely when, in the wake of the Civil War, Congress bestowed general federal question jurisdiction on the federal courts,[1171] enacted a series of civil rights statutes and conferred jurisdiction on the federal courts

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[1166] *See* 28 U.S.C. §§ 1251, 1331 *et seq*. Indeed, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicity or implicitly confine jurisdiction to the federal courts to oust the state courts. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-484 (1981); Tafflin v. Levitt, 493 U.S. 455 (1990); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990). Federal courts have exclusive jurisdiction of the federal antitrust laws, even though Congress has not spoken expressly or impliedly. *See* General Investment Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 287 (1922). Justice Scalia has argued that, inasmuch as state courts have jurisdiction generally because federal law *is* law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, Tafflin v. Levitt, 493 U.S. at 469, but as can be seen that is not now the rule.

[1167] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[1168] Through the "saving to suitors" clause. 28 U.S.C. § 1333(1). *See* Madruga v. Superior Court, 346 U.S. 556, 560-561 (1954).

[1169] Supra, "Organization of Courts, Tenure, and Compensation of Judges" and "Marbury v. Madison". *See* 28 U.S.C. § 1257.

[1170] *E.g.*, by a suit against a State by a citizen of another State directly in the Supreme Court, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which was overturned by the Eleventh Amendment; by suits in diversity or removal from state courts where diversity existed, 1 Stat. 78, 79; by suits by aliens on treaties, 1 Stat. 77, and, subsequently, by removal from state courts of certain actions. 3 Stat. 198. And for some unknown reason, Congress passed in 1793 a statute prohibiting federal court injunctions against state court proceedings. *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 120-132 (1941).

[1171] Act of March 3, 1875, 18 Stat. 470.

to enforce them,[1172] and most important proposed and saw to the ratification of the three constitutional amendments, especially the Fourteenth, which made an ever-increasing number of state actions subject to federal scrutiny.[1173]

The Autonomy of State Courts

Noncompliance With and Disobedience of Supreme Court Orders by State Courts.—The United States Supreme Court when deciding cases on review from the state courts usually remands the case to the state court when it reverses for "proceedings not inconsistent" with the Court's opinion. This disposition leaves open the possibility that unresolved issues of state law will be decided adversely to the party prevailing in the Supreme Court or that the state court will so interpret the facts or the Court's opinion to the detriment of the party prevailing in the Supreme Court.[1174] When it is alleged that the state court has deviated from the Supreme Court's mandate, the party losing below may appeal again[1175] or she may presumably apply for mandamus to compel compliance.[1176] Statutorily, the Court may attempt to overcome state recalcitrance by a variety of specific forms of judgment.[1177] If, however, the state courts simply defy the mandate of the Court,

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[1172] Civil Rights Act of 1871, § 1, 17 Stat. 13. The authorization for equitable relief is now 42 U.S.C. § 1983, while jurisdiction is granted by 28 U.S.C. § 1343.

[1173] *See* H. WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS (1969).

[1174] Hart & Wechsler, supra. Notable examples include Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). For studies, *see* Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term 1931 to October Term 1940*, 55 HARV. L. REV. 1357 (1942); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954); Schneider, *State Court Evasion of United States Supreme Court Mandates: A Reconsideration of the Evidence*, 7 VALP. U. L. REV. 191 (1973).

[1175] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). *See* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 785-817 (1953); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 442-453 (1926). For recent examples, *see* NAACP v. Alabama, 360 U.S. 240, 245 (1959); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964), after remand, 277 Ala. 89, 167 So. 2d 171 (1964); Stanton v. Stanton, 429 U.S. 501 (1977); General Atomic Co. v. Felter, 436 U.S. 493 (1978).

[1176] It does not appear that mandamus has ever actually issued. *See* In re Blake, 175 U.S. 114 (1899); Ex parte Texas, 315 U.S. 8 (1942); Fisher v. Hurst, 333 U.S. 147 (1948); Lavender v. Clark, 329 U.S. 674 (1946); General Atomic Co. v. Felter, 436 U.S. 493 (1978).

[1177] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 437 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239 (1824); Williams v. Bruffy, 102 U.S. 248 (1880) (entry of judgment); Tyler v. Maguire, 84 U.S. (17 Wall.) 253 (1873) (award of execution); Stanley v. Schwalby, 162 U.S. 255 (1896); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885) (remand with direction to enter a specific judgment). *See* 28 U.S.C. § 1651(a), 2106.

difficult problems face the Court, extending to the possibility of contempt citations.[1178]

The most spectacular disobedience of federal authority arose out of the conflict between the Cherokees and the State of Georgia, which was seeking to remove them and seize their lands with the active support of President Jackson.[1179] In the first instance, after the Court had issued a writ of error to the Georgia Supreme Court to review the murder conviction of a Cherokee, Corn Tassel, and after the writ was served, Corn Tassel was executed on the day set for the event, contrary to the federal law that a writ of error superseded sentence until the appeal was decided.[1180] Two years later, Georgia again defied the Court when in *Worcester v. Georgia*,[1181] it set aside the conviction of two missionaries for residing among the Indians without a license. Despite the issuance of a special mandate to a local court to discharge the missionaries, they were not released, and the State's governor loudly proclaimed resistance. Consequently, the two remained in jail until they agreed to abandon further efforts for their discharge by federal authority and to leave the State, whereupon the governor pardoned them.

Use of State Courts in Enforcement of Federal Law.—Although the states-rights proponents in the Convention and in the First Congress wished to leave to the state courts the enforcement of federal law and rights rather than to create inferior federal courts,[1182] it was not long before they or their successors began to argue that state courts could not be required to adjudicate cases based on federal law. The practice in the early years was to make the jurisdiction of federal courts generally concurrent with that of state courts,[1183] and early Congresses imposed positive duties on state courts to enforce federal laws.[1184] Reaction set in out of hos-

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[1178] *See* 18 U.S.C. § 401. In United States v. Shipp, 203 U.S. 563 (1906), 214 U.S. 386 (1909); 215 U.S. 580 (1909), on action by the Attorney General, the Court appointed a commissioner to take testimony, rendered judgment of conviction, and imposed sentence on a state sheriff who had conspired with others to cause the lynching of a prisoner in his custody after the Court had allowed an appeal from a circuit court's denial of a petition for a writ of *habeas corpus*. A question whether a probate judge was guilty of contempt of an order of the Court in failing to place certain candidates on the ballot was certified to the district court, over the objections of Justices Douglas and Harlan, who wished to follow the *Shipp* practice. In re Herndon, 394 U.S. 399 (1969). *See* In re Herndon, 325 F. Supp. 779 (M.D. Ala. 1971).

[1179] 1 C. Warren, supra at 729-79.

[1180] Id. at 732-36.

[1181] 31 U.S. (6 Pet.) 515 (1832).

[1182] Supra, "Organization of Courts, Tenure, and Compensation of Judges".

[1183] Judiciary Act of 1789, §§ 9, 11, 1 Stat. 76, 78, *and see* id. at § 25, 1 Stat, 85.

[1184] *E.g.*, Carriage Tax Act, 1 Stat. 373 (1794); License Tax on Wine & Spirits Act, 1 Stat. 376 (1794): Fugitive Slave Act, 1 Stat. 302 (1794); Naturalization Act

tility to the Embargo Acts, the Fugitive Slave Law, and other measures,[1185] and in *Prigg v. Pennsylvania*,[1186] involving the Fugitive Slave Law, the Court indicated that the States could not be compelled to enforce federal law. After a long period, however, Congress resumed its former practice,[1187] which the Court sustained,[1188] and it went even further in the Federal Employers' Liability Act by not only giving state courts concurrent jurisdiction but also by prohibiting the removal of cases begun in state courts to the federal courts.[1189]

When Connecticut courts refused to enforce an FELA claim on the ground that to do so was contrary to the public policy of the State, the Court held on the basis of the Supremacy Clause that when Congress enacts a law and declares a national policy, that policy is as much Connecticut's and every other State's as it is of the collective United States.[1190] The Court's suggestion that the Act could be enforced "as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion,"[1191] leaving the impression that state practice might in some instances preclude enforcement in state courts, was given body when the Court upheld New York's refusal to adjudicate an FELA claim which fell in a class of cases in which claims under state law would not be entertained.[1192] "[T]here is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."[1193] However, "[a]n excuse that

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of 1795, 1 Stat. 414; Alien Enemies Act of 1798, 1 Stat. 577. State courts in 1799 were vested with jurisdiction to try criminal offenses against the postal laws. 1 Stat. 733, 28. The Act of March 3, 1815, 3 Stat. 244, vested state courts with jurisdiction of complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures. *See* Warren, *Federal Criminal Laws and State Courts*, 38 HARV. L. REV. 545, 577-581 (1925).

[1185] Embargo Acts, 2 Stat. 453, 473, 499, 506, 528, 550, 605, 707 (1808-1812); 3 Stat. 88 (1813); Fugitive Slave Act, 1 Stat. 302 (1793).

[1186] 41 U.S. (16 Pet.) 539, 615 (1842), *See also* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 69 (1820) (Justice Story dissenting); United States v. Bailey, 34 U.S. (9 Pet.) 238, 259 (1835) (Justice McLean dissenting). However, it was held that States could exercise concurrent jurisdiction if they wished. Claflin v. Houseman, 93 U.S. 130 (1876), and cases cited.

[1187] *E.g.*, Act of June 8, 1872, 17 Stat. 323.

[1188] Claflin v. Houseman, 93 U.S. 130 (1876).

[1189] 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60.

[1190] Second Employers' Liability Cases (Mondou v. New York, N.H. & H. R.R.), 223 U.S. 1 (1912).

[1191] 223 U.S. at 59.

[1192] Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[1193] 279 U.S. at 388. For what constitutes a valid excuse, *compare* Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950), *with* McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934). It appears that generally state procedure must yield to federal when it would make a difference in outcome. *Compare* Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949), *and* Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952), with Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

is inconsistent with or violates federal law is not a valid excuse. . . ." [1194]

In *Testa v. Katt*, [1195] the Court unanimously held that state courts, at least in regard to claims and cases analogous to claims and cases enforceable in those courts under state law, are as required to enforce penal laws of the United States as they are to enforce remedial laws. Respecting Rhode Island's claim that one sovereign cannot enforce the penal laws of another, Justice Black observed that the assumption underlying this claim flew "in the face of the fact that the States of the Union constitute a nation" and the fact of the existence of the Supremacy Clause. [1196]

State Interference with Federal Jurisdiction.—It seems settled, though not without dissent, that state courts have no power to enjoin proceedings [1197] or effectuation of judgments [1198] of the federal courts, with the exception of cases in which a state court has custody of property in proceedings *in rem* or *quasi in rem*, where the state court has exclusive jurisdiction to proceed and may enjoin parties from further action in federal court. [1199]

[1194] Howlett v. Rose, 496 U.S. 356, 371 (1990). *See also* Felder v. Casey, 487 U.S. 131 (1988).

[1195] 330 U.S. 386 (1947).

[1196] 330 U.S. at 389. *See*, for a discussion as well as an extension of *Testa*, FERC v. Mississippi, 456 U.S. 742 (1982). Cases since *Testa* requiring state court enforcement of federal rights have generally concerned federal remedial laws. *E.g.*, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). The Court has approved state court adjudication under 42 U.S.C. § 1983, Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980), but curiously in Martinez v. California, 444 U.S. 277, 283 n.7 (1980) (emphasis by Court), it noted that it has "never considered . . . the question whether a State *must* entertain a claim under 1983." *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 n.7 (1987) (continuing to reserve question). But with Felder v. Casey, 487 U.S. 131 (1988), and Howlett by Howlett v. Rose, 496 U.S. 356 (1990), it seems dubious that state courts could refuse. Enforcement is not limited to federal statutory law; federal common law must similarly be enforced. Free v. Brand, 369 U.S. 663 (1962).

[1197] Donovan v. City of Dallas, 377 U.S. 408 (1964), and cases cited. Justices Harlan, Clark, and Stewart dissented, arguing that a State should have power to enjoin vexatious, duplicative litigation which would have the effect of thwarting a state-court judgment already entered. *See also* Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 56 (1941) (Justice Frankfurter dissenting). In Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868), the general rule was attributed to the complete independence of state and federal courts in their spheres of action, but federal courts, of course may under certain circumstances enjoin actions in state courts.

[1198] McKim v. Voorhies, 11 U.S. (7 Cr.) 279 (1812); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868).

[1199] Princess Lida v. Thompson, 305 U.S. 456 (1939). Nor do state courts have any power to release by *habeas corpus* persons in custody pursuant to federal authority. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); Tarble's Case, 80 U.S. (13 Wall.) 397 (1872).

Conflicts of Jurisdiction: Rules of Accommodation

Federal courts primarily interfere with state courts in three ways: by enjoining proceedings in them, by issuing writs of *habeas corpus* to set aside convictions obtained in them, and by adjudicating cases removed from them. With regard to all three but particularly with regard to the first, there have been developed certain rules plus a statutory limitation designed to minimize needless conflict.

Comity.—"[T]he notion of 'comity,'" Justice Black asserted, is composed of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism'. . . ." [1200] Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. It is not a rule of law but "one of practice, convenience, and expediency" [1201] which persuades but does not command.

Abstention.—Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine. The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive of the controversy, is unclear and a state court interpretation of the state law question might obviate the necessity of deciding a federal constitutional issue. [1202] Abstention is not proper, however, where the rel-

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[1200] Younger v. Harris, 401 U.S. 37, 44 (1971). *Compare* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), *with* id. at 119-25 (Justice Brennan concurring, joined by three other Justices).

[1201] Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 458, 488 (1900). Recent decisions emphasize comity as the primary reason for restraint in federal court actions tending to interfere with state courts. *E.g.*, O'Shea v. Littleton, 414 U.S. 488, 499-504 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592, 599-603 (1975); Trainor v. Hernandez, 431 U.S. 434, 441 (1977); Moore v. Sims, 442 U.S. 415, 430 (1979). The Court has also cited comity as a reason to restrict access to federal *habeas corpus*. Francis v. Henderson, 425 U.S. 536, 541 and n.31 (1976); Wainwright v. Sykes, 433 U.S. 72, 83, 88, 90 (1977); Engle v. Isaac, 456 U.S. 107, 128-129 (1982). *See also* Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (comity limits federal court interference with state tax systems). *And see* Missouri v. Jenkins, 495 U.S. 33 (1990).

[1202] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 13 (4th ed. 1983). The basic doctrine was formulated by Justice Frankfurter for the Court in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Other strands of the doctrine are that a federal court should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a State of its own affairs, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Alabama Public Service Comm'n v. Southern Ry., 341 U.S.

evant state law is settled,[1203] or where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law.[1204] Federal jurisdiction is not ousted by abstention; rather it is postponed.[1205] Federal-state tensions would be ameliorated through federal-court deference to the concept that state courts are as adequate a protector of constitutional liberties as the federal courts and through the minimization of the likelihood that state programs would be thwarted by federal intercession. Federal courts would benefit because time and effort would not be expended in decision of difficult constitutional issues which might not require decision.[1206]

During the 1960s, the abstention doctrine was in disfavor with the Supreme Court, suffering rejection in numerous cases, most of

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341 (1951); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Martin v. Creasy, 360 U.S. 219 (1959); Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) (carefully reviewing the scope of the doctrine), especially where state law is unsettled. Meredith v. City of Winter Haven, 320 U.S. 228 (1943); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). *See also* Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960). Also, while pendency of an action in state court will not ordinarily cause a federal court to abstain, there are "exceptional" circumstances in which it should. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). But in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), an exercise in *Burford* abstention, the Court held that federal courts have power to dismiss or remand cases based on abstention principles only where relief being sought is equitable or otherwise discretionary but may not do so in common-law actions for damages.

[1203] City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Zwickler v. Koota, 389 U.S. 241, 249-251 (1967). *See* Babbitt v. United Farm Workers Nat'l. Union, 442 U.S. 289, 306 (1979) (quoting Harman v. Forssenius, 380 U.S. 528, 534-35 (1965)).

[1204] Harman v. Forssenius, 380 U.S. 528, 534-535 (1965); Babbitt v. United Farm Workers Nat'l., 442 U.S. 289, 305-312 (1979). Abstention is not proper simply to afford a state court the opportunity to hold that a state law violates the federal Constitution. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978); Douglas v. Seacoast Products, 431 U.S. 265, 271 n.4 (1977); City of Houston v. Hill, 482 U.S. 451 (1987) ("A federal court may not properly ask a state court if it would care in effect to rewrite a statute"). But if the statute is clear and there is a reasonable possibility that the state court would find it in violation of a distinct or specialized state constitutional provision, abstention may be proper, Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975); Reetz v. Bozanich, 397 U.S. 82 (1970), although not if the state and federal constitutional provisions are alike. Examining Bd. v. Flores de Otero, 426 U.S. 572, 598 (1976).

[1205] American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973); Harrison v. NAACP, 360 U.S. 167 (1959). Dismissal may be necessary if the state court will not accept jurisdiction while the case is pending in federal court. Harris County Comm'rs v. Moore, 420 U.S. 77, 88 n.14 (1975).

[1206] *E.g.*, Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Harrison v. NAACP, 360 U.S. 167 (1959).

them civil rights and civil liberties cases.[1207] Time-consuming delays[1208] and piecemeal resolution of important questions[1209] were cited as a too-costly consequence of the doctrine. Actions brought under the civil rights statutes seem not to have been wholly subject to the doctrine,[1210] and for awhile cases involving First Amendment expression guarantees seemed to be sheltered as well, but this is no longer the rule.[1211] Abstention developed robustly with *Younger v. Harris*,[1212] and its progeny.

Exhaustion of State Remedies.—A complainant will ordinarily be required, as a matter of comity, to exhaust all available state legislative and administrative remedies before seeking relief in federal court.[1213] To do so may make unnecessary federal-court adjudication. The complainant will ordinarily not be required, however, to exhaust his state judicial remedies, inasmuch as it is a litigant's choice to proceed in either state or federal courts when the alternatives exist and a question for judicial adjudication is present.[1214] But when a litigant is suing for protection of federally-guaranteed civil rights, he need not exhaust any kind of state remedy.[1215]

[1207] McNeese v. Board of Education, 373 U.S. 668 (1963); Griffin v. School Board, 377 U.S. 218 (1964); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Davis v. Mann, 377 U.S. 678 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965); Harman v. Forssenius, 380 U.S. 528 (1965); Zwickler v. Koota, 389 U.S. 241 (1967); Wisconsin v. Constanineau, 400 U.S. 433 (1971).

[1208] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 426 (1964) (Justice Douglas concurring). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 305 (4th ed. 1983).

[1209] Baggett v. Bullitt, 377 U.S. 360, 378-379 (1964). Both consequences may be alleviated substantially by state adoption of procedures by which federal courts may certify to the State's highest court questions of unsettled state law which would be dispositive of the federal court action. The Supreme Court has actively encouraged resort to certification where it exists. Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960); Lehman Brothers v. Schein, 416 U.S. 386 (1974); Bellotti v. Baird, 428 U.S. 132, 151 (1976).

[1210] *Compare* Harrison v. NAACP, 360 U.S. 167 (1959), *with* McNeese v. Board of Education, 373 U.S. 668 (1963).

[1211] *Compare* Baggett v. Bullitt, 377 U.S. 360 (1964), *and* Dombrowski v. Pfister, 380 U.S. 479 (1965), *with* Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971). *See* Babbitt v. United Farm Workers, 442 U.S. 289, 305-312 (1979).

[1212] 401 U.S. 37 (1971). There is room to argue whether the *Younger* line of cases represents the abstention doctrine at all, but the Court continues to refer to it in those terms. *E.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992).

[1213] The rule was formulated in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), and Bacon v. Rutland R.R., 232 U.S. 134 (1914).

[1214] City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 (1934); Lane v. Wilson, 307 U.S. 268 (1939). *But see* Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951). Exhaustion of state court remedies is required in *habeas corpus* cases and usually in suits to restrain state court proceedings.

[1215] Patsy v. Board of Regents, 457 U.S. 496 (1982). Where there are pending administrative proceedings that fall within the *Younger* rule, a litigant must ex-

Anti-Injunction Statute.—For reasons unknown,[1216] Congress in 1793 enacted a statute to prohibit the issuance of injunctions by federal courts to stay state court proceedings.[1217] Over time, a long list of exceptions to the statutory bar was created by judicial decision,[1218] but in *Toucey v. New York Life Ins. Co.*,[1219] the Court in a lengthy opinion by Justice Frankfurter announced a very liberal interpretation of the anti-junction statute so as to do away with practically all the exceptions that had been created. Congress' response was to redraft the statute and to indicate that it was restoring the pre- *Toucey* interpretation.[1220] Considerable disagreement exists over the application of the statute, however, and especially with regard to the exceptions permissible under its language. The present tendency appears to be to read the law expansively and the exceptions restrictively in the interest of preventing conflict with state courts.[1221] Nonetheless, some exceptions do exist, either expressly or implicitly in statutory language[1222] or

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haust. Younger v. Harris, 401 U.S. 37 (1971), as explicated in Ohio Civil Rights Comm'n v. Dayton Christian School, Inc., 477 U.S. 619, 627 n.2 (1986). Under title VII of the Civil Rights Act of 1964, barring employment discrimination on racial and other specified grounds, the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter. 42 U.S.C. §§ 2000e-5(c). *See* Love v. Pullman Co., 404 U.S. 522 (1972). And under the Civil Rights of Institutionalized Persons Act, there is a requirement of exhaustion, where States have federally-approved procedures. *See* Patsy, 457 U.S. at 507-13.

[1216] Toucey v. New York Life Ins. Co., 314 U.S. 118, 130-132 (1941).

[1217] "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state; ..." § 5, 1 Stat. 334 (1793), now, as amended, 28 U.S.C. § 2283.

[1218] Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932).

[1219] 314 U.S. 118 (1941).

[1220] "A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Reviser's Note is appended to the statute, stating intent.

[1221] Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER ch. 10 (1980).

[1222] The greatest difficulty is with the "expressly authorized by Act of Congress" exception. No other Act of Congress expressly refers to § 2283 and the Court has indicated that no such reference is necessary to create a statutory exception. Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 516 (1955). *Compare* Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954). Rather, "in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." Mitchum v. Foster, 407 U.S. 225, 237 (1972). Applying this test, the Court in *Mitchum* held that a 42 U.S.C. § 1983 suit is an exception to § 2283 and that persons suing under this authority may, if they satisfy the requirements of comity, obtain an injunction against state court proceedings. The exception is, of course, highly constrained by the comity principle. On the difficulty of applying the test, *see* Vendo Co. v. Lektco-Vend Corp., 433 U.S. 623

through Court interpretation.[1223] The Court's general policy of application, however, seems to a considerable degree to effectuate what is now at least the major rationale of the statute, deference to state court adjudication of issues presented to them for decision.[1224]

Res Judicata.—Both the Constitution and a contemporaneously-enacted statute require federal courts to give "full faith and credit" to state court judgments, to give, that is, preclusive effect to state court judgments when those judgments would be given preclusive effect by the courts of that State.[1225] The present Court views the interpretation of "full faith and credit" in the overall context of deference to state courts running throughout this section. "Thus, *res judicata* and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."[1226] The Court in this case, after reviewing enactment of the statute that is now 42 U.S.C. § 1983, held that § 1983 is not an exception to the mandate of the *res judicata* statute.[1227] An exception to § 1738 "will not be recognized unless a later statute contains an express or implied partial repeal."[1228] Thus, a claimant who pursued his employment discrimination remedies through state administrative procedures, as the federal law requires her to do (within limits), and then ap-

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(1977) (fragmented Court on whether Clayton Act authorization of private suits for injunctive relief is an "expressly authorized" exception to § 2283).

On the interpretation of the § 2283 exception for injunctions to protect or effectuate a federal-court judgment, *see* Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988).

[1223] Thus, the Act bars federal court restraint of pending state court proceedings but not restraint of the institution of such proceedings. Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965). Restraint is not barred if sought by the United States or an officer or agency of the United States. Leiter Minerals v. United States, 352 U.S. 220 (1957); NLRB v. Nash-Finch Co., 404 U.S. 138 (1971). Restraint is not barred if the state court proceeding is not judicial but rather administrative. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Roudebush v. Hartke, 405 U.S. 15 (1972). *Compare* Hill v. Martin, 296 U.S. 393, 403 (1935), *with* Lynch v. Household Finance Corp., 405 U.S. 538, 552-556 (1972).

[1224] The statute is to be applied "to prevent needless friction between state and federal courts." Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9 (1940); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 285-286 (1970).

[1225] Article IV, § 1, of the Constitution; 28 U.S.C. § 1738.

[1226] Allen v. McCurry, 449 U.S. 90, 95-96 (1980).

[1227] 449 U.S. at 96-105. There were three dissenters. Id. at 105 (Justices Blackmun, Brennan, and Marshall). In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court held that when parties are compelled to go to state court under Pullman abstention, either party may reserve the federal issue and thus be enabled to return to federal court without being barred by *res judicata*.

[1228] Kramer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982).

pealed an adverse state agency decision to state court will be precluded from bringing her federal claim to federal court, since the federal court is obligated to give the state court decision "full faith and credit." [1229]

Three-Judge Court Act.—When the Court in *Ex parte Young* [1230] held that federal courts were not precluded by the Eleventh Amendment from restraining state officers from enforcing state laws determined to be in violation of the federal Constitution, serious efforts were made in Congress to take away the authority thus asserted, but the result instead was legislation providing that suits in which an interlocutory injunction was sought against the enforcement of state statutes by state officers were to be heard by a panel of three federal judges, rather than by a single district judge, with appeal direct to the Supreme Court. [1231] The provision was designed to assuage state feeling by vesting such determinations in a court more prestigious than a single-judge district court, to assure a more authoritative determination, and to prevent the assertion of individual predilections in sensitive and emotional areas. [1232] Because, however, of the heavy burden that convening a three-judge court placed on the judiciary and that the direct appeals placed on the Supreme Court, the provisions for such courts, save in cases "when otherwise required by an Act of Congress" [1233] or in cases involving state legislative or congressional districting, were repealed by Congress in 1976. [1234]

Conflicts of Jurisdiction; Federal Court Interference with State Courts

One challenging the constitutionality, under the United States Constitution, of state actions, statutory or otherwise, could, of course, bring suit in state court; indeed, in the time before conferral of federal-question jurisdiction on lower federal courts plaintiffs had to bring actions in state courts, and on some occasions

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[1229] 456 U.S. 468-76. There were four dissents. Id. at 486 (Justices Blackmun, Brennan, and Marshall), 508 (Stevens).

[1230] 209 U.S. 123 (1908).

[1231] 36 Stat. 557 (1910). The statute was amended in 1925 to apply to requests for permanent injunctions, 43 Stat. 936, and again in 1937 to apply to constitutional attacks on federal statutes. 50 Stat. 752.

[1232] Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965); Ex parte Collins, 277 U.S. 565, 567 (1928).

[1233] These now are primarily limited to suits under the Voting Rights Act, 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c), and to certain suits by the Attorney General under public accommodations and equal employment provisions of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000a-5(b), 2000e-6(b).

[1234] Pub. L. 94-381, 90 Stat. 1119, 28 U.S.C. § 2284. In actions still required to be heard by three-judge courts, direct appeals are still available to the Supreme Court. 28 U.S.C. § 1253.

now, this has been done.[1235] But the usual course is to sue in federal court for either an injunction or a declaratory judgment or both. In an era in which landmark decisions of the Supreme Court and of inferior federal courts have been handed down voiding racial segregation requirements, legislative apportionment and congressional districting, abortion regulations, and many other state laws and policies, it is difficult to imagine a situation in which it might be impossible to obtain such rulings because no one required as a defendant could be sued. Yet, the adoption of the Eleventh Amendment in 1798 resulted in the immunity of the State,[1236] and the immunity of state officers if the action upon which they were being sued was state action,[1237] from suit without the State's consent. *Ex parte Young*[1238] is a seminal case in American constitutional law because it created a fiction by which the validity of state statutes and other actions could be challenged by suits against state officers as individuals.[1239]

Conflict between federal and state courts is inevitable when the federal courts are open to persons complaining about unconstitutional or unlawful state action which could as well be brought in the state courts and perhaps is so brought by other persons, but the various rules of restraint flowing from the concept of comity reduce federal interference here some considerable degree. It is rather in three fairly well defined areas that institutional conflict is most pronounced.

Federal Restraint of State Courts by Injunctions.—Even where the federal anti-injunction law is inapplicable, or where the question of application is not reached,[1240] those seeking to enjoin

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[1235] For example, one of the cases decided in Brown v. Board of Education, 347 U.S. 483 (1954), came from the Supreme Court of Delaware. In Scott v. Germano, 381 U.S. 407 (1965), the Court set aside an order of the district court refusing to defer to the state court which was hearing an apportionment suit and said: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States has been specifically encouraged." *See also* Scranton v. Drew, 379 U.S. 40 (1964).

[1236] By its terms, the Eleventh Amendment bars only suits against a State by citizens of other States, but in Hans v. Louisiana, 134 U.S. 1 (1890), the Court deemed it to embody principles of sovereign immunity which applied to unconsented suits by its own citizens.

[1237] In re Ayers, 123 U.S. 443 (1887).

[1238] 209 U.S. 123 (1908).

[1239] The fiction is that while the official is a state actor for purposes of suit against him, the claim that his action is unconstitutional removes the imprimatur of the State that would shield him under the Eleventh Amendment. 209 U.S. at 159-60.

[1240] 28 U.S.C. § 2283 may be inapplicable because no state court proceeding is pending or because the action is brought under 42 U.S.C. § 1983. Its application may never be reached because a court may decide that equitable principles do not justify injunctive relief. Younger v. Harris, 401 U.S. 37, 54 (1971).

state court proceedings must overcome substantial prudential barriers, among them the abstention doctrine [1241] and more important than that the equity doctrine that suits in equity are to be withheld "in any case where plain, adequate and complete remedy may be had at law." [1242] The application of this latter principle has been most pronounced in the reluctance of federal courts to interfere with a State's good faith enforcement of its criminal law. Here, the Court has required of a litigant seeking to bar threatened state prosecution not only a showing of irreparable injury which is both great and immediate but an inability to defend his constitutional right in the state proceeding. Certain types of injury, such as the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, are insufficient to be considered irreparable in this sense. Even if a state criminal statute *is* unconstitutional, a person charged under it usually has an adequate remedy at law by raising his constitutional defense in the state trial. [1243] The policy has never been stated as an absolute, recognizing that in exceptional and limited circumstances, such as the existence of factors making it impossible for a litigant to protect his federal constitutional rights through a defense of the state criminal charges or the bringing of multiple criminal charges, a federal court injunction could properly issue. [1244]

In *Dombrowski v. Pfister*, [1245] the Court appeared to change the policy somewhat. The case on its face contained allegations and offers of proof that may have been sufficient alone to establish the

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[1241] Supra, "Abstention".

[1242] The quoted phrase setting out the general principle is from the Judiciary Act of 1789, § 16, 1 Stat. 82.

[1243] The older cases are Fenner v. Boykin, 271 U.S. 240 (1926); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Watson v. Buck, 313 U.S. 387 (1941); Williams v. Miller, 317 U.S. 599 (1942); Douglas v. City of Jeannette, 319 U.S. 157 (1943). There is a stricter rule against federal restraint of the use of evidence in state criminal trials. Stefanelli v. Minard, 342 U.S. 117 (1951); Pugach v. Dollinger, 365 U.S. 458 (1961). The Court reaffirmed the rule in Perez v. Ledesma, 401 U.S. 82 (1971). State officers may not be enjoined from testifying or using evidence gathered in violation of federal constitutional restrictions, Cleary v. Bolger, 371 U.S. 392 (1963), but the rule is unclear with regard to federal officers and state trials. *Compare* Rea v. United States, 350 U.S. 214 (1956), *with* Wilson v. Schnettler, 365 U.S. 381 (1961).

[1244] *E.g.*, Douglas v. City of Jeannette, 319 U.S. 157, 163-164 (1943); Stefanelli v. Minard, 342 U.S. 117, 122 (1951). *See also* Terrace v. Thompson, 263 U.S. 197, 214 (1923), Future criminal proceedings were sometimes enjoined. *E.g.*, Hague v. CIO, 307 U.S. 496 (1939).

[1245] 380 U.S. 479 (1965). Grand jury indictments had been returned after the district court had dissolved a preliminary injunction, erroneously in the Supreme Court's view, so that it took the view that no state proceedings were pending as of the appropriate time. For a detailed analysis of the case, *see* Fiss, *Dombrowski*, 86 YALE L. J. 1103 (1977).

"irreparable injury" justifying federal injunctive relief.[1246] But the formulation of standards by Justice Brennan for the majority placed great emphasis upon the fact that the state criminal statute in issue regulated expression. Any criminal prosecution under a statute regulating expression might of itself inhibit the exercise of First Amendment rights, it was said, and prosecution under an overbroad[1247] statute like the one in this case might critically impair exercise of those rights. The mere threat of prosecution under such an overbroad statute "may deter . . . almost as potently as the actual application of sanctions."

In such cases, courts could no longer embrace the assumption that defense of the criminal prosecution "will generally assure ample vindication of constitutional rights," because either the mere threat of prosecution or the long wait between prosecution and final vindication could result in a "chilling effect" upon First Amendment rights.[1248] The principle apparently established by the Court was two-phased: a federal court should not abstain when there is a facially unconstitutional statute infringing upon speech and application of that statute discourages protected activities, and the court should further enjoin the state proceedings when there is prosecution or threat of prosecution under an overbroad statute regulating expression if the prosecution or threat of prosecution chills the exercise of freedom of expression.[1249] These formulations were reaffirmed in *Zwickler v. Koota*,[1250] in which a declaratory judgment was sought with regard to a statute prohibiting anonymous election literature. Abstention was deemed improper,[1251] and further it was held that adjudication for purposes of declaratory judgment is not hemmed in by considerations attendant upon injunctive relief.[1252]

The aftermath of the *Dombrowski* and *Zwickler* decisions was a considerable expansion of federal-court adjudication of constitu-

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[1246] "[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 380 U.S. at 485-86.

[1247] That is, a statute which reaches both protected and unprotected expression and conduct.

[1248] 380 U.S. at 486-87.

[1249] *See* Cameron v. Johnson, 381 U.S. 741 (1965); Cameron v. Johnson, 390 U.S. 611 (1968).

[1250] 389 U.S. 241 (1967). The state criminal conviction had been reversed by a state court on state law grounds and no new charge had been instituted.

[1251] It was clear that the statute could not be construed by a state court to render a federal constitutional decision unnecessary. 389 U.S. at 248-52.

[1252] 389 U.S. at 254.

tional attack through requests for injunctive and declaratory relief, which gradually spread out from First Amendment areas to other constitutionally-protected activities.[1253] However, these developments were highly controversial and after three arguments on the issue, the Court in a series of cases receded from its position and circumscribed the discretion of the lower federal courts to a considerable and ever-broadening degree.[1254] The important difference between this series of cases and the *Dombrowski- Zwickler* line was that in the latter there were no prosecutions pending whereas in the former there were. Nevertheless, the care with which Justice Black for the majority undertook to distinguish and limit *Dombrowski* signified a limitation of its doctrine, which proved partially true in later cases.

Justice Black reviewed and reaffirmed the traditional rule of reluctance to interfere with state court proceedings except in extraordinary circumstances. The holding in *Dombrowski*, as distinguished from some of the language, did not change the general rule, because extraordinary circumstances had existed. Thus, Justice Black, with considerable support from the other Justices,[1255] went on to affirm that where a criminal proceeding is already pending in a state court, if it is a single prosecution about which there is no allegation that it was brought in bad faith or that it was one of a series of repeated prosecutions which would be brought, and the defendant may put in issue his federal-constitutional defense at the trial, federal injunctive relief is improper, even if it is alleged that the statute on which the prosecution was based regulated expression and was overbroad.

Many statutes regulating expression were valid and some overbroad statutes could be validly applied and attacks on facial unconstitutionality abstracted from concrete factual situations was not a sound judicial method. "It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any

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[1253] Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535 (1970).

[1254] Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

[1255] Only Justice Douglas dissented. 401 U.S. at 58. Justices Brennan, White, and Marshall generally concurred in somewhat restrained fashion. Id. at 56, 75, 93.

other unusual circumstances that would call for equitable relief." [1256]

The reason for the principle, said Justice Black, flows from "Our Federalism," which requires federal courts to defer to state courts when there are proceedings pending in them. [1257]

Moreover, in a companion case, the Court held that when prosecutions are pending in state court, ordinarily the propriety of injunctive and declaratory relief should be judged by the same standards. [1258] A declaratory judgment is as likely to interfere with state proceedings as an injunction, whether the federal decision be treated as *res judicata* or whether it is viewed as a strong precedent guiding the state court. Additionally, "the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting 'further necessary or proper relief' and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings." [1259]

When, however, there is no pending state prosecution, the Court is clear, "Our Federalism" is not offended if a plaintiff in a federal court is able to demonstrate a genuine threat of enforcement of a disputed criminal statute, whether the statute is attacked on its face or as applied, and becomes entitled to a federal declaratory judgment. [1260] And, in fact, when no state prosecution is pending, a federal plaintiff need not demonstrate the existence of the *Younger* factors to justify the issuance of a preliminary or permanent injunction against prosecution under a disputed state statute. [1261]

[1256] 401 U.S. at 54. On bad faith enforcement, *see* id. at 56 (Justices Stewart and Harlan concurring); 97 (Justices Brennan, White, and Marshall concurring in part and dissenting in part). For an example, *see* Universal Amusement Co. v. Vance, 559 F. 2d 1286, 1293-1301 (5th Cir. 1977), *affd. per curiam sub nom.*, Dexter v. Butler, 587 F. 2d 176 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 929 (1979).

[1257] 401 U.S. at 44.

[1258] Samuels v. Mackell, 401 U.S. 66 (1971). The holding was in line with Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

[1259] Samuels v. Mackell, 401 U.S. 66, 72 (1971).

[1260] Steffel v. Thompson, 415 U.S. 452 (1974).

[1261] Doran v. Salem Inn, 422 U.S. 922 (1975) (preliminary injunction may issue to preserve *status quo* while court considers whether to grant declaratory relief); Wooley v. Maynard, 430 U.S. 705 (1977) (when declaratory relief is given, permanent injunction may be issued if necessary to protect constitutional rights). However, it may not be easy to discern when state proceedings will be deemed to have been instituted prior to the federal proceeding. *E.g.*, Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue. Ltd., 420 U.S. 592 (1975); *see also* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984).

Of much greater significance is the extension of *Younger* to civil proceedings in state courts [1262] and to state administrative proceedings of a judicial nature. [1263] The *Younger* principle applies whenever in civil or administrative proceedings important state interests are involved which the State, or its officers or agency, is seeking to promote. Indeed, the presence of important state interests in state proceedings has been held to raise the *Younger* bar to federal relief in proceedings which are entirely between private parties. [1264] Comity, the Court said, requires abstention when States have "important" interests in pending civil proceedings between private parties, [1265] as long as litigants are not precluded from asserting federal rights. Thus, the Court explained, "proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand." [1266]

Habeas Corpus: Scope of the Writ.—At the English common law, *habeas corpus* was available to attack pretrial detention and confinement by executive order; it could not be used to question the conviction of a person pursuant to the judgment of a court with jurisdiction over the person. That common law meaning was applied in the federal courts. [1267] Expansion began after the Civil War through more liberal court interpretation of "jurisdiction." Thus, one who had already completed one sentence on a conviction was released from custody on a second sentence on the ground that the court had lost jurisdiction upon completion of the first sentence. [1268] Then, the Court held that the constitutionality of the statute upon which a charge was based could be examined on *habeas*, because an unconstitutional statute was said to deprive the trial court of

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[1262] Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Judice v. Vail, 430 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 434 (1977); Moore v. Sims, 442 U.S. 415 (1979); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

[1263] Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986). The "judicial in nature" requirement is more fully explicated in New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 366-373 (1989).

[1264] Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

[1265] "[T]he State's interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory'" was deemed sufficient. Id. at 14 n.12 (quoting Judice v. Vail, 430 U.S. 327, 336 n.12 (1977)).

[1266] 481 U.S. at 14.

[1267] Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830) (Chief Justice Marshall); *cf.* Ex parte Parks, 93 U.S. 18 (1876). *But see* Fay v. Noia, 372 U.S. 391, 404-415 (1963). It should be noted that the expansive language used when Congress in 1867 extended the *habeas* power of federal courts to state prisoners "restrained of . . . liberty in violation of the constitution, or of any treaty or law of the United States. . . .", 14 Stat. 385, could have encouraged an expansion of the writ to persons convicted after trial.

[1268] Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874).

its jurisdiction.[1269] Other cases expanded the want-of-jurisdiction rationale.[1270] But the present status of the writ of *habeas corpus* may be said to have been started in its development in *Frank v. Mangum*,[1271] in which the Court reviewed on *habeas* a murder conviction in a trial in which there was substantial evidence of mob domination of the judicial process. This issue had been considered and rejected by the state appeals court. The Supreme Court indicated that, though it might initially have had jurisdiction, the trial court could have lost it if mob domination rendered the proceedings lacking in due process.

Further, in order to determine if there had been a denial of due process, a *habeas* court should examine the totality of the process, including the appellate proceedings. Since Frank's claim of mob domination was reviewed fully and rejected by the state appellate court, he had been afforded an adequate corrective process for any denial of rights, and his custody was not in violation of the Constitution. Then, eight years later, in *Moore v. Dempsey*,[1272] involving another conviction in a trial in which the court was alleged to have been influenced by a mob and in which the state appellate court had heard and rejected Moore's contentions, the Court directed that the federal district judge himself determine the merits of the petitioner's allegations.

Moreover, the Court shortly abandoned its emphasis upon want of jurisdiction and held that the writ was available to consider constitutional claims as well as questions of jurisdiction.[1273] The landmark case was *Brown v. Allen*,[1274] in which the Court laid

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[1269] Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Royall, 117 U.S. 241 (1886); Crowley v. Christensen, 137 U.S. 86 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1270] Ex parte Wilson, 114 U.S. 417 (1885); In re Nielsen, 131 U.S. 176 (1889); In re Snow, 120 U.S. 274 (1887); *but see* Ex parte Parks, 93 U.S. 18 (1876); Ex parte Bigelow, 113 U.S. 328 (1885). It is possible that the Court expanded the office of the writ because its reviewing power over federal convictions was closely limited. F. Frankfurter & J. Landis, supra. Once such review was granted, the Court began to restrict the use of the writ. *E.g.*, Glasgow v. Moyer, 225 U.S. 420 (1912); In re Lincoln, 202 U.S. 178 (1906); In re Morgan, 203 U.S. 96 (1906).

[1271] 237 U.S. 309 (1915).

[1272] 261 U.S. 86 (1923).

[1273] Waley v. Johnston, 316 U.S. 101 (1942). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938); Walker v. Johnson, 312 U.S. 275 (1941). The way one reads the history of the developments is inevitably a product of the philosophy one brings to the subject. In addition to the recitations cited in other notes, *compare* Wright v. West, 505 U.S. 277, 285-87 & n.3 (1992) (Justice Thomas for a plurality of the Court), *with* id. at 297-301 (Justice O'Connor concurring).

[1274] 344 U.S. 443 (1953). *Brown* is commonly thought to rest on the assumption that federal constututional rights cannot be adequately protected only by direct Supreme Court review of state court judgments but that independent review, on *habeas*, must rest with federal judges. It is, of course, true that *Brown* coincided with the extension of most of the Bill of Rights to the States by way of incorporation and

down several principles of statutory construction of the *habeas* statute. First, all federal constitutional questions raised by state prisoners are cognizable in federal *habeas*. Second, a federal court is not bound by state court judgments on federal questions, even though the state courts may have fully and fairly considered the issues. Third, a federal *habeas* court may inquire into issues of fact as well as of law, although the federal court may defer to the state court if the prisoner received an adequate hearing. Fourth, new evidentiary hearings must be held when there are unusual circumstances, when there is a "vital flaw" in the state proceedings, or when the state court record is incomplete or otherwise inadequate.

Almost plenary federal *habeas* review of state court convictions was authorized and rationalized in the Court's famous "1963 trilogy." [1275] First, the Court dealt with the established principle that a federal *habeas* court is empowered, where a prisoner alleges facts which if proved would entitle him to relief, to relitigate facts, to receive evidence and try the facts anew, and sought to lay down broad guidelines as to when district courts must hold a hearing and find facts. [1276] "Where the facts are in dispute, the federal court

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expansive interpretation of federal constitutional rights; previously, there was not a substantial corpus of federal rights to protect through *habeas*. *See* Wright v. West, 505 U.S. 277, 297-99 (1992) (Justice O'Connor concurring). In Fay v. Noia, 372 U.S. 391 (1963), Justice Brennan, for the Court, and Justice Harlan, in dissent, engaged in a lengthy, informed historical debate about the legitimacy of Brown and its premises. *Compare* id. at 401-24, *with* id. at 450-61. *See* the material gathered and cited in Hart & Wechsler, supra at 1487-1505.

[1275] Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). These cases dealt, respectively, with the treatment to be accorded a *habeas* petition in the three principal categories in which they come to the federal court: when a state court has rejected petitioner's claims on the merits, when a state court has refused to hear petitioner's claims on the merits because she has failed properly or timely to present them, or when the petition is a second or later petition raising either old or new, or mixed, claims. Of course, as will be demonstrated infra, these cases have now been largely drained of their force.

[1276] Townsend v. Sain, 372 U.S. 293, 310-12 (1963). If the district judge concluded that the *habeas* applicant was afforded a full and fair hearing by the state court resulting in reliable findings, the Court said, he may, and ordinarily should, defer to the state factfinding. Id. at 318. Under the 1966 statutory revision, a *habeas* court must generally presume correct a state court's written findings of fact from a hearing to which the petitioner was a party. A state finding cannot be set aside merely on a preponderance of the evidence and the federal court granting the writ must include in its opinion the reason it found the state findings not fairly supported by the record or the existence of one or more listed factors justifying disregard of the factfinding. P.L. 89-711, 80 Stat. 1105, 28 U.S.C. § 2254(d). *See* Sumner v. Mata, 449 U.S. 539 (1981); Sumner v. Mata, 455 U.S. 591 (1982); Marshall v. Lonberger, 459 U.S. 422 (1983); Patton v. Yount, 467 U.S. 1025 (1984); Parker v. Dugger, 498 U.S. 308 (1991); Burden v. Zant, 498 U.S. 433 (1991). The presumption of correctness does not apply to questions of law or to mixed questions of law and fact. Miller v. Fenton, 474 U.S. 104, 110-16 (1985). However, in Wright v. West,

in *habeas corpus* must hold an evidentiary hearing if the *habeas* applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."[1277] To "particularize" this general test, the Court went on to hold that an evidentiary hearing must take place when (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) for any reason it appears that the state trier of fact did not afford the *habeas* applicant a full and fair fact hearing.[1278]

Second, *Sanders v. United States*[1279] dealt with two interrelated questions: the effects to be given successive petitions for the writ, when the second or subsequent application presented grounds previously asserted or grounds not theretofore raised. Emphasizing that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,"[1280] the Court set out generous standards for consideration of successive claims. As to previously asserted grounds, the Court held that controlling weight may be given to a prior denial of relief if (1) the same ground presented was determined adversely to the applicant before, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application, so that the *ha-*

505 U.S. 277 (1992), the Justices argued inconclusively whether deferential review of questions of law or especially of law and fact should be adopted.

[1277] Townsend v. Sain, 372 U.S. 293, 312 (1963). The Court was unanimous on the statement, but it divided 5-to-4 on application.

[1278] 372 U.S. at 313-18. Congress in 1966 codified the factors in somewhat different form but essentially codified *Townsend*. P.L. 89-711, 80 Stat. 1105, 28 U.S.C. § 2254. The present Court is of the view that Congress neither codified *Townsend* nor precluded the Court from altering the *Townsend* standards. Keeney v. Tamayo-Reyes, 504 U.S. 1, 10, n.5 (1992). *Compare* id. at 20-21 (Justice O'Connor dissenting). *Keeney* formally overruled part of *Townsend*. Id. at 5.

[1279] 373 U.S. 1 (1963). *Sanders* was a § 2255 case, a federal prisoner petitioning for postconviction relief. The Court applied the same liberal rules with respect to federal prisoners as it did for state. *See* Kaufman v. United States, 394 U.S. 217 (1969). As such, the case has also been eroded by subsequent cases. *E.g.*, Davis v. United States, 411 U.S. 233 (1973); United States v. Frady, 456 U.S. 152 (1982).

[1280] 373 U.S. at 8. The statement accorded with the established view that principles of *res judicata* were not applicable in *habeas*. *E.g.*, Price v. Johnston, 334 U.S. 266 (1948); Wong Doo v. United States, 265 U.S. 239 (1924); Salinger v. Loisel, 265 U.S. 224 (1924). Congress in 1948 had appeared to adopt some limited version of *res judicata* for federal prisoners but not for state prisoners, Act of June 25, 1948, 62 Stat. 965, 967, 28 U.S.C. §§ 2244, 2255, but the Court in *Sanders* held the same standards applicable and denied the statute changed existing caselaw. 373 U.S. at 11-14. *But see* id. at 27-28 (Justice Harlan dissenting).

beas court might but was not obligated to deny relief without considering the claim on the merits.[1281] With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim only if it decided the petitioner had deliberately bypassed the opportunity in the prior proceeding to raise it; if not, "[n]o matter how many prior applications for federal collateral relief a prisoner has made," the court must consider the merits of the new claim.[1282]

Third, the most controversial of the 1963 cases, *Fay v. Noia*,[1283] dealt with the important issue of state defaults, of, that is, what the effect on *habeas* is when a defendant in a state criminal trial has failed to raise in a manner in accordance with state procedure a claim which he subsequently wants to raise on *habeas*. If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the State's "independent and adequate state ground" bars direct federal review of the claim.[1284] Whether a similar result prevailed upon *habeas* divided the Court in *Brown v. Allen*,[1285] in which the majority held that a prisoner, refused consideration of his appeal in state court because his papers had been filed a day late, could not be heard on *habeas* because of his state procedural default. The result was changed in *Fay v. Noia*, in which the Court held that the adequate and independent state ground doctrine was a limitation only upon the Court's appellate review, but that it had no place in *habeas*. A federal court has power to consider any claim that has been procedurally defaulted in state courts.[1286]

Still, the Court recognized that the States had legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had dis-

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[1281] 373 U.S. at 15. In codifying the *Sanders* standards in 1966, P.L. 89-711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the "ends of justice" language. Although it was long thought that the omission probably had no substantive effect, this may not be the case. Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[1282] 373 U.S. at 17-19.

[1283] 372 U.S. 391 (1963). *Fay* was largely obliterated over the years, beginning with Davis v. United States, 411 U.S. 233 (1973), a federal-prisoner postconviction relief case, and Wainwright v. Sykes, 433 U.S. 72 (1977), but it was not formally overruled until Coleman v. Thompson, 501 U.S. 722, 744-751 (1991).

[1284] *E.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Herb v. Pitcairn, 324 U.S. 117 (1945). In the *habeas* context, the procedural-bar rules are ultimately a function of the requirement that petitioners first exhaust state avenues of relief before coming to federal court.

[1285] 344 U.S. 443 (1953).

[1286] Fay v. Noia, 372 U.S. 391, 424-34 (1963).

cretion to deny a *habeas* petitioner relief if it found that he had deliberately bypassed state procedure; the discretion could be exercised only if the court found that the prisoner had intentionally waived his right to pursue his state remedy.[1287]

Liberalization of the writ thus made it possible for convicted persons who had fully litigated their claims at state trials and on appeal, who had because of some procedural default been denied the opportunity to have their claims reviewed, or who had been at least once heard on federal *habeas*, to have the chance to present their grounds for relief to a federal *habeas* judge. In addition to opportunities to relitigate the facts and the law relating to their convictions, prisoners could also take advantage of new constitutional decisions that were retroactive. The filings in federal courts increased year by year, but the numbers of prisoners who in fact obtained either release or retrial remained quite small. A major effect, however, was to exacerbate the feelings of state judges and state law enforcement officials and to stimulate many efforts in Congress to enact restrictive *habeas* amendments.[1288] While the efforts were unsuccessful, complaints were received more sympathetically in a newly-constituted Supreme Court and more restrictive rulings ensued.

The discretion afforded the Court was sounded by Justice Rehnquist, who, after reviewing the case law on the 1867 statute, remarked that the history "illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[1289] The emphasis from early on has been upon the equitable nature of the *habeas* remedy and the judiciary's

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[1287] 372 U.S. at 438-40.

[1288] In 1961, state prisoner *habeas* filings totaled 1,020, in 1965, 4,845, in 1970, a high (to date) of 9,063, in 1975, 7,843 in 1980, 8,534 in 1985, 9,045 in 1986. On relief afforded, no reliable figures are available, but estimates indicate that at most 4% of the filings result in either release or retrial. C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (1988 & supps.), § 4261, at 284-91.

[1289] Wainwright v. Sykes, 433 U.S. 72, 81 (1977). The present Court's emphasis in *habeas* cases is, of course, quite different from that of the Court in the 1963 trilogy. Now, the Court favors decisions that promote finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum. Keeney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992). Overall, federalism concerns are critical. *See* Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism." First sentence of opinion). The seminal opinion on which subsequent cases have drawn is Justice Powell's concurrence in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973). He suggested that *habeas* courts should entertain only those claims that go to the integrity of the fact-finding process, thus raising questions of the value of a guilty verdict, or, more radically, that only those prisoners able to make a credible showing of "factual innocence" could be heard on *habeas*. Id. at 256-58, 274-75. As will be evident infra, some form of innocence standard now is pervasive in much of the Court's *habeas* jurisprudence.

responsibility to guide the exercise of that remedy in accordance with equitable principles; thus, the Court time and again underscores that the federal courts have plenary *power* under the statute to implement it to the fullest while the Court's decisions may deny them the discretion to exercise the power. [1290]

Change has occurred in several respects in regard to access to and the scope of the writ. It is sufficient to say that the more recent rulings have eviscerated the content of the 1963 trilogy and that *Brown v. Allen* itself is threatened with extinction.

First, the Court in search and seizure cases has returned to the standard of *Frank v. Mangum*, holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review and that he cannot raise those claims again in a *habeas* petition. [1291] Grounded as it is in the Court's dissatisfaction with the exclusionary rule, the case has not since been extended to other constitutional grounds, [1292] but the rationale of the opinion suggests the likelihood of reaching other exclusion questions. [1293]

Second, the Court has formulated a "new rule" exception to *habeas* cognizance. That is, subject to two exceptions, [1294] a case de-

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[1290] 433 U.S. at 83; Stone v. Powell, 428 U.S. 465, 495 n.37 (1976); Francis v. Henderson, 425 U.S. 536, 538 (1976); Fay v. Noia, 372 U.S. 391, 438 (1963). The dichotomy between power and discretion goes all the way back to the case imposing the rule of exhaustion of state remedies. Ex parte Royall, 117 U.S. 241, 251 (1886).

[1291] Stone v. Powell, 428 U.S. 465 (1976). The decision is based as much on the Court's dissatisfaction with the exclusionary rule as with its desire to curb *habeas*. Holding that the purpose of the exclusionary rule is to deter unconstitutional searches and seizures rather than to redress individual injuries, the Court reasoned that no deterrent purpose was advanced by applying the rule on *habeas*, except to encourage state courts to give claimants a full and fair hearing. Id. at 493-95.

[1292] *Stone* does not apply to a Sixth Amendment claim of ineffective assistance of counsel in litigating a search and seizure claim. Kimmelman v. Morrison, 477 U.S. 365, 382-383 (1986). *See also* Rose v. Mitchell, 443 U.S. 545 (1979) (racial discrimination in selection of grand jury foreman); Jackson v. Virginia, 443 U.S. 307 (1979) (insufficient evidence to satisfy reasonable doubt standard).

[1293] Issues of admissibility of confessions (*Miranda* violations) and eyewitness identifications are obvious candidates. *See, e.g.*, Duckworth v. Eagan, 492 U.S. 195, 205 (1989) (Justice O'Connor concurring); Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Justice Powell concurring), and id. at 415 (Chief Justice Burger dissenting); Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (reserving Miranda).

[1294] The first exception permits the retroactive application on *habeas* of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution. The rule must, to say it differently, either decriminalize a class of conduct or prohibit the imposition of a particular punishment on a particular class of persons. The second exception would permit the application of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Saffle v. Parks, 494 U.S. 484, 494-495 (1990) (citing cases); Sawyer v. Smith, 497 U.S. 227, 241-245 (1990).

cided after a petitioner's conviction and sentence became final may not be the predicate for federal *habeas* relief if the case announces or applies a "new rule."[1295] A decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[1296] If a rule "was susceptible to debate among reasonable minds," it could not have been dictated by precedent, and therefore it must be classified as a "new rule."[1297]

Third, the Court has largely maintained the standards of *Townsend v. Sain*, as embodied in somewhat modified form in statute, with respect to when federal judges must conduct an evidentiary hearing. However, one *Townsend* factor, not expressly set out in the statute, has been overturned in order to bring the case law into line with other decisions. *Townsend* had held that a hearing was required if the material facts were not adequately developed at the state-court hearing. If the defendant had failed to develop the material facts in the state court, however, the Court held that unless he had "deliberately bypass[ed]" that procedural outlet he was still entitled to the hearing.[1298] The Court overruled that point and substituted a much-stricter "cause-and-prejudice" standard.[1299]

Fourth, the Court has significantly stiffened the standards governing when a federal *habeas* court should entertain a second or successive petition filed by a state prisoner, which was dealt with by *Sanders v. United States*.[1300] A successive petition may be dismissed if the same ground was determined adversely to petitioner previously, the prior determination was on the merits, and "the ends of justice" would not be served by reconsideration. It is with the latter element that the Court has become more restrictive. A plurality in *Kuhlmann v. Wilson*[1301] argued that the "ends of jus-

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[1295] Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion); Penry v. Lynaugh, 492 U.S. 302, 313-319 (1989).

[1296] Butler v. McKellar, 494 U.S. 407, 412 (1990) (quoting Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (quoting Teague v. Lane, 489 U.S. 288, 314 (1989) (plurality opinion) (emphasis in original)).

[1297] 494 U.S. at 415. *See also* Stringer v. Black, 503 U.S. 222, 228-29 (1992). This latter case found that two decisions relied on by petitioner merely drew on existing precedent and so did not establish a new rule. *See also* O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

[1298] Townsend v. Sain, 372 U.S. 293, 313, 317 (1963), imported the "deliberate bypass" standard from Fay v. Noia, 372 U.S. 391, 438 (1963).

[1299] Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). This standard is imported from the cases abandoning *Fay v. Noia* and is discussed infra.

[1300] 373 U.S. 1, 15-18 (1963). The standards are embodied in 28 U.S.C. § 2244(b).

[1301] 477 U.S. 436 (1986).

tice" standard would be met only if a petitioner supplemented her constitutional claim with a colorable showing of factual innocence. While the Court has not expressly adopted this standard, a later capital case utilized it, holding that a petitioner sentenced to death could escape the bar on successive petitions by demonstrating "actual innocence" of the death penalty by showing by clear and convincing evidence that no reasonable juror would have found the prisoner eligible for the death penalty under applicable state law.[1302]

Even if the subsequent petition alleges new and different grounds, a *habeas* court may dismiss the petition if the prisoner's failure to assert those grounds in the prior, or first, petition constitutes "an abuse of the writ."[1303] Following the 1963 trilogy and especially *Sanders*, the federal courts had generally followed a rule excusing the failure to raise claims in earlier petitions unless the failure was a result of "inexcusable neglect" or of deliberate relinguishment. In *McClesky v. Zant*,[1304] the Court construed the "abuse of the writ" language to require a showing of both "cause and prejudice" before a petitioner may allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a "fundamental miscarriage of justice" will occur, which means she must make a "colorable showing of factual innocence."[1305]

Fifth, the Court abandoned the rules of *Fay v. Noia*, although it was not until 1991 that it expressly overruled the case.[1306] *Fay*, it will be recalled, dealt with so-called procedural-bar circumstances; that is, if a defendant fails to assert a claim at the proper time or in accordance with proper procedure under valid state rules, and if the State then refuses to reach the merits of his claim and holds against him solely because of the noncompliance with state procedure, when may a petitioner present the claim in federal *habeas*? The answer in *Fay* was that the federal court al-

[1302] Sawyer v. Whitley, 503 U.S. 333 (1992). Language in the opinion suggests that the standard is not limited to capital cases. Id. at 339.

[1303] The standard is in 28 U.S.C. § 2244(b), along with the standard that if a petitioner "deliberately withheld" a claim, the petition can be dismissed. *See also* 28 U.S.C. § 2254 Rule 9(b) (judge may dismiss successive petition raising new claims if failure to assert them previously was an abuse of the writ).

[1304] 499 U.S. 467 (1991).

[1305] 499 U.S. at 489-97. The "actual innocence" element runs through the cases under all the headings.

[1306] Coleman v. Thompson, 501 U.S. 722, 744-51 (1991).

ways had power to review the claim but that it had discretion to deny relief to a *habeas* claimant if it found that the prisoner had intentionally waived his right to pursue his state remedy through a "deliberate bypass" of state procedure.

That is no longer the law. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules."[1307] The "miscarriage-of-justice" element is probably limited to cases in which actual innocence or actual impairment of a guilty verdict can be shown.[1308] The concept of "cause" excusing failure to observe a state rule is extremely narrow; "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[1309] As for the "prejudice" factor, it is an undeveloped concept, but the Court's only case establishes a high barrier.[1310]

[1307] Coleman v. Thompson, 501 U.S. 722, 750 (1991). The standard has been developed in a long line of cases. Davis v. United States, 411 U.S. 233 (1973) (under federal rules); Francis v. Henderson, 425 U.S. 536 (1976); Engle v. Isaac, 456 U.S. 107 (1982); Murray v. Carrier, 477 U.S. 478 (1986); Harris v. Reed, 489 U.S. 255 (1989). *Coleman* arose because the defendant's attorney had filed his appeal in state court three days late. *Wainwright v. Sykes* involved the failure of defendant to object to the admission of inculpatory statements at the time of trial. *Engle v. Isaac* involved a failure to object at trial to jury instructions.

[1308] *E.g.*, Smith v. Murray, 477 U.S. 527, 538-39 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986). In Bousley v. Brooks, 523 U.S. 614 (1998), a federal post-conviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted more narrowly the elements of the offense than had the trial court in Bousley's case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate "actual innocence" so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

[1309] Murray v. Carrier, 477 U.S. at 488. This case held that ineffective assistance of counsel is not "cause" unless it rises to the level of a Sixth Amendment violation. *See also* Coleman v. Thompson, 501 U.S. 722, 752-57 (1991) (because petitioner had no right to counsel in state postconviction proceeding where error occurred, he could not claim constitutionally ineffective assistance of counsel). The actual novelty of a constitutional claim at the time of the state court proceeding is "cause" excusing the petitioner's failure to raise it then, Reed v. Ross, 468 U.S. 1 (1984), although the failure of counsel to anticipate a line of constitutional argument then foreshadowed in Supreme Court precedent is insufficient "cause." Engle v. Isaac, 456 U.S. 107 (1982).

[1310] United States v. Frady, 456 U.S. 152, 169 (1982) (under federal rules) (with respect to erroneous jury instruction, inquiring whether the error "so infected the entire trial that the resulting conviction violates due process").

The Court continues, with some modest exceptions, to construe *habeas* jurisdiction quite restrictively, but it has now been joined by new congressional legislation that is also restrictive. In *Herrera v. Collins*,[1311] the Court appeared, though ambiguously, to take the position that, while it requires a showing of actual innocence to permit a claimant to bring a successive or abusive petition, a claim of innocence is not alone sufficient to enable a claimant to obtain review of his conviction on *habeas*. Petitioners are entitled in federal *habeas* courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of one's conviction or detention, and the execution of a person claiming actual innocence would not itself violate the Constitution.[1312]

But, in *Schlup v. Delo*,[1313] the Court adopted the plurality opinion of *Kuhlmann v. Wilson* and held that, absent a sufficient showing of "cause and prejudice," a claimant filing a successive or abusive petition must, as an initial matter, make a showing of "actual innocence" so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. One standard, found in some of the cases, was championed by the dissenters; "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[1314] The Court adopted a second standard, under which the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." To meet this burden, a claimant "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[1315]

[1311] 506 U.S. 390 (1993).

[1312] 506 U.S. at 398-417. However, in a subsequent part of the opinion, the Court purports to reserve the question whether "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for making this showing. Id. at 417-19. Justices Scalia and Thomas would have unequivocally held that "[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Id. at 427-28 (Concurring). However, it is not at all clear that all the Justices joining the Court believe innocence to be nondispositive on *habeas*. Id. at 419 (Justices O'Connor and Kennedy concurring), 429 (Justice White concurring).

[1313] 513 U.S. 298 (1995).

[1314] 513 U.S. at 334 (Chief Justice Rehnquist dissenting, with Justices Kennedy and Thomas), 342 (Justice Scalia dissenting, with Justice Thomas). This standard was drawn from Sawyer v. Whitney, 505 U.S. 333 (1995).

[1315] 513 U.S. at 327. This standard was drawn from Murray v. Carrier, 477 U.S. 478 (1986).

In the Antiterrorism and Effective Death Penalty Act of 1996,[1316] Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts "gate keepers" in permitting or denying the filing of such petitions, with bars to appellate review of these decisions, provisions that in part were upheld in *Felker v. Turpin*.[1317] An important new restriction on the authority of federal *habeas* courts found in the new law provides that a *habeas* court shall not grant a writ to any person in custody pursuant to a judgment of a state court "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*."[1318]

For the future, barring changes in Court membership, other curtailing of *habeas* jurisdiction can be expected. Perhaps the Court will impose some form of showing of innocence as a predicate to obtaining a hearing. More far-reaching would be, as the Court continues to emphasize broad federalism concerns, rather than simply comity and respect for state courts, an overturning of *Brown v. Allen* itself and the renunciation of any oversight, save for the extremely limited direct review of state court convictions in the Supreme Court.

Removal.—In the Judiciary Act of 1789, Congress provided that civil actions commenced in the state courts which could have been brought in the original jurisdiction of the inferior federal courts could be removed by the defendant from the state court to the federal court.[1319] Generally, as Congress expanded the original jurisdiction of the inferior federal courts, it similarly expanded removal jurisdiction.[1320] Although there is potentiality for intra-court

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[1316] P. L. 104-132, Title I, 110 Stat. 1217-21, amending 28 U.S.C. §§ 2244, 2253, 2254, and Rule 22 of the Federal Rules of Appellate Procedure.

[1317] 518 U.S. 651 (1996).

[1318] The amended 28 U.S.C. § 2254(d) (emphasis supplied). The provision was applied in Bell v. Cone, 122 S. Ct. 1843 (2002). For analysis of its constitutionality, *see* the various opinions in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998), *cert. denied*,525 U.S. 1090 (1999).

[1319] § 12, 1 Stat. 79. The removal provision contained the same jurisdictional amount requirement as the original jurisdictional statute. It applied in the main to aliens and defendants not residents of the State in which suit was brought.

[1320] Thus the Act of March 3, 1875, § 2, 18 Stat. 470, conferring federal question jurisdiction on the inferior federal courts, provided for removal of such actions. The constitutionality of congressional authorization for removal is well-established. Chicago & N.W. Ry. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1871); Ten-

conflict here, of course, in the implied mistrust of state courts' willingness or ability to protect federal interests, it is rather with regard to the limited areas of removal that do not correspond to federal court original jurisdiction that the greatest amount of conflict is likely to arise.

If a federal officer is sued or prosecuted in a state court for acts done under color of law [1321] or if a federal employee is sued for a wrongful or negligent act that the Attorney General certifies was done while she was acting within the scope of her employment, [1322] the actions may be removed. But the statute most open to federal-state court dispute is the civil rights removal law, which authorizes removal of any action, civil or criminal, which is commenced in a state court "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." [1323] In the years after enactment of this statute, however, the court narrowly construed the removal privilege granted, [1324] and recent decisions for the most part confirm this restrictive interpretation, [1325] so that instances of successful resort to the statute are fairly rare.

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nessee v. Davis, 100 U.S. 257 (1879); Ames v. Kansas ex rel. Johnston, 111 U.S. 449 (1884). *See* City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966).

[1321] *See* 28 U.S.C. § 1442. This statute had its origins in the Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts), and the Act of March 2, 1833, § 3, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), both of which grew out of disputes arising when certain States attempted to nullify federal laws, and the Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers for acts done during the existence of the Civil War under color of federal authority). In Mesa v. California, 489 U.S. 121 (1989), the Court held that the statute authorized federal officer removal only when the defendant avers a federal defense. *See* Willingham v. Morgan, 395 U.S. 402 (1969).

[1322] 28 U.S.C. § 2679(d), enacted after Westfall v. Erwin, 484 U.S. 292 (1988).

[1323] 28 U.S.C. § 1443(1). Subsection (2) provides for the removal of state court actions "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." This subsection "is available only to federal officers and to persons assisting such officers in the performance of their official duties." City of Greenwood v. Peacock, 384 U.S. 808, 815 (1966).

[1324] Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Neal v. Delaware, 103 U.S. 370 (1880); Bush v. Kentucky, 107 U.S. 110 (1883); Gibson v. Mississippi, 162 U.S. 565 (1896); Smith v. Mississippi, 162 U.S. 592 (1896); Murray v. Louisiana, 163 U.S. 101 (1896); Williams v. Mississippi, 170 U.S. 213 (1898); Kentucky v. Powers, 201 U.S. 1 (1906).

[1325] Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966). There was a hiatus of cases reviewing removal from 1906 to 1966 because from 1887 to 1964 there was no provision for an appeal of an order of a federal court remanding a removed case to the state courts. § 901 of the Civil Rights Act of 1964, 78 Stat. 266, 28 U.S.C. § 1447(d).

Thus, the Court's position holds, one may not obtain removal simply by an assertion that he is being denied equal rights or that he cannot enforce the law granting equal rights. Because the removal statute requires the denial to be "in the courts of such State," the pretrial conduct of police and prosecutors was deemed irrelevant, because it afforded no basis for predicting that state courts would not vindicate the federal rights of defendants.[1326] Moreover, in predicting a denial of rights, only an assertion founded on a facially unconstitutional state statute denying the right in question would suffice. From the existence of such a law, it could be predicted that defendant's rights would be denied.[1327] Furthermore, the removal statute's reference to "any law providing for . . . equal rights" covered only laws "providing for specific civil rights stated in terms of racial equality."[1328] Thus, apparently federal constitutional provisions and many general federal laws do not qualify as a basis for such removal.[1329]

Clause 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at

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[1326] Georgia v. Rachel, 384 U.S. 780, 803 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 827 (1966). Justice Douglas in dissent, joined by Justices Black, Fortas, and Chief Justice Warren, argued that "in the courts of such State" modified only "cannot enforce," so that one could be denied rights prior to as well as during a trial and police and prosecutorial conduct would be relevant. Alternately, he argued that state courts could be implicated in the denial prior to trial by certain actions. Id. at 844-55.

[1327] Georgia v. Rachel, 384 U.S. 780, 797-802 (1966). Thus, in Strauder v. West Virginia, 100 U.S. 303 (1880), African-Americans were excluded by statute from service on grand and petit juries, and it was held that a black defendant's criminal indictment should have been removed because federal law secured nondiscriminatory jury service and it could be predicted that he would be denied his rights before a discriminatorily-selected state jury. In Virginia v. Rives, 100 U.S. 313 (1880), there was no state statute, but there was exclusion of Negroes from juries pursuant to custom and removal was denied. In Neal v. Delaware, 103 U.S. 370 (1880), the state provision authorizing discrimination in jury selection had been held invalid under federal law by a state court, and a similar situation existed in Bush v. Kentucky, 107 U.S. 110 (1882). Removal was denied in both cases. The dissenters in City of Greenwood v. Peacock, 384 U.S. 808, 848-852 (1966), argued that federal courts should consider facially valid statutes which might be applied unconstitutionally and state court enforcement of custom as well in evaluating whether a removal petitioner could enforce his federal rights in state court.

[1328] Georgia v. Rachel, 384 U.S. 780, 788-94 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 824-27 (1966), *See also* id. at 847-48 (Justice Douglas dissenting).

[1329] City of Greenwood v. Peacock, 384 U.S. at 824-27. *See also* Johnson v. Mississippi, 421 U.S. 213 (1975).

such Place or Places as the Congress may by Law have directed. [1330]

IN GENERAL

See analysis under the Sixth Amendment.

SECTION 3. Clause 1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open court.

TREASON

The treason clause is a product of the awareness of the Framers of the "numerous and dangerous excrescences" which had disfigured the English law of treason and was therefore intended to put it beyond the power of Congress to "extend the crime and punishment of treason." [1331] The debate in the Convention, remarks in the ratifying conventions, and contemporaneous public comment make clear that a restrictive concept of the crime was imposed and that ordinary partisan divisions within political society were not to be escalated by the stronger into capital charges of treason, as so often had happened in England. [1332]

Thus, the Framers adopted two of the three formulations and the phraseology of the English Statute of Treason enacted in 1350, [1333] but they conspicuously omitted the phrase defining as treason the "compass[ing] or imagin[ing] the death of our lord the King," [1334] under which most of the English law of "constructive

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[1330] *See* the Sixth Amendment.

[1331] 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE CONSTITUTION 469 (1836) (James Wilson). Wilson was apparently the author of the clause in the Committee of Detail and had some first hand knowledge of the abuse of treason charges. J. HURST, THE LAW OF TREASON IN THE UNITED STATES—SELECTED ESSAYS 90-91, 129-136 (1971).

[1332] 2 M. Farrand, supra at 345-50; 2 J. Elliot, supra at 469, 487 (James Wilson); 3 id. at 102-103, 447, 451, 466; 4 id. at 209, 219, 220; THE FEDERALIST No. 43 (J. Cooke ed. 1961), 290 (Madison); id. at No. 84, 576-577 (Hamilton); THE WORKS OF JAMES WILSON 663-69 (R. McCloskey ed. 1967). The matter is comprehensively studied in J. Hurst, supra at chs. 3, 4.

[1333] 25 Edward III, Stat. 5, ch. 2, *See* J. Hurst, supra at ch 2.

[1334] Id. at 15, 31-37, 41-49, 51-55.

treason" had been developed.[1335] Beyond limiting the power of Congress to define treason,[1336] the clause also prescribes limitations upon Congress' ability to make proof of the offense easy to establish[1337] and its ability to define punishment.[1338]

Levying War

Early judicial interpretation of the meaning of treason in terms of levying war was conditioned by the partisan struggles of the early nineteenth century, in which were involved the treason trials of Aaron Burr and his associates. In *Ex parte Bollman*,[1339] which involved two of Burr's confederates, Chief Justice Marshall, speaking for himself and three other Justices, confined the meaning of levying war to the actual waging of war. "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that . . . it has been determined that the actual enlistment of men to serve against the government does not amount to levying of war." Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. "On the contrary, if it be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who

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[1335] Id. "[T]he record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the treason clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king's death had been the principal instrument by which 'treason' had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king's death to the mere speaking or writing of views restrictive of the royal authority." Id. at 152-53.

[1336] The clause does not, however, prevent Congress from specifying other crimes of a subversive nature and prescribing punishment, so long as Congress is not merely attempting to evade the restrictions of the treason clause. *E.g.*, Ex parte Bollman, 8 U.S. (4 Cr.) 75, 126 (1807); Wimmer v. United States, 264 Fed. 11, 12-13 (6th Cir. 1920), *cert den.*, 253 U.S. 494 (1920).

[1337] By the requirement of two witnesses to the same overt act or a confession in open court.

[1338] Cl. 2, infra, "Corruption of the Blood and Forfeiture".

[1339] 8 U.S. (4 Cr.) 75 (1807).

perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war."

On the basis of these considerations and due to the fact that no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District, and ordered their discharge. Marshall continued by saying that "the crime of treason should not be extended by construction to doubtful cases" and concluded that no conspiracy for overturning the Government and "no enlisting of men to effect it, would be an actual levying of war." [1340]

The Burr Trial.—Not long afterward, the Chief Justice went to Richmond to preside over the trial of Aaron Burr himself. His ruling [1341] denying a motion to introduce certain collateral evidence bearing on Burr's activities is significant both for rendering the latter's acquittal inevitable and for the qualifications and exceptions made to the *Bollman* decision. In brief, this ruling held that Burr, who had not been present at the assemblage on Blennerhassett's Island, could be convicted of advising or procuring a levying of war only upon the testimony of two witnesses to his having procured the assemblage. This operation having been covert, such testimony was naturally unobtainable. The net effect of Marshall's pronouncements was to make it extremely difficult to convict one of levying war against the United States short of the conduct of or personal participation in actual hostilities. [1342]

[1340] 8 U.S. at 126-27.

[1341] United States v. Burr, 8 U.S. (4 Cr.) 469, Appx. (1807).

[1342] There have been a number of lower court cases in some of which convictions were obtained. As a result of the Whiskey Rebellion, convictions of treason were obtained on the basis of the ruling that forcible resistance to the enforcement of the revenue laws was a constructive levying of war. United States v. Vigol, 29 Fed. Cas. 376 (No. 16621) (C.C.D. Pa. 1795); United States v. Mitchell, 26 Fed. Cas. 1277 (No. 15788) (C.C.D. Pa. 1795). After conviction, the defendants were pardoned. *See also* for the same ruling in a different situation the Case of Fries, 9 Fed. Cas. 826, 924 (Nos. 5126, 5127) (C.C.D. Pa. 1799, 1800). The defendant was again pardoned after conviction. About a half century later participation in forcible resistance to the Fugitive Slave Law was held not to be a constructive levying of war. United States v. Hanway, 26 Fed. Cas. 105 (No. 15299) (C.C.E.D. Pa. 1851). Although the United States Government regarded the activities of the Confederate States as a levying of war, the President by Amnesty Proclamation of December 25, 1868, pardoned all those who had participated on the southern side in the Civil War. In applying the Captured and Abandoned Property Act of 1863 (12 Stat. 820) in a civil proceeding, the Court declared that the foundation of the Confederacy was treason against the United States. Sprott v. United States, 87 U.S. (20 Wall.) 459 (1875). *See also* Hanauer v. Doane, 79 U.S. (12 Wall.) 342 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869); Young v. United States, 97 U.S. 39 (1878). These four cases bring in the concept of adhering to the enemy and giving him aid and comfort, but these

Aid and Comfort to the Enemy

The Cramer Case.—Since the *Bollman* case, the few treason cases which have reached the Supreme Court were outgrowths of World War II and have charged adherence to enemies of the United States and the giving of aid and comfort. In the first of these, *Cramer v. United States*,[1343] the issue was whether the "overt act" had to be "openly manifest treason" or if it was enough if, when supported by the proper evidence, it showed the required treasonable intention.[1344] The Court in a five-to-four opinion by Justice Jackson in effect took the former view holding that "the two-witness principle" interdicted "imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness,"[1345] even though the single witness in question was the accused himself. "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses,"[1346] Justice Jackson asserted. Justice Douglas in a dissent, in which Chief Justice Stone and Justices Black and Reed concurred, contended that Cramer's treasonable intention was sufficiently shown by overt acts as attested to by two witnesses each, plus statements made by Cramer on the witness stand.

The Haupt Case.—The Supreme Court sustained a conviction of treason, for the first time in its history, in 1947 in *Haupt v. United States*.[1347] Here it was held that although the overt acts relied upon to support the charge of treason—defendant's harboring and sheltering in his home his son who was an enemy spy and saboteur, assisting him in purchasing an automobile, and in obtaining employment in a defense plant—were all acts which a father would naturally perform for a son, this fact did not necessarily relieve them of the treasonable purpose of giving aid and comfort to the enemy. Speaking for the Court, Justice Jackson said: "No matter

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are not criminal cases and deal with attempts to recover property under the Captured and Abandoned Property Act by persons who claimed that they had given no aid or comfort to the enemy. These cases are not, therefore, an interpretation of the Constitution.

[1343] 325 U.S. 1 (1945).

[1344] 89 Law. Ed. 1443-1444 (Argument of Counsel).

[1345] 325 U.S. at 35.

[1346] 325 U.S. at 34-35. Earlier, Justice Jackson had declared that this phase of treason consists of two elements: "adherence to the enemy; and rendering him aid and comfort." A citizen, it was said, may take actions "which do aid and comfort the enemy . . . but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." Id. at 29. Justice Jackson states erroneously that the requirement of two witnesses to the same overt act was an original invention of the Convention of 1787. Actually it comes from the British Treason Trials Act of 1695. 7 Wm. III, c.3.

[1347] 330 U.S. 631 (1947).

whether young Haupt's mission was benign or traitorous, known or unknown to the defendant, these acts were aid and comfort to him. In the light of this mission and his instructions, they were more than casually useful; they were aids in steps essential to his design for treason. If proof be added that the defendant knew of his son's instruction, preparation and plans, the purpose to aid and comfort the enemy becomes clear." [1348]

The Court held that conversation and occurrences long prior to the indictment were admissible evidence on the question of defendant's intent. And more important, it held that the constitutional requirement of two witnesses to the same overt act or confession in open court does not operate to exclude confessions or admissions made out of court, where a legal basis for the conviction has been laid by the testimony of two witnesses of which such confessions or admissions are merely corroborative. This relaxation of restrictions surrounding the definition of treason evoked obvious satisfaction from Justice Douglas, who saw in the *Haupt* decision a vindication of his position in the *Cramer* case. His concurring opinion contains what may be called a restatement of the law of treason and merits quotation at length:

'As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act. But if two witnesses are not required to prove treasonable intent, two witnesses need not be required to show the treasonable character of the overt act. For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character.'

'The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action. That requirement is undeniably met in the present case, as it was in the case of *Cramer*.'

'The *Cramer* case departed from those rules when it held that 'The two-witness principle is to interdict imputation of incriminating acts to the accused by circumstantial evidence or by the testimony of a single witness. 325 U.S. p. 35. The present decision is truer to the constitutional definition of treason when it forsakes

[1348] 330 U.S. at 635-36.

that test and holds that an act, quite innocent on its face, does not need two witnesses to be transfomred into a incriminating one.'[1349]

The Kawakita Case.—*Kawakita v. United States*[1350] was decided on June 2, 1952. The facts are sufficiently stated in the following headnote: "At petitioner's trial for treason, it appeared that originally he was a native-born citizen of the United States and also a national of Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the United States; went to Japan for a visit on an American passport; and was prevented by the outbreak of war from returning to this country. During the war, he reached his majority in Japan; changed his registration from American to Japanese, showed sympathy with Japan and hostility to the United States; served as a civilian employee of a private corporation producing war materials for Japan; and brutally abused American prisoners of war who were forced to work there. After Japan's surrender, he registered as an American citizen; swore that he was an American citizen and had not done various acts amounting to expatriation; and returned to this country on an American passport." The question whether, on this record Kawakita had intended to renounce American citizenship, said the Court, in sustaining conviction, was peculiarly one for the jury and their verdict that he had not so intended was based on sufficient evidence. An American citizen, it continued, owes allegiance to the United States wherever he may reside, and dual nationality does not alter the situation.[1351]

Doubtful State of the Law of Treason Today

The vacillation of Chief Justice Marshall between the *Bollman*[1352] and *Burr*[1353] cases and the vacillation of the Court in the *Cramer*[1354] and *Haupt*[1355] cases leave the law of treason in a somewhat doubtful condition. The difficulties created by the

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[1349] 330 U.S. at 645-46. Justice Douglas cites no cases for these propositions. Justice Murphy in a solitary dissent stated: 'But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non-treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how unlawful it might otherwise be.' Id. at 649.

[1350] 343 U.S. 717 (1952).

[1351] 343 U.S. at 732. For citations in the subject of dual nationality, *see* id. at 723 n.2. Three dissenters asserted that Kawakita's conduct in Japan clearly showed he was consistently demonstrating his allegiance to Japan. "As a matter of law, he expatriated himself as well as that can be done." Id. at 746.

[1352] Ex parte Bollman, 8 U.S. (4 Cr.) 75 (1807).

[1353] United States v. Burr, 8 U.S. (4 Cr.) 469 (1807).

[1354] Cramer v. United States, 325 U.S. 1 (1945).

[1355] Haupt v. United States, 330 U.S. 631 (1947).

Burr case have been obviated to a considerable extent through the punishment of acts ordinarily treasonable in nature under a different label,[1356] within a formula provided by Chief Justice Marshall himself in the *Bollman* case. The passage reads: "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution . . . must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation."[1357]

Clause 2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

CORRUPTION OF BLOOD AND FORFEITURE

The Confiscation Act of 1862 "to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels"[1358] raised issues under Article III, § 3, cl.2. Because of the constitutional doubts of the President, the act was accompanied by an explanatory joint resolution which stipulated that only a life estate terminating with the death of the offender could be sold and that at his death his children could take the fee simple by descent as his heirs without deriving any title from the United States. In applying this act, passed in pursuance of the war power and not

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[1356] *Cf.* United States v. Rosenberg, 195 F.2d 583 (2d. Cir.), *cert den.*, 344 U.S. 889 (1952), holding that in a prosecution under the Espionage Act for giving aid to a country, not an enemy, an offense distinct from treason, neither the two-witness rule nor the requirement as to the overt act is applicable.

[1357] Ex parte Bollman, 8 U.S. (4 Cr.) 126, 127 (1807). Justice Frankfurter appended to his opinion in Cramer v. United States, 325 U.S. 1, 25 n.38 (1945), a list taken from the Government's brief of all the cases prior to Cramer in which construction of the treason clause was involved. The same list, updated, appears in J. Hurst, supra at 260-67. Professor Hurst was responsible for the historical research underlaying the Government's brief in Cramer.

[1358] 12 Stat. 589. This act incidentally did not designate rebellion as treason.

the power to punish treason,[1359] the Court in one case[1360] quoted with approval the English distinction between a disability absolute and perpetual and one personal or temporary. Corruption of blood as a result of attainder of treason was cited as an example of the former and was defined as the disability of any of the posterity of the attained person "to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him."[1361]

[1359] Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871).

[1360] Wallach v. Van Riswick, 92 U.S. 202, 213 (1876).

[1361] Lord de la Warre's Case, 11 Coke Rept. 1a, 77 Eng. Rept. 1145 (1597). A number of cases dealt with the effect of a full pardon by the President of owners of property confiscated under this act. They held that a full pardon relieved the owner of forfeiture as far as the Government was concerned but did not divide the interest acquired by third persons from the Government during the lifetime of the offender. Illinois Central R.R. v. Bosworth, 133 U.S. 92, 101 (1890); Knote v. United States, 95 U.S. 149 (1877); Wallach v. Van Riswick, 92 U.S. 202, 203 (1876); Armstrong's Foundry, 73 U.S. (6 Wall.) 766, 769 (1868). There is no direct ruling on the question of whether only citizens can commit treason. In Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154-155 (1873), the Court declared that aliens while domiciled in this country owe a temporary allegiance to it and may be punished for treason equally with a native-born citizen in the absence of a treaty stipulation to the contrary. This case involved the attempt of certain British subjects to recover claims for property seized under the Captured and Abandoned Property Act, 12 Stat. 820 (1863), which provided for the recovery of property or its value in suits in the Court of Claims by persons who had not rendered aid and comfort to the enemy. Earlier in United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 97 (1820), which involved a conviction for manslaughter under an act punishing manslaughter and treason on the high seas, Chief Justice Marshall going beyond the necessities of the case stated that treason "is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary." However, *see* In re Shinohara, Court Martial Orders, No. 19, September 8, 1949, p. 4, Office of the Judge Advocate General of the Navy, reported in 17 Geo. Wash. L. Rev. 283 (1949). In the latter, an enemy alien resident in United States territory (Guam) was held guilty of treason for acts done while the enemy nation of which he was a citizen occupied such territory. Under English precedents, an alien residing in British territory is open to conviction for high treason on the theory that his allegiance to the Crown is not suspended by foreign occupation of the territory. DeJager v. Attorney General of Natal (1907), A.C., 96 L.T.R. 857. *See also* 18 U.S.C. § 2381.

ARTICLE IV

STATES' RELATIONS

CONTENTS

STATES' RELATIONS

ARTICLE IV

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

SOURCES AND EFFECT OF THIS PROVISION

Private International Law

The historical background of this section is furnished by that branch of private law which is variously termed "private international law," "conflict of laws," and "comity." This comprises a body of rules, based largely on the writings of jurists and judicial decisions, in accordance with which the courts of one country, or "jurisdiction," will ordinarily, in the absence of a local policy to the contrary, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or "jurisdiction." Most frequently applied examples of these rules include the following: the rule that a marriage which is good in the country where performed (*lex loci*) is good elsewhere; the rule that contracts are to be interpreted in accordance with the laws of the country where entered into (*lex loci contractus*) unless the parties clearly intended otherwise; the rule that immovables may be disposed of only in accordance with the law of the country where situated (*lex rei sitae*);[1] the converse rule that chattels adhere to the person of their owner and hence are disposable by him, even when located elsewhere, in accordance with the law of his domicile(*lex domicilii*); the rule that regardless of where the cause arose, the courts of any country where personal service of the defendant can be effected will take jurisdiction of certain types of personal actions, hence termed "transitory," and accord such remedy as the *lex fori* affords. Still other rules, of first importance in the present connection, determine the recognition which the judgments

[1] Clark v. Graham, 19 U.S. (6 Wheat.) 577 (1821), is an early case in which the Supreme Court enforced this rule.

of the courts of one country shall receive from those of another country.

So even had the States of the Union remained in a mutual relationship of entire independence, private claims originating in one often would have been assured recognition and enforcement in the others. The Framers felt, however, that the rules of private international law should not be left among the States altogether on a basis of comity and hence subject always to the overruling local policy of the *lex fori* but ought to be in some measure at least placed on the higher plane of constitutional obligation. In fulfillment of this intent the section now under consideration was inserted, and Congress was empowered to enact supplementary and enforcing legislation.[2]

JUDGMENTS: EFFECT TO BE GIVEN IN FORUM STATE

In General

Article IV, § 1, has had its principal operation in relation to judgments. Embraced within the relevant discussions are two principal classes of judgments. First, those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the State where rendered, as for example, when an action for debt is brought in the courts of State B on a judgment for money damages rendered in State A; second, those in which the judgment involved was offered, in conformance with the principle of *res judicata*, in defense in a new or collateral proceeding growing out of the same facts as the original suit, as for example, when a decree of divorce granted in State A is offered as barring a suit for divorce by the other party to the marriage in the courts of State B.

The English courts and the different state courts in the United States, while recognizing "foreign judgments *in personam*" which were reducible to money terms as affording a basis for actions in debt, originally accorded them generally only the status of *prima facie* evidence in support thereof, so that the merits of the original controversy could always be opened. When offered in defense, on the other hand, "foreign judgments *in personam*" were regarded as conclusive upon everybody on the theory that, as stated by Chief Justice Marshall, "it is a proceeding *in rem*, to which all the world

[2] Congressional legislation under the Full Faith and Credit Clause, so far as it is pertinent to adjudication hereunder, is today embraced in 28 U.S.C. §§ 1738-1739. *See also* 28 U.S.C. §§ 1740-1742.

Sec. 1—Full Faith and Credit

are parties."[3] The pioneer case was *Mills v. Duryee*,[4] decided in 1813. In an action brought in the circuit court of the District of Columbia, the equivalent of a state court for this purpose, on a judgment from a New York court, the defendant endeavored to reopen the whole question of the merits of the original case by a plea of "*nil debet*." It was answered in the words of the first implementing statute of 1790[5] that such records and proceedings were entitled in each State to the same faith and credit as in the State of origin, and that inasmuch as they were records of a court in the State of origin, and so conclusive of the merits of the case there, they were equally so in the forum State. The Court adopted the latter view, saying that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—with regard to the reception of foreign judgments, but to amplify and fortify these.[6] And in *Hampton v. McConnell*,[7] some years later, Chief Justice Marshall went even further, using language which seems to show that he regarded the judgment of a state court as constitutionally entitled to be accorded in the courts of sister States not simply the faith and credit on conclusive evidence but the validity of final judgment.

When, however, the next important case arose, the Court had come under new influences. This was *McElmoyle v. Cohen*,[8] in which the issue was whether a statute of limitations of the State of Georgia, which applied only to judgments obtained in courts other than those of Georgia, could constitutionally bar an action in Georgia on a judgment rendered by a court of record of South Caro-

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[3] Mankin v. Chandler, 16 F. Cas. 625, 626 (No. 9030) (C.C.D. Va. 1823).

[4] 11 U.S. (7 Cr.) 481 (1813). *See also* Everett v. Everett, 215 U.S. 203 (1909); Insurance Company v. Harris, 97 U.S. 331 (1878).

[5] 1 Stat. 122.

[6] On the same basis, a judgment cannot be impeached either in, or out of, the State by showing that it was based on a mistake of law. American Express Co. v. Mullins, 212 U.S. 311, 312 (1909). Fauntleroy v. Lum, 210 U.S. 230 (1908); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917).

[7] 16 U.S. (3 Wheat.) 234 (1818).

[8] 38 U.S. (13 Pet.) 312 (1839). *See also* Townsend v. Jemison, 50 U.S. (9 How.) 407, 413-420 (1850); Bank of Alabama v. Dalton, 50 U.S. (9 How.) 522, 528 (1850); Bacon v. Howard, 61 U.S. (20 How.) 22, 25 (1858); Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301 (1866); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 292 (1888); Great Western Tel. Co. v. Purdy, 162 U.S. 329 (1896); Wells v. Simonds Abrasive Co., 345 U.S. 514, 516-518 (1953). Recently, the Court reconsidered and adhered to the rule of these cases, although the Justices divided with respect to rationales. Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). Acknowledging that in some areas it had treated statutes of limitations as substantive rules, such as in diversity cases to insure uniformity with state law in federal courts, the Court ruled that such rules are procedural for full-faith-and-credit purposes, since "[t]he purpose . . . of the Full Faith and Credit Clause . . . is . . . to delimit spheres of state legislative competence." id. at 727.

lina. Declining to follow Marshall's lead in *Hampton v. McConnell*, the Court held that the Constitution was not intended "materially to interfere with the essential attributes of the *lex fori*," that the act of Congress only established a rule of evidence, of conclusive evidence to be sure, but still of evidence only; and that it was necessary, in order to carry into effect in a State the judgment of a court of a sister State, to institute a fresh action in the court of the former, in strict compliance with its laws; and that, consequently, when remedies were sought in support of the rights accruing in another jurisdiction, they were governed by the *lex fori*. In accord with this holding, it has been further held that foreign judgments enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced but only that which the *lex fori* gives them by its own laws, in their character of foreign judgments.[9] A judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court in another State, as it has in the State in which it was rendered.[10]

A judgment enforceable in the State where rendered must be given effect in another State, notwithstanding that the modes of procedure to enforce its collection may not be the same in both States.[11] If the initial court acquired jurisdiction, its judgment is entitled to full faith and credit elsewhere even though the former, by reason of the departure of the defendant with all his property, after having been served, has lost its capacity to enforce it by execution in the State of origin.[12] "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without

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[9] Cole v. Cunningham, 133 U.S. 107, 112 (1890). *See also* Stacy v. Thrasher, 47 U.S. (6 How.) 44, 61 (1848); Milwaukee County v. White Co., 296 U.S. 268 (1935).

[10] Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887); Hanley v. Donoghue, 116 U.S. 1, 3 (1885). *See also* Green v. Van Buskirk, 74 U.S. (7 Wall.) 139, 140 (1869); Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Roche v. McDonald, 275 U.S. 449 (1928); Ohio v. Chattanooga Boiler Co., 289 U.S. 439 (1933).

[11] Sistare v. Sistare, 218 U.S. 1 (1910).

[12] Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). *See also* Fall v. Eastin, 215 U.S. 1 (1909).

jurisdiction, . . . or that it has ceased to be obligatory because of payment or other discharge . . . or that it is a cause of action for which the State of the forum has not provided a court."[13]

On the other hand, the clause is not violated when a judgment is disregarded because it is not conclusive of the issues before a court of the forum. Conversely, no greater effect can be given than is given in the State where rendered. Thus, an interlocutory judgment may not be given the effect of a final judgment.[14] Likewise, when a federal court does not attempt to foreclose the state court from hearing all matters of personal defense which landowners might plead, a state court may refuse to accept the former's judgment as determinative of the landowners' liabilities.[15] Similarly, though a confession of judgment upon a note, with a warrant of attorney annexed, in favor of the holder, is in conformity with a state law and usage as declared by the highest court of the State in which the judgment is rendered, the judgement may be collaterally impeached upon the ground that the party in whose behalf it was rendered was not in fact the holder.[16] But a consent decree, which under the law of the State has the same force and effect as a decree *in invitum*, must be given the same effect in the courts of another State.[17]

Subsequent to its departure from *Hampton v. McConnell*,[18] the Court does not appear to have formulated, by way of substitution, any clear-cut principles for disposing of the contention that a State need not provide a forum for a particular type of judgment of a sister State. Thus, in one case it held that a New York statute forbidding foreign corporations doing a domestic business to sue on causes originating outside the State was constitutionally applicable to prevent such a corporation from suing on a judgment obtained in a sister State.[19] But in a later case it ruled that a Mississippi statute forbidding contracts in cotton futures could not validly close the courts of the State to an action on a judgment obtained in a sister State on such a contract, although the contract in question had been entered into in the forum State and between its citi-

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[13] Milwaukee County v. White Co., 296 U.S. 268, 275-276 (1935).

[14] Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873); Robertson v. Pickrell, 109 U.S. 608, 610 (1883).

[15] Kersh Lake Dist. v. Johnson, 309 U.S. 485 (1940). *See also* Texas & Pac. Ry. v. Southern Pacific Co., 137 U.S. 48 (1890).

[16] National Exchange Bank v. Wiley, 195 U.S. 257, 265 (1904). *See also* Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287 (1890).

[17] Harding v. Harding, 198 U.S. 317 (1905).

[18] 16 U.S. (3 Wheat.) 234 (1818).

[19] Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903).

zens.[20] Following the later rather than the earlier precedent, subsequent cases[21] have held: (1) that a State may adopt such system of courts and form of remedy as it sees fit but cannot, under the guise of merely affecting the remedy, deny enforcement of claims otherwise within the protection of the Full Faith and Credit Clause when its courts have general jurisdiction of the subject matter and the parties;[22] (2) that, accordingly, a forum State, which has a shorter period of limitations than the State in which a judgment was granted and later revived, erred in concluding that, whatever the effect of the revivor under the law of the State of origin, it could refuse enforcement of the revived judgment;[23] (3) that the courts of one State have no jurisdiction to enjoin the enforcement of judgments at law obtained in another State, when the same reasons assigned for granting the restraining order were passed upon on a motion for new trial in the action at law and the motion denied;[24] (4) that the constitutional mandate requires credit to be given to a money judgment rendered in a civil cause of action in another State, even though the forum State would have been under no duty to entertain the suit on which the judgment was founded, inasmuch as a State cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on a judgment;[25] and (5) that, similarly, tort claimants in State A, who obtain a judgment against a foreign insurance company, notwithstanding that, prior to judgment, domiciliary State B appointed a liquidator for the company, vested company assets in him, and ordered suits against the company stayed, are entitled to have such judgment recognized in State B for purposes of determining the amount of the claim, although not for determination of what priority, if any, their claim should have.[26]

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[20] Fauntleroy v. Lum, 210 U.S. 230 (1908). Justice Holmes, who spoke for the Court in both cases, asserted in his opinion in the latter that the New York statute was "directed to jurisdiction," the Mississippi statute to "merits," but four Justices could not grasp the distinction.

[21] Kenney v. Supreme Lodge, 252 U.S. 411 (1920), and cases there cited. Holmes again spoke for the Court. *See also* Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 434 (1919).

[22] Broderick v. Rosner, 294 U.S. 629 (1935), approved in Hughes v. Fetter, 341 U.S. 609 (1951).

[23] Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949); *see also* Roche v. McDonald, 275 U.S. 449 (1928).

[24] Embry v. Palmer, 107 U.S. 3, 13 (1883).

[25] Titus v. Wallick, 306 U.S. 282, 291-292 (1939).

[26] Morris v. Jones, 329 U.S. 545 (1947). Moreover, there is no apparent reason why Congress, acting on the implications of Marshall's words in Hampton v. McConnell, 16 U.S. (3 Wheat.) 234 (1818), should not clothe extrastate judgments of any particular type with the full status of domestic judgments of the same type in the several States. Thus, why should not a judgment for alimony be made directly enforceable in sister States instead of merely furnishing the basis of an action in debt?

Jurisdiction: A Prerequisite to Enforcement of Judgments

The jurisdictional question arises both in connection with judgments *in personam* against nonresident defendants to whom it is alleged personal service was not obtained in the State originating the judgment and in relation to judgments *in rem* against property or a status alleged not to have been within the jurisdiction of the court which handed down the original decree.[27] Records and proceedings of courts wanting jurisdiction are not entitled to credit.[28]

Judgments in Personam.—When the subject matter of a suit is merely the defendant's liability, it is necessary that it should appear from the record that the defendant has been brought within the jurisdiction of the court by personal service of process, or by his voluntary appearance, or that he had in some manner authorized the proceeding.[29] Thus, when a state court endeavored to acquire jurisdiction of a nonresident defendant by an attachment of his property within the State and constructive notice to him, its judgment was defective for want of jurisdiction and hence could not afford the basis of an action against the defendant in the court of another State, although it bound him so far as the property attached by virtue of the inherent right of a State to assist its own citizens in obtaining satisfaction of their just claims.[30]

The fact that a nonresident defendant was only temporarily in the State when he was served in the original action does not vitiate the judgment thus obtained and later relied upon as the basis of an action in his home State.[31] Also a judgment rendered in the State of his domicile against a defendant who, pursuant to the statute thereof providing for the service of process on absent defend-

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[27] Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870); Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). Full faith and credit extends to the issue of the original court's jurisdiction, when the second court's inquiry discloses that the question of jurisdiction had been fully and fairly litigated and finally decided in the court which rendered the original judgment. Durfee v. Duke, 375 U.S. 106 (1963); Underwriters Assur. Co. v. North Carolina Life Ins. Ass'n, 455 U.S. 691 (1982).

[28] Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521, 528 (1873). *See also* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1888); Huntington v. Attrill, 146 U.S. 657, 685 (1892); Brown v. Fletcher's Estate, 210 U.S. 82 (1908); Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Spokane Inland R.R. v. Whitley, 237 U.S. 487 (1915). However, a denial of credit, founded upon a mere suggestion of want of jurisdiction and unsupported by evidence, violates the clause. Rogers v. Alabama, 192 U.S. 226, 231 (1904); Wells Fargo & Co. v. Ford, 238 U.S. 503 (1915).

[29] Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287 (1890). *See also* Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907); Brown v. Fletcher's Estate, 210 U.S. 82 (1908).

[30] Pennoyer v. Neff, 95 U.S. 714 (1878). *See*, for a reformulation of this case's due process foundation, Shaffer v. Heitner, 433 U.S. 186 (1977).

[31] Renaud v. Abbot, 116 U.S. 277 (1886); Jaster v. Currie, 198 U.S. 144 (1905); Reynolds v. Stockton, 140 U.S. 254 (1891).

ants, was personally served in another State is entitled to full faith and credit.[32] When the matter of fact or law on which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment.[33]

Inasmuch as the principle of *res judicata* applies only to proceedings between the same parties and privies, the plea by defendant in an action based on a judgment that he was not party or privy to the original action raises the question of jurisdiction; while a judgment against a corporation in one State may validly bind a stockholder in another State to the extent of the par value of his holdings,[34] an administrator acting under a grant of administration in one State stands in no sort of relation of privity to an administrator of the same estate in another State.[35] But where a judgment of dismissal was entered in a federal court in an action against one of two joint tortfeasors, in a State in which such a judgment would constitute an estoppel in another action in the same State against the other tortfeasor, such judgment is not entitled to full faith and credit in an action brought against the tortfeasor in another State.[36]

Service on Foreign Corporations.—In 1856, the Court decided *Lafayette Ins. Co. v. French*,[37] a pioneer case in its general class. Here it was held that "where a corporation chartered by the State of Indiana was allowed by a law of Ohio to transact business in the latter State upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment obtained against the corporation by means of such process" ought to receive in Indiana the same

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[32] Milliken v. Meyer, 311 U.S. 457, 463 (1940). In the pioneer case of D'Arcy v. Ketchum, 52 U.S. (1 How.) 165 (1851), the question presented was whether a judgment rendered by a New York court, under a statute which provided that, when joint debtors were sued and one of them was brought into court on a process, a judgment in favor of the plaintiff would entitle him to execute against all, must be accorded full faith and credit in Louisiana when offered as a basis of an action in debt against a resident of that State who had not been served by process in the New York action. The Court ruled that the original implementing statute, 1 Stat. 122 (1790), did not reach this type of case, and hence the New York judgment was not enforceable in Louisiana against defendant. Had the Louisiana defendant thereafter ventured to New York, however, he could, as the Constitution then stood, have been subjected to the judgment to the same extent as the New York defendant who had been personally served. Subsequently, the disparity between operation of personal judgment in the home State has been eliminated, because of the adoption of the Fourteenth Amendment. In divorce cases, however, it still persists in some measure. *See* infra.

[33] Adam v. Saenger, 303 U.S. 59, 62 (1938).

[34] Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900).

[35] Stacy v. Thrasher, 47 U.S. (6 How.) 44, 58 (1848).

[36] Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912).

[37] 59 U.S. (18 How.) 404 (1856).

faith and credit as it was entitled to in Ohio.[38] Later cases establish under both the Fourteenth Amendment and article IV, § 1, that the cause of action must have arisen within the State obtaining service in this way,[39] that service on an officer of a corporation, not its resident agent and not present in the State in an official capacity, will not confer jurisdiction over the corporation,[40] that the question whether the corporation was actually "doing business" in the State may be raised.[41] On the other hand, the fact that the business was interstate is no objection.[42]

Service on Nonresident Motor Vehicle Owners.—By analogy to the above cases, it has been held that a State may require nonresident owners of motor vehicles to designate an official within the State as an agent upon whom process may be served in any legal proceedings growing out of their operation of a motor vehicle within the State.[43] While these cases arose under the Fourteenth Amendment alone, unquestionably a judgment validly obtained upon this species of service could be enforced upon the owner of a car through the courts of his home State.

Judgments in Rem.—In sustaining the challenge to jurisdiction in cases involving judgments *in personam*, the Court in the main was making only a somewhat more extended application of recognized principles. In order to sustain the same kind of challenge in cases involving judgments *in rem* it has had to make law outright. The leading case is *Thompson v. Whitman*.[44] Thompson, sheriff of Monmouth County, New Jersey, acting under a New Jersey statute, had seized a sloop belonging to Whitman and by a proceeding *in rem* had obtained its condemnation and forfeiture in a local court. Later, Whitman, a citizen of New York, brought an action for trespass against Thompson in the United States Circuit Court for the Southern District of New York, and Thompson answered by producing a record of the proceedings before the New Jersey tribunal. Whitman thereupon set up the contention that the New Jersey court had acted without jurisdiction, inasmuch as the sloop which was the subject matter of the proceedings had been

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[38] To the same effect is Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[39] Simon v. Southern Ry., 236 U.S. 115 (1915).

[40] Goldey v. Morning News, 156 U.S. 518 (1895); Riverside Mills v. Menfee, 237 U.S. 189 (1915).

[41] International Harvester v. Kentucky, 234 U.S. 579 (1914). Riverside Mills v. Menefee, 237 U.S. 189 (1915).

[42] International Harvester v. Kentucky, 234 U.S. 579 (1914).

[43] Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927), limited in Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[44] 85 U.S. (18 Wall.) 457 (1874).

seized outside the county to which, by the statute under which it had acted, its jurisdiction was confined.

As previously explained, the plea of lack of privity cannot be set up in defense in a sister State against a judgment *in rem*. In a proceeding *in rem*, however, the presence of the *res* within the court's jurisdiction is a prerequisite, and this, it was urged, had not been the case in *Thompson v. Whitman*. Could, then, the Court consider this challenge with respect to a judgment which was offered, not as the basis for an action for enforcement through the courts of a sister State but merely as a defense in a collateral action? As the law stood in 1873, it apparently could not.[45] All difficulties, nevertheless, to its consideration of the challenge to jurisdiction in the case were brushed aside by the Court. Whenever, it said, the record of a judgment rendered in a state court is offered "in evidence" by either of the parties to an action in another State, it may be contradicted as to the facts necessary to sustain the former court's jurisdiction; "and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding the claim that they did exist."[46]

Divorce Decrees: Domicile as the Jurisdictional Prerequisite

This, however, was only the beginning of the Court's lawmaking in cases *in rem*. The most important class of such cases is that in which the respondent to a suit for divorce offers in defense an earlier decree from the courts of a sister State. By the almost universally accepted view prior to 1906, a proceeding in divorce was one against the marriage status, i.e., *in rem*, and hence might be validly brought by either party in any State where he or she was *bona fide* domiciled;[47] and, conversely, when the plaintiff did not have a *bona fide* domicile in the State, a court could not render a decree binding in other States even if the nonresident defendant entered a personal appearance.[48]

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[45] 1 H. BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 246 (1891).

[46] *See also* Simmons v. Saul, 138 U.S. 439, 448 (1891). In other words, the challenge to jurisdiction is treated as equivalent to the plea *nul tiel* record, a plea which was recognized even in *Mills v. Duryee* as available against an attempted invocation of the Full Faith and Credit Clause. What is not pointed out by the Court is that it was also assumed in the earlier case that such a plea could always be rebutted by producing a transcript, properly authenticated in accordance with the act of Congress, of the judgment in the original case. *See also* Brown v. Fletcher's Estate, 210 U.S. 82 (1908); German Savings Soc'y v. Dormitzer, 192 U.S. 125, 128 (1904); Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287, 294 (1890).

[47] Cheever v. Wilson, 76 U.S. (9 Wall.) 108 (1870).

[48] Andrews v. Andrews, 188 U.S. 14 (1903). *See also* German Savings Soc'y v. Dormitzer, 192 U.S. 125 (1904).

Sec. 1—Full Faith and Credit

Divorce Suit: In Rem or in Personam; Judicial Indecision.—In 1906, however, by a vote of five to four, the Court departed from its earlier ruling, rendered five years previously in *Atherton v. Atherton*,[49] and in *Haddock v. Haddock*,[50] it announced that a divorce proceeding might be viewed as one *in personam*. In the former it was held, in the latter denied, that a divorce granted a husband without personal service upon the wife, who at the time was residing in another State, was entitled to recognition under the Full Faith and Credit Clause and the acts of Congress; the difference between the cases consisted solely in the fact that in the *Atherton* case the husband had driven the wife from their joint home by his conduct, while in the *Haddock* case he had deserted her. The court which granted the divorce in *Atherton v. Atherton* was held to have had jurisdiction of the marriage status, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. Haddock's suit, on the contrary, was held to be as to the wife *in personam* and so to require personal service upon her or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid in the State where obtained because of the State's inherent power to determine the status of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when the one was in Connecticut and the other in New York, the former was divorced and the latter married. In *Atherton v. Atherton* the Court had earlier acknowledged that "a husband without a wife, or a wife without a husband, is unknown to the law."

The practical difficulties and distresses likely to result from such anomalies were pointed out by critics of the decision at the time. In point of fact, they have been largely avoided, because most of the state courts have continued to give judicial recognition and full faith and credit to one another's divorce proceedings on the basis of the older idea that a divorce proceeding is one *in rem*, and that if the applicant is *bona fide* domiciled in the State the court has jurisdiction in this respect. Moreover, until the second of the *Williams v. North Carolina* cases[51] was decided in 1945, there had not been manifested the slightest disposition to challenge judicially the power of the States to determine what shall constitute domicile for divorce purposes. Shortly prior thereto, the Court in *Davis v.*

[49] 181 U.S. 155, 162 (1901).
[50] 201 U.S. 562 (1906).
[51] 317 U.S. 287 (1942); 325 U.S. 226 (1945).

Davis[52] rejected contentions adverse to the validity of a Virginia decree of which enforcement was sought in the District of Columbia. In this case, a husband, after having obtained in the District a decree of separation subject to payment of alimony, established years later a residence in Virginia and sued there for a divorce. Personally served in the District, where she continued to reside, the wife filed a plea denying that her husband was a resident of Virginia and averred that he was guilty of a fraud on the court in seeking to establish a residence for purposes of jurisdiction. In ruling that the Virginia decree, granting to the husband an absolute divorce minus any alimony payment, was enforceable in the District, the Court stated that in view of the wife's failure, while in Virginia litigating her husband's status to sue, to answer the husband's charges of willful desertion, it would be unreasonable to hold that the husband's domicile in Virginia was not sufficient to entitle him to a divorce effective in the District. The finding of the Virginia court on domicile and jurisdiction was declared to bind the wife. *Davis v. Davis* is distinguishable from the *Williams v. North Carolina* decisions in that in the former determination of the jurisdictional prerequisite of domicile was made in a contested proceeding while in the *Williams* cases it was not.

Williams I and Williams II.—In the *Williams* I and *Williams* II cases, the husband of one marriage and the wife of another left North Carolina, obtained six-week divorce decrees in Nevada, married there, and resumed their residence in North Carolina where both previously had been married and domiciled. Prosecuted for bigamy, the defendants relied upon their Nevada decrees and won the preliminary round of this litigation, that is, in *Williams* I,[53] when a majority of the Justices, overruling *Haddock v. Haddock*, declaring that in this case, the Court must assume that the petitioners for divorce had a *bona fide* domicile in Nevada and not that their Nevada domicile was a sham. "[E]ach State, by virtue of its command over the domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of substituted service meet the requirements of due process." Accordingly, a decree granted by Nevada to one, who, it is assumed, is at the time *bona fide* domiciled therein, is binding upon the courts of other States, including North Carolina in which the marriage was performed and where the other party to the marriage is still domiciled when the divorce was decreed. In view of its

[52] 305 U.S. 32 (1938).
[53] 317 U.S. 287, 298-299 (1942).

assumptions, which it justified on the basis of an inadequate record, the Court did not here pass upon the question whether North Carolina had the power to refuse full faith and credit to a Nevada decree because it was based on residence rather than domicile or because, contrary to the findings of the Nevada court, North Carolina found that no *bona fide* domicile had been acquired in Nevada.[54]

Presaging what ruling the Court would make when it did get around to passing upon the latter question, Justice Jackson, dissenting in *Williams* I, protested that "this decision repeals the divorce laws of all the States and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there.... While a State can no doubt set up its own standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other States.... The effect of the Court's decision today—that we must give extra-territorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first State to pass on the facts necessary to jurisdiction."[55]

Notwithstanding that one of the deserted spouses had died since the initial trial and that another had remarried, North Carolina, without calling into question the status of the latter marriage, began a new prosecution for bigamy; when the defendants appealed the conviction resulting therefrom, the Supreme Court, in *Williams* II,[56] sustained the adjudication of guilt as not denying full faith and credit to the Nevada divorce decree. Reiterating the doctrine that jurisdiction to grant divorce is founded on domicile,[57] a majority of the Court held that a decree of divorce rendered in one State may be collaterally impeached in another by proof that the court which rendered the decree lacked jurisdiction (the parties not having been domiciled therein), even though the record of proceedings in that court purports to show jurisdiction.[58]

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[54] Id. at 302.

[55] Id. at 311.

[56] 325 U.S. 226, 229 (1945).

[57] Bell v. Bell, 181 U.S. 175 (1901); Andrews v. Andrews, 188 U.S. 14 (1903).

[58] Strong dissents were filed which have influenced subsequent holdings. Among these was that of Justice Rutledge which attacked both the consequences of the decision as well as the concept of jurisdictional domicile on which it was founded.

"Unless 'matrimonial domicil,' banished in *Williams* I [by the overruling of *Haddock v. Haddock*], has returned renamed ['domicil of origin'] in *Williams* II, every decree becomes vulnerable in every State. Every divorce, wherever granted ... may

Sec. 1—Full Faith and Credit

Cases Following Williams II.—Fears registered by the dissenters in the second *Williams* case that the stability of all divorces might be undermined thereby and that thereafter the court of each forum State, by its own independent determination of domicile, might refuse recognition of foreign decrees were temporarily set at rest by the holding in *Sherrer v. Sherrer*,[59] wherein Massachusetts, a State of domiciliary origin, was required to accord full faith and credit to a 90-day Florida decree which had been contested by the husband. The latter, upon receiving notice by mail, retained Florida counsel who entered a general appearance and denied all allegations in the complaint, including the wife's residence. At the hearing, the husband, though present in person and by counsel, did not offer evidence in rebuttal of the wife's proof of her Florida residence, and when the Florida court ruled that she was a *bona fide* resident, the husband did not appeal. Inasmuch as the findings of the requisite jurisdictional facts, unlike those in the second *Williams* case, were made in proceedings in which the defendant appeared and participated, the requirements of full faith and credit were held to bar him from collaterally attacking such findings in a suit instituted by him in his home State of Massachusetts, par-

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now be reexamined by every other State, upon the same or different evidence, to redetermine the 'jurisdiction fact,' always the ultimate conclusion of 'domicil.' . . ."

"The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common law conception. . . . No legal conception, save possibly 'jurisdiction' . . . afford such possibilities for uncertain application. . . . Apart from the necessity for travel, [to effect a change of domicile, the latter], criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity. ... When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. . . . [The majority have not held] that denial of credit will be allowed, only if the evidence [as to the place of domicile] is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact 'not unreasonably.' . . . But . . . [the Court] does not define 'not unreasonably.' It vaguely suggests a supervisory function, to be exercised when the denial [of credit] strikes its sensibilities as wrong, by some not stated standard. . . . There will be no 'weighing' [of evidence], . . . only examination for sufficiency." 325 U.S. at 248, 251, 255, 258-259.

No less disposed to prophesy undesirable results from this decision was Justice Black in whose dissenting opinion Justice Douglas concurred.

"The Full Faith and Credit Clause, as now interpreted, has become a disrupting influence. The Court in effect states that the clause does not apply to divorce actions, and that States alone have the right to determine what effect shall be given to the decrees of other States. If the Court is abandoning the principle that a marriage [valid where made is valid everywhere], a consequence is to subject people to bigamy or adultery prosecutions because they exercise their constitutional right to pass from a State in which they were validly married on to another which refuses to recognize their marriage. Such a consequence violates basic guarantees." Id. at 262.

[59] 334 U.S. 343 (1948).

ticularly in the absence of proof that the divorce decree was subject to such collateral attack in a Florida court. Having failed to take advantage of the opportunities afforded him by his appearance in the Florida proceeding, the husband was thereafter precluded from relitigating in another State the issue of his wife's domicile already passed upon by the Florida court.

In *Coe v. Coe*,[60] embracing a similar set of facts, the Court applied like reasoning to reach a similar result. Massachusetts again was compelled to recognize the validity of a six-week Nevada decree obtained by a husband who had left Massachusetts after a court of that State had refused him a divorce and had granted his wife separate support. In the Nevada proceeding, the wife appeared personally and by counsel filed a cross-complaint for divorce, admitted the husband's residence, and participated personally in the proceedings. After finding that it had jurisdiction of the plaintiff, defendant, and the subject matter involved, the Nevada court granted the wife a divorce, which was valid, final, and not subject to collateral attack under Nevada law. The husband married again, and on his return to Massachusetts, his ex-wife petitioned the Massachusetts court to adjudge him in contempt for failing to make payments for her separate support under the earlier Massachusetts decree. Inasmuch as there was no intimation that under Massachusetts law a decree of separate support would survive a divorce, recognition of the Nevada decree as valid accordingly necessitated a rejection of the ex-wife's contention.

Appearing to review *Williams* II, and significant for the social consequences produced by the result decreed therein, is the case of *Rice v. Rice*.[61] To determine the widowhood status of the party litigants in relation to inheritance of property of a husband who had

[60] 334 U.S. 378 (1948). In a dissenting opinion filed in the case of Sherrer v. Sherrer, but applicable also to the case of Coe v. Coe, Justice Frankfurter, with Justice Murphy concurring, asserted his inability to accept the proposition advanced by the majority that "regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy had been gone through." 334 U.S. at 343, 377.

[61] 336 U.S. 674 (1949). Of four justices dissenting, Black, Douglas, Rutledge, and Jackson, Justice Jackson alone filed a written opinion. To him the decision was "an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece,' but for the first *Williams* case and its progeny, the judgment of the Connecticut court might properly have held that the *Rice* divorce decree was void for every purpose because it was rendered by a State court which never obtained jurisdiction of the nonresident defendant. But if we adhere to the holdings that the Nevada court had power over her for the purpose of blasting her marriage and opening the way to a successor, I do not see the justice of inventing a compensating confusion in the device of divisible divorce by which the parties are half-bound and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife." Id. at 676, 679, 680.

deserted his first wife in Connecticut, had obtained an *ex parte* divorce in Nevada, and after remarriage, had died without ever returning to Connecticut, the first wife, joining the second wife and the administrator of his estate as defendants, petitioned a Connecticut court for a declaratory judgment. After having placed upon the first wife the burden of proving that the decedent had not acquired a *bona fide* domicile in Nevada, and after giving proper weight to the claims of power by the Nevada court, the Connecticut court concluded that the evidence sustained the contentions of the first wife, and in so doing, it was upheld by the Supreme Court. The cases of *Sherrer v. Sherrer*, and *Coe v. Coe*, previously discussed, were declared not to be in point, inasmuch as no personal service was made upon the first wife, nor did she in any way participate in the Nevada proceedings. She was not, therefore, precluded from challenging the findings of the Nevada court that the decedent was, at the time of the divorce, domiciled in that State.[62]

Claims for Alimony or Property in Forum State.—In *Esenwein v. Commonwealth*,[63] decided on the same day as the second *Williams* case, the Supreme Court also sustained a Pennsylvania court in its refusal to recognize an *ex parte* Nevada decree on the ground that the husband who obtained it never acquired a *bona fide* domicile in the latter State. In this instance, the husband and wife had separated in Pennsylvania, where the wife was granted a support order; after two unsuccessful attempts to win a divorce in that State, the husband departed for Nevada. Upon the receipt of a Nevada decree, the husband thereafter established a residence in Ohio and filed an action in Pennsylvania for total relief from the support order. In a concurring opinion, in which he was joined by Justices Black and Rutledge, Justice Douglas stressed the "basic difference between the problem of marital capacity and the problem of support," and stated that it was "not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domi-

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[62] Vermont violated the clause in sustaining a collateral attack on a Florida divorce decree, the presumption of Florida's jurisdiction over the cause and the parties not having been overcome by extrinsic evidence or the record of the case. Cook v. Cook, 342 U.S. 126 (1951). The *Sherrer* and *Coe* cases were relied upon. There seems, therefore, to be no doubt of their continued vitality.

A Florida divorce decree was also at the bottom of another case in which the daughter of a divorced man by his first wife and his legatee under his will sought to attack his divorce in the New York courts and thereby indirectly his third marriage. The Court held that inasmuch as the attack would not have been permitted in Florida under the doctrine of *res judicata*, it was not permissible under the Full Faith and Credit Clause in New York. On the whole, it appears that the principle of *res judicata* is slowly winning out against the principle of domicile. Johnson v. Muelberger, 340 U.S. 581 (1951).

[63] 325 U.S. 279 (1945).

ciled in the State which awarded him the divorce decree," unless the other spouse appeared or was personally served. "The State where the deserted wife is domiciled has a concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized." Or, as succinctly stated by Justice Rutledge, "the jurisdictional foundation for a decree in one State capable of foreclosing an action for maintenance or support in another may be different from that required to alter the marital status with extraterritorial effect."[64]

Three years later, but on this occasion as spokesman for a majority of the Court, Justice Douglas reiterated these views in the case of *Estin v. Estin*.[65] Even though it acknowledged the validity of an *ex parte* Nevada decree obtained by a husband, New York was held not to have denied full faith and credit to the decree when, subsequently thereto, it granted the wife a judgment for arrears in alimony founded upon a decree of separation previously awarded to her when both she and her husband after he had resided there a year and upon constructive notice to the wife in New York who entered no appearance, was held to be effective only to change the marital status of both parties in all States of the Union but ineffective on the issue of alimony. Divorce, in other words, was viewed as being divisible; Nevada, in the absence of acquiring jurisdiction over the wife, was held incapable of adjudicating the rights of the wife in the prior New York judgment awarding her alimony. Accordingly, the Nevada decree could not prevent New York from applying its own rule of law which, unlike that of Pennsylvania,[66] does permit a support order to survive a divorce decree.[67]

Such a result was justified as accommodating the interests of both New York and Nevada in the broken marriage by restricting each State to matters of her dominant concern, the concern of New

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[64] Id. at 281-283.

[65] 334 U.S. 541 (1948). *See also* the companion case of Kreiger v. Kreiger, 334 U.S. 555 (1948).

[66] Esenwein v. Commonwealth, 325 U.S. 279, 280 (1945).

[67] Because the record, in his opinion, did not make it clear whether New York "law" held that no "*ex parte*" divorce decree could terminate a prior New York separate maintenance decree, or merely that no "*ex parte*" decree of divorce *of another State* could, Justice Frankfurter dissented and recommended that the case be remanded for clarification. Justice Jackson dissented on the ground that under New York law, a New York divorce would terminate the wife's right to alimony, and if the Nevada decree is good, it was entitled to no less effect in New York than a local decree. However, for reasons stated in his dissent in the first *Williams* case, 317 U.S. 287, he would have preferred not to give standing to constructive service divorces obtained on short residence. 334 U.S. 541, 549-554 (1948). These two Justices filed similar dissents in the companion case of Kreiger v. Kreiger, 334 U.S. 555, 557 (1948).

York being that of protecting the abandoned wife against impoverishment. In *Simons v. Miami National Bank*,[68] the Court held that a dower right in the deceased husband's estate is extinguished even though a divorce decree was obtained in a proceeding in which the nonresident wife was served by publication only and did not make a personal appearance.[69] The Court found the principle of *Estin v. Estin*[70] was not applicable. In *Simons*, the Court rejected the contention that the forum court, in giving recognition to the foreign court's separation decree providing for maintenance and support, has to allow for dower rights in the deceased husband's estate in the forum State.[71] Full faith and credit is not denied to a sister State's separation decree, including an award of monthly alimony, where nothing in the foreign State's separation decree could be construed as creating or preserving any interest in the nature of or in lieu of dower in any property of the decedent, wherever located and where the law of the forum State did not treat such a decree as having such effect nor indicate such an effect irrespective of the existence of the foreign State's decree.[72]

Decrees Awarding Alimony, Custody of Children.—Resulting as a by-product of divorce litigation are decrees for the payment of alimony, judgments for accrued and unpaid installments of alimony, and judicial awards of the custody of children, all of which necessitate application of the Full Faith and Credit Clause when extrastate enforcement is sought for them. Thus, a judgment in State A for alimony in arrears and payable under a prior judgment of separation which is not by its terms conditional nor subject by the law of State A to modification or recall, and on which execution was directed to issue, is entitled to recognition in the forum State. Although an obligation for accrued alimony could have been modified or set aside in State A prior to its merger in the judgment, such a judgment, by the law of State A, is not lacking in finality.[73] As to the finality of alimony decrees in general, the Court had previously ruled that where such a decree is rendered, payable in future installments, the right to such installments becomes absolute and vested on becoming due, provided no modification of the decree has been made prior to the maturity of the installments.[74] How-

[68] 381 U.S. 81 (1965).
[69] Id. at 84-85.
[70] 334 U.S. 541 (1948).
[71] 381 U.S. at 84-85.
[72] Id. at 85.
[73] Barber v. Barber, 323 U.S. 77, 84 (1944).
[74] Sistare v. Sistare, 218 U.S. 1, 11 (1910). *See also* Barber v. Barber, 62 U.S. (21 How.) 582 (1859); Lynde v. Lynde, 181 U.S. 183, 186-187 (1901); Audubon v. Shufeldt, 181 U.S. 575, 577 (1901); Bates v. Bodie, 245 U.S. 520 (1918); Yarborough v. Yarborough, 290 U.S. 202 (1933); Loughran v. Loughran, 292 U.S. 216 (1934).

ever, a judicial order requiring the payment of arrearages in alimony, which exceeded the alimony previously decreed, is invalid for want of due process, the respondent having been given no opportunity to contest it.[75] "A judgment obtained in violation of procedural due process," said Chief Justice Stone, "is not entitled to full faith and credit when sued upon in another jurisdiction."[76]

An example of a custody case was one involving a Florida divorce decree which was granted *ex parte* to a wife who had left her husband in New York, where he was served by publication. The decree carried with it an award of the exclusive custody of the child, whom the day before the husband had secretly seized and brought back to New York. The Court ruled that the decree was adequately honored by a New York court when, in *habeas corpus* proceedings, it gave the father rights of visitation and custody of the child during stated periods and exacted a surety bond of the wife conditioned on her delivery of the child to the father at the proper times,[77] it having not been "shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida laws. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida."

Answering a question left open in the preceding holding as to the binding effect of the *ex parte* award, the Court more recently acknowledged that in a proceeding challenging a mother's right to retain custody of her children, a State is not required to give effect to the decree of another State's court, which never acquired personal jurisdiction over the mother of her children, and which awarded custody to the father as the result of an *ex parte* divorce action instituted by him.[78] In *Kovacs v. Brewer*,[79] however, the

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[75] Griffin v. Griffin, 327 U.S. 220 (1946).

[76] Id. at 228. An alimony case of a quite extraordinary pattern was that of *Sutton v. Leib*, 342 U.S. 402 (1952). Because of the diverse citizenship of the parties, who had once been husband and wife, the case was brought by the latter in a federal court in Illinois. Her suit was to recover unpaid alimony which was to continue until her remarriage. To be sure, she had, as she confessed, remarried in Nevada, but the marriage had been annulled in New York on the ground that the man was already married, inasmuch as his divorce from his previous wife was null and void, she having neither entered a personal appearance nor been personally served. The Court, speaking by Justice Reed, held that the New York annulment of the Nevada marriage must be given full faith and credit in Illinois but left Illinois to decide for itself the effect of the annulment upon the obligations of petitioner's first husband.

[77] Halvey v. Halvey, 330 U.S. 610, 615 (1947).

[78] May v. Anderson, 345 U.S. 528 (1953). Justices Jackson, Reed, and Minton dissented.

[79] 356 U.S. 604 (1958). Rejecting the implication that recognition must be accorded unless the circumstances have changed, Justice Frankfurter dissented on the ground that in determining what is best for the welfare of the child, the forum court cannot be bound by an absentee, foreign custody decree, "irrespective of whether changes in circumstances are objectively provable."

Court indicated that a finding of changed circumstances rendering observance of an absentee foreign custody decree inimical to the best interests of the child is essential to sustain the validity of the forum court's refusal to enforce a foreign decree, rendered with jurisdiction over all the parties but the child, and revising an initial decree by transferring custody from the paternal grandfather to the mother. However, when, as is true in Virginia, agreements by parents as to shared custody of a child do not bind the State's courts, the dismissal by a Virginia court of a *habeas corpus* petition instituted by a father to obtain custody was not *res judicata* in that State; therefore, even if the Full Faith and Credit Clause were applicable to child custody decrees, it would not require a South Carolina court, in a custody suit instituted by the wife, to recognize a court order not binding in Virginia.[80]

Status of the Law.—The doctrine of divisible divorce, as developed by Justice Douglas in *Estin v. Estin*,[81] may have become the prevailing standard for determining the enforceability of foreign divorce decrees. If such be the case, it may be tenable to assert that an *ex parte* divorce, founded upon acquisition of domicile by one spouse in the State which granted it, is effective to destroy the marital status of both parties in the State of domiciliary origin and probably in all other States. The effect is to preclude subsequent prosecutions for bigamy but not to alter rights as to property, alimony, or custody of children in the State of domiciliary origin of a spouse who neither was served nor appeared personally.

In any event the accuracy of these conclusions has not been impaired by any decision rendered by the Court since 1948. Thus, in *Armstrong v. Armstrong*,[82] an *ex parte* divorce decree obtained by the husband in Florida was deemed to have been adequately recognized by an Ohio court when, with both of the parties before it, it disposed of the wife's suit for divorce and alimony with a decree limited solely to an award of alimony.[83] Similarly, a New York court was held not bound by an *ex parte* Nevada divorce decree, rendered without personal jurisdiction over the wife, to the extent that it relieved the husband of all marital obligations, and in an *ex parte* action for separation and alimony instituted by the wife,

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[80] Ford v. Ford, 371 U.S. 187, 192-194 (1962). As part of a law dealing with parental kidnapping, Congress, in Pub. L. 96-611, 8(a), 94 Stat. 3569, 28 U.S.C. § 1738A, required States to give full faith and credit to state court custody decrees provided the original court had jurisdiction and is the home State of the child.

[81] 334 U.S. 541 (1948).

[82] 350 U.S. 568 (1956).

[83] Four Justices, Black, Douglas, Clark, and Chief Justice Warren, disputed the Court's contention that the Florida decree contained no ruling on the wife's entitlement to alimony and mentioned that for want of personal jurisdiction over the wife, the Florida court was not competent to dispose of that issue. Id. at 575

it was competent to sequester the husband's property in New York to satisfy his obligations to the wife.[84]

Other Types of Decrees

Probate Decrees.—Many judgments, enforcement of which has given rise to litigation, embrace decrees of courts of probate respecting the distribution of estates. In order that a court have jurisdiction of such a proceeding, the decedent must have been domiciled in the state, and the question whether he was so domiciled at the time of his death may be raised in the court of a sister State.[85] Thus, when a court of State A, in probating a will and issuing letters, in a proceeding to which all distributees were parties, expressly found that the testator's domicile at the time of death was in State A, such adjudication of domicile was held not to bind one subsequently appointed as domiciliary administrator c.t.a. in State B, in which he was liable to be called upon to deal with claims of local creditors and that of the State itself for taxes, he having not been a party to the proceeding in State A. In this situation, it was held, a court of State C, when disposing of local assets claimed by both personal representatives, was free to determine domicile in accordance with the law of State C.[86]

Similarly, there is no such relation of privity between an executor appointed in one State and an administrator c.t.a. appointed in another State as will make a decree against the latter binding upon the former.[87] On the other hand, judicial proceedings in one State, under which inheritance taxes have been paid and the administration upon the estate has been closed, are denied full faith and credit by the action of a probate court in another State in assuming jurisdiction and assessing inheritance taxes against the beneficiaries of the estate, when under the law of the former State the order of the probate court barring all creditors who had failed to bring in their demand from any further claim against the executors was binding upon all.[88] What is more important, however, is

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[84] Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). Two Justices dissented. Justice Frankfurter was unable to perceive "why dissolution of the marital relation is not so personal as to require personal jurisdiction over the absent spouse, while the denial of alimony . . . is." Justice Harlan maintained that inasmuch as the wife did not become a domiciliary of New York until after the Nevada decree, she had no predivorce rights in New York which the latter was obligated to protect.

[85] Tilt v. Kelsey, 207 U.S. 43 (1907); Burbank v. Ernst, 232 U.S. 162 (1914).

[86] Riley v. New York Trust Co., 315 U.S. 343 (1942).

[87] Brown v. Fletcher's Estate, 210 U.S. 82, 90 (1908). *See also* Stacy v. Thrasher, 47 U.S. (6 How.) 44, 58 (1848); McLean v. Meek, 59 U.S. (18 How.) 16, 18 (1856).

[88] Tilt v. Kelsey, 207 U.S. 43 (1907). In the case of Borer v. Chapman, 119 U.S. 587, 599 (1887), involving a complicated set of facts, it was held that a judgment in a probate proceeding, which was merely ancillary to proceedings in another State and which ordered the residue of the estate to be assigned to the legatee and dis-

that the *res* in such a proceeding, that is, the estate, in order to entitle the judgment to recognition under article IV, 1, must have been located in the State or legally attached to the person of the decedent. Such a judgment is accordingly valid, generally speaking, to distribute the intangible property of the decedent, though the evidences thereof were actually located elsewhere.[89] This is not so, on the other hand, as to tangibles and realty. In order that the judgment of a probate court distributing these be entitled to recognition under the Constitution, they must have been located in the State; as to tangibles and realty outside the State, the decree of the probate court is entirely at the mercy of the *lex rei sitae*.[90] So, the probate of a will in one State, while conclusive therein, does not displace legal provisions necessary to its validity as a will of real property in other States.[91]

Adoption Decrees.—That a statute legitimizing children born out of wedlock does not entitle them by the aid of the Full Faith and Credit Clause to share in the property located in another State is not surprising, in view of the general principle, to which, however, there are exceptions, that statutes do not have extraterritorial operation.[92] For the same reason, adoption proceedings in one State are not denied full faith and credit by the law of the sister State which excludes children adopted by proceedings in other States from the right to inherit land therein.[93]

Garnishment Decrees.—Garnishment proceedings combine some of the elements of both an *in rem* and an *in personam* action. Suppose that A owes B and B owes C, and that the two former live in a different State than C. A, while on a brief visit to C's State, is presented with a writ attaching his debt to B and also a summons to appear in court on a named day. The result of the proceedings thus instituted is that a judgment is entered in C's favor against A to the amount of his indebtedness to B. Subsequently A is sued by B in their home State and offers the judgment, which he has in the meantime paid, in defense. It was argued in behalf

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charged the executor from further liability, did not prevent a creditor, who was not a resident of the State in which the ancillary judgment was rendered, from setting up his claim in the state probate court which had the primary administration of the estate.

[89] Blodgett v. Silberman, 277 U.S. 1 (1928).

[90] Kerr v. Moon, 22 U.S. (9 Wheat.) 565 (1824); McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825); Clarke v. Clarke, 178 U.S. 186 (1900). The controlling principle of these cases is not confined to proceedings in probate. A court of equity "not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree." Fall v. Eastin, 215 U.S. 1, 11 (1909).

[91] Robertson v. Pickrell, 109 U.S. 608, 611 (1883). *See also* Darby v. Mayer, 23 U.S. (10 Wheat.) 465 (1825); Gasquet v. Fenner, 247 U.S. 16 (1918).

[92] Olmstead v. Olmstead, 216 U.S. 386 (1910).

[93] Hood v. McGehee, 237 U.S. 611 (1915).

of B that A's debt to him had a *situs* in their home State and furthermore that C could not have sued B in this same State without formally acquiring a domicile there. Both propositions were, however, rejected by the Court, which held that the judgment in the garnishment proceedings was entitled to full faith and credit as against B's action.[94]

Penal Judgments: Types Entitled to Recognition

Finally, the clause has been interpreted in the light of the "incontrovertible maxim" that "the courts of no country execute the penal laws of another."[95] In the leading case of *Huntington v. Attrill*,[96] however, the Court so narrowly defined "penal" in this connection as to make it substantially synonymous with "criminal" and on this basis held a judgment which had been recovered under a state statute making the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all of its debts to be entitled under article IV, § 1, to recognition and enforcement in the courts of sister States. Nor, in general, is a judgment for taxes to be denied full faith and credit in state and federal courts merely because it is for taxes. In *Nelson v. George*,[97] in which a prisoner was tried in California and North Carolina and convicted and sentenced in both states for various felonies, the Court determined that the Full Faith and Credit Clause did not require California to enforce a penal judgment handed down by North Carolina; California was free to consider what effect if any it would give to the North Carolina detainer.[98] Until the obligation to extradite matured, the Full Faith and Credit Clause did not require California to enforce the North Carolina penal judgment in any way.

Fraud as a Defense to Suits on Foreign Judgments

With regard to whether recognition of a state judgment can be refused by the forum State on other than jurisdictional grounds, there are dicta to the effect that judgments for which extraterritorial operation is demanded under article IV, § 1 and

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[94] Harris v. Balk, 198 U.S. 215 (1905). *See also* Chicago, R.I. & P. Ry. v. Sturm, 174 U.S. 710 (1899); King v. Cross, 175 U.S. 396, 399 (1899); Louisville & Nashville Railroad v. Deer, 200 U.S. 176 (1906); Baltimore & Ohio R.R. v. Hostetter, 240 U.S. 620 (1916). *Harris* itself has not survived the due process reformulation of Shaffer v. Heitner, 433 U.S. 186 (1977). *See* Rush v. Savchuk, 444 U.S. 320 (1980).

[95] The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825). *See also* Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[96] 146 U.S. 657 (1892). *See also* Dennick v. Railroad Co., 103 U.S. 11 (1881); Moore v. Mitchell, 281 U.S. 18 (1930); Milwaukee County v. White Co., 296 U.S. 268 (1935).

[97] 399 U.S. 224 (1970).

[98] Id. at 229.

acts of Congress are "impeachable for manifest fraud." But unless the fraud affected the jurisdiction of the court, the vast weight of authority is against the proposition. Also, it is universally agreed that a judgment may not be impeached for alleged error or irregularity,[99] or as contrary to the public policy of the State where recognition is sought for it under the Full Faith and Credit Clause.[100] Previously listed cases indicate, however, that the Court in fact has permitted local policy to determine the merits of a judgment under the pretext of regulating jurisdiction.[101] Thus in one case, *Cole v. Cunningham*,[102] the Court sustained a Massachusetts court in enjoining, in connection with insolvency proceedings instituted in that State, a Massachusetts creditor from continuing in New York courts an action which had been commenced there before the insolvency suit was brought. This was done on the theory that a party within the jurisdiction of a court may be restrained from doing something in another jurisdiction opposed to principles of equity, it having been shown that the creditor was aware of the debtor's embarrassed condition when the New York action was instituted. The injunction unquestionably denied full faith and credit and commanded the assent of only five Justices.

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

With regard to the extrastate protection of rights which have not matured into final judgments, the Full Faith and Credit Clause has never abolished the general principle of the dominance of local policy over the rules of comity.[103] This was stated by Justice Nelson in the *Dred Scott* case, as follows: "No State . . . can enact laws to operate beyond its own dominions . . . Nations, from convenience and comity . . . recognizes [sic] and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself." He added that it was the same with the States of the Union in relation to one another. It followed that even though Dred Scott had become a free man in con-

[99] Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Maxwell v. Stewart, 88 U.S. (21 Wall.) 71 (1875); Hanley v. Donoghue, 116 U.S. 1 (1885); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888); Simmons v. Saul, 138 U.S. 439 (1891); American Express Co. v. Mullins, 212 U.S. 311 (1909).

[100] Fauntleroy v. Lum, 210 U.S. 230 (1908).

[101] Anglo-American Prov. Co. v. Davis Prov. Co., 191 U.S. 373 (1903).

[102] 133 U.S. 107 (1890).

[103] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589-596 (1839). *See* Kryger v. Wilson, 242 U.S. 171 (1916); Bond v. Hume, 243 U.S. 15 (1917).

sequence of his having resided in the "free" State of Illinois, he had nevertheless upon his return to Missouri, which had the same power as Illinois to determine its local policy respecting rights acquired extraterritorially, reverted to servitude under the laws and judicial decisions of that State. [104]

In a case decided in 1887, however, the Court remarked: "Without doubt the constitutional requirement, Art. IV, § 1, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." [105] And this proposition was later held to extend to state constitutional provisions. [106] More recently this doctrine has been stated in a very mitigated form, the Court saying that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each State to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly. [107] That is, the Full Faith and Credit Clause, in its design to transform the States from independent sovereigns into a single unified Nation, directs that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty, but because the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate in-

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[104] Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857); Bonaparte v. Tax Court, 104 U.S. 592 (1882), where it was held that a law exempting from taxation certain bonds of the enacting State did not operate extraterritorially by virtue of the Full Faith and Credit Clause.

[105] Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887).

[106] Smithsonian Institution v. St. John, 214 U.S. 19 (1909). When, in a state court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the Full Faith and Credit Clause. *See also* Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914), citing Glenn v. Garth, 147 U.S. 360 (1893), Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900); Allen v. Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R.R. v. Miller, 221 U.S. 408 (1911). *See also* National Mut. B. & L. Ass'n v. Brahan, 193 U.S. 635 (1904); Johnson v. New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co. 243 U.S. 93 (1917).

[107] Alaska Packers Ass'n. v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932).

terests.[108] The clause (and the comparable due process clause standards) obligate the forum State to take jurisdiction and to apply foreign law, subject to the forum's own interest in furthering its public policy. In order "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[109] Obviously this doctrine endows the Court with something akin to an arbitral function in the decision of cases to which it is applied.

Transitory Actions: Death Statutes.—The initial effort in this direction was made in connection with transitory actions based on statute. Earlier, such actions had rested upon the common law, which was fairly uniform throughout the States, so that there was usually little discrepancy between the law under which the plaintiff from another jurisdiction brought his action (*lex loci*) and the law under which the defendant responded (*lex fori*). In the late seventies, however, the States, abandoning the common law rule on the subject, began passing laws which authorized the representatives of a decedent whose death had resulted from injury to bring an action for damages.[110] The question at once presented itself whether, if such an action was brought in a State other than that in which the injury occurred, it was governed by the statute under which it arose or by the law of the forum State, which might be less favorable to the defendant. Nor was it long before the same question presented itself with respect to transitory action *ex contractu,*

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[108] *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[109] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-313 (1981) (plurality opinion)).

[110] Dennick v. Railroad Co., 103 U.S. 11 (1881), was the first so-called "Death Act" case to reach the Supreme Court. *See also* Stewart v. Baltimore & O.R.R., 168 U.S. 445 (1897). Even today the obligation of a State to furnish a forum for the determination of death claims arising in another State under the laws thereof appears to rest on a rather precarious basis. In Hughes v. Fetter, 341 U.S. 609 (1951), the Court, by a narrow majority, held invalid under the Full Faith and Credit Clause a statute of Wisconsin which, as locally interpreted, forbade its courts to entertain suits of this nature; in First Nat'l Bank v. United Airlines, 342 U.S. 396 (1952), a like result was reached under an Illinois statute. More recently, the Court has acknowledged that the Full Faith and Credit Clause does not compel the forum state, in an action for wrongful death occurring in another jurisdiction, to apply a longer period of limitations set out in the Wrongful Death Statute of the State in which the fatal injury was sustained. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953). Justices Jackson, Black, and Minton, in dissenting, advanced the contrary principle that the clause requires that the law where the tort action arose should follow said action in whatever forum it is pursued.

where the contract involved had been made under laws peculiar to the State where made, and with those laws in view.

Actions Upon Contract.—In *Chicago & Alton R.R. v. Wiggins Ferry Co.*,[111] the Court indicated that it was the law under which the contract was made, not the law of the forum State, which should govern. Its utterance on the point was, however, not merely *obiter*, it was based on an error, namely, the false supposition that the Constitution gives "acts" the same extraterritorial operation as the Act of 1790 does "judicial records and proceedings." Notwithstanding which, this *dictum* is today the basis of "the settled rule" that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff's rights of action originated sets thereto, except that courts of sister States cannot be thus prevented from taking jurisdiction in such cases.[112]

However, the modern doctrine permits a forum State with sufficient contacts with the parties or the matter in dispute to follow its own law. In *Allstate Ins. Co. v. Hague*,[113] the decedent was a Wisconsin resident who had died in an automobile accident within Wisconsin near the Minnesota border in the course of his daily employment commute to Wisconsin. He had three automobile insurance policies on three automobiles, each limited to $15,000. Following his death, his widow and personal representative moved to Minnesota, and she sued in that State. She sought to apply Minnesota law, under which she could "stack" or aggregate all three policies, permissible under Minnesota law but not allowed under Wisconsin law, where the insurance contracts had been made. The Court, in a divided opinion, permitted resort to Minnesota law, because of the number of contacts the State had with the matter. On the other hand, an earlier decision is in considerable conflict with *Hague*. There, a life insurance policy was executed in New York, on a New York insured, with a New York beneficiary. The insured died in New York, and his beneficiary moved to Georgia and sued to recover on the policy. The insurance company defended on the ground that the insured, in the application for the policy, had made materially false statements that rendered it void under New York law. The defense was good under New York law, impermissible under Georgia law, and Georgia's decision to apply its own law was overturned, the Court stressing the surprise to the parties of the

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[111] 119 U.S. 615 (1887).

[112] Northern Pacific R.R. v. Babcock, 154 U.S. 190 (1894); Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55, 67 (1909).

[113] 449 U.S. 302 (1981). *See also* Clay v. Sun Ins. Office, 377 U.S. 179 (1964).

resort to the law of another State and the absence of any occurrence in Georgia to which its law could apply.[114]

Stockholder Corporation Relationship.—The protections of the Full Faith and Credit Clause extend beyond transitory actions. Some legal relationships are so complex, the Court holds, that the law under which they were formed ought always to govern them as long as they persist.[115] One such relationship is that of a stockholder and his corporation. Hence, if a question arises as to the liability of the stockholders of a corporation, the courts of the forum State are required by the Full Faith and Credit Clause to determine the question in accordance with the constitution, laws and judicial decisions of the corporation's home States.[116] Illustrative applications of the latter rule are to be found in the following cases. A New Jersey statute forbidding an action at law to enforce a stockholder's liability arising under the laws of another State and providing that such liability may be enforced only in equity, and that in such a case the corporation, its legal representatives, all its creditors, and stockholders, should be necessary parties, was held not to preclude an action at law in New Jersey by the New York superintendent of banks against 557 New Jersey stockholders in an insolvent New York bank to recover assessments made under the laws of New York.[117] Also, in a suit to enforce double liability, brought in Rhode Island against a stockholder in a Kansas trust company, the courts of Rhode Island were held to be obligated to extend recognition to the statutes and court decisions of Kansas whereunder it is established that a Kansas judgment recovered by a creditor against the trust company is not only conclusive as to the liability of the corporation but also an adjudication binding each stockholder therein. The only defenses available to the stockholder are those which he could make in a suit in Kansas.[118]

Fraternal Benefit Society: Member Relationship.—The same principle applies to the relationship which is formed when one takes out a policy in a "fraternal benefit society." Thus in *Royal Arcanum v. Green*,[119] in which a fraternal insurance association chartered under the laws of Massachusetts was being sued in the courts of New York by a citizen of the latter State on a contract

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[114] John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

[115] Modern Woodmen v. Mixer, 267 U.S. 544 (1925).

[116] Converse v. Hamilton, 224 U.S. 243 (1912); Selig v. Hamilton, 234 U.S. 652 (1914); Marin v. Augedahl, 247 U.S. 142 (1918).

[117] Broderick v. Rosner, 294 U.S. 629 (1935). *See also* Thormann v. Frame, 176 U.S. 350, 356 (1900); Reynolds v. Stockton, 140 U.S. 254, 264 (1891).

[118] Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900).

[119] 237 U.S.. 531 (1915), followed in Modern Woodmen v. Mixer, 267 U.S. 544 (1925).

of insurance made in that State, the Court held that the defendant company was entitled under the Full Faith and Credit Clause to have the case determined in accordance with the laws of Massachusetts and its own constitution and by-laws as these had been construed by the Massachusetts courts.

Nor has the Court manifested any disposition to depart from this rule. In *Sovereign Camp v. Bolin*,[120] it declared that a State in which a certificate of life membership of a foreign fraternal benefit association is issued, which construes and enforces the certificate according to its own law rather than according to the law of the State in which the association is domiciled, denies full faith and credit to the association's charter embodied in the status of the domiciliary State as interpreted by the latter's court. "The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. [Hence] another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of domicile." Consistent therewith, the Court also held, in *Order of Travelers v. Wolfe*,[121] that South Dakota, in a suit brought therein by an Ohio citizen against an Ohio benefit society, must give effect to a provision of the constitution of the society prohibiting the bringing of an action on a claim more than six months after disallowance by the society, notwithstanding that South Dakota's period of limitation was six years and that its own statutes voided contract stipulations limiting the time within which rights may be enforced. Objecting to these results, Justice Black dissented on the ground that fraternal insurance companies are not entitled, either by the language of the Constitution, or by the nature of their enterprise, to such unique constitutional protection.

Insurance Company, Building and Loan Association: Contractual Relationships.—Whether or not distinguishable by nature of their enterprise, stock and mutual insurance companies and mutual building and loan associations, unlike fraternal benefit societies, have not been accorded the same unique constitutional protection; with few exceptions,[122] they have had controversies arising out of their business relationships settled by application of

[120] 305 U.S. 66, 75, 79 (1938).

[121] 331 U.S. 586, 588-589, 637 (1947).

[122] New York Life Ins. Co. v. Head, 234 U.S. 149 (1914); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924).

the law of the forum State. In *National Mutual B. & L. Ass'n v. Brahan*,[123] the principle applicable to these three forms of business organizations was stated as follows: where a corporation has become localized in a State and has accepted the laws of the State as a condition of doing business there, it cannot abrogate those laws by attempting to make contract stipulations, and there is no violation of the Full Faith and Credit Clause in instructing a jury to find according to local law notwithstanding a clause in a contract that it should be construed according to the laws of another State.

Thus, when a Mississippi borrower, having repaid a mortgage loan to a New York building and loan association, sued in a Mississippi court to recover, as usurious, certain charges collected by the association, the usury law of Mississippi rather than that of New York was held to control. In this case, the loan contract, which was negotiated in Mississippi subject to approval by the New York office, did not expressly state that it was governed by New York law.[124] Similarly, when the New York Life Insurance Company, which had expressly stated in its application and policy forms that they would be controlled by New York law, was sued in Missouri on a policy sold to a resident thereof, the court of that State was sustained in its application of Missouri, rather than New York law.[125] Also, in an action in a federal court in Texas to collect the amount of a life insurance policy which had been made in New York and later changed by instruments assigning beneficial interest, it was held that questions (1) whether the contract remained one governed by the law of New York with respect to rights of assignees, rather than by the law of Texas, (2) whether the public policy of Texas permits recovery by one named beneficiary who has no beneficial interest in the life of the insured, and (3) whether lack of insurable interest becomes material when the insurer acknowledges liability and pays the money into court, were questions of Texas law, to be decided according to Texas decisions.[126] Similarly, a State, by reason of its potential obligation to care for dependents of persons injured or killed within its limits, is conceded to have a substantial interest in insurance policies, wherever issued, which may afford compensation for such losses; accordingly, it is competent, by its own direct action statute, to grant the injured party a direct cause of action against the insurer of the tortfeasor, and to refuse to enforce the law of the State, in which

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[123] 193 U.S. 635 (1904).

[124] Id.

[125] New York Life Ins. Co. v. Cravens, 178 U.S. 389 (1900). *See also* American Fire Ins. Co v. King Lumber Co., 250 U.S. 2 (1919).

[126] Griffin v. McCoach, 313 U.S. 498 (1941).

the policy is issued or delivered, which recognizes as binding a policy stipulation which forbids direct actions until after the determination of the liability of the insured tortfeasor.[127]

Consistent with the latter holding are the following two involving mutual insurance companies. In *Pink v. A.A.A. Highway Express*,[128] the New York insurance commissioner, as a statutory liquidator of an insolvent auto mutual company organized in New York, sued resident Georgia policyholders in a Georgia court to recover assessments alleged to be due by virtue of their membership in it. The Supreme Court held that, although by the law of the State of incorporation, policyholders of a mutual insurance company become members thereof and as such liable to pay assessments adjudged to be required in liquidation proceedings in that State, the courts of another State are not required to enforce such liability against local resident policyholders who did not appear and were not personally served in the foreign liquidation proceedings but are free to decide according to local law the questions whether, by entering into the policies, residents became members of the company. Again, in *State Farm Ins. Co. v. Duel*,[129] the Court ruled that an insurance company chartered in State A, which does not treat membership fees as part of premiums, cannot plead denial of full faith and credit when State B, as a condition of entry, requires the company to maintain a reserve computed by including membership fees as well as premiums received in all States. Were the company's contention accepted, "no State," the Court observed, "could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation." It is not apparent, the Court added, that State A has an interest superior to that of State B in the financial soundness and stability of insurance companies doing business in State B.

Workers' Compensation Statutes.—Finally, the relationship of employer and employee, insofar as the obligations of the one and the rights of the other under workmen's compensation acts are con-

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[127] Watson v. Employers Liability Corp., 348 U.S. 66 (1954). In Clay v. Sun Ins. Office, 363 U.S. 207 (1960), three dissenters, Justices Black, and Douglas, and Chief Justice Warren, would have resolved the constitutional issue which the Court avoided, and would have sustained application of the forum State's statute of limitations fixing a period in excess of that set forth in the policy.

[128] 314 U.S. 201, 206-208 (1941). However, a decree of a Montana Supreme Court, insofar as it permitted judgment creditors of a dissolved Iowa surety company to levy execution against local assets to satisfy judgment, as against title to such assets of the Iowa insurance commissioner as statutory liquidator and successor to the dissolved company, was held to deny full faith and credit to the statutes of Iowa. Clark v. Williard, 292 U.S. 112 (1934).

[129] 324 U.S. 154, 159-160 (1945).

cerned, has been the subject of differing and confusing treatment. In an early case, the injury occurred in New Hampshire, resulting in death to a worker who had entered the defendant company's employ in Vermont, the home State of both parties. The Court required the New Hampshire courts to respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job related injuries where the employment relation was formed in Vermont, prescribing a constitutional rule giving priority to the place of the establishment of the employment relationship over the place of injury.[130] The same result was achieved in a subsequent case, but the Court promulgated a new rule, applied thereafter, which emphasized a balancing of the governmental interests of each jurisdiction, rather than the mere application of the statutory rule of one or another State under full faith and credit.[131] Thus, the Court held that the clause did not preclude California from disregarding a Massachusett's workmen's compensation statute, making its law exclusive of any common law action or any law of any other jurisdiction, and applying its own act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.[132] It is therefore settled that an injured worker may seek a compensation award either in the State in which the injury occurred or in the State in which the employee resided, his employer was principally located, and the employment relation was formed, even if one statute or the other purported to confer an exclusive remedy on the worker.[133]

Less settled is the question whether a second State, with interests in the matter, may supplement a workers' compensation award provided in the first State. At first, the Court ruled that a Louisiana employee of a Louisiana employer, who was injured on the job in Texas and who received an award under the Texas act, which did not grant further recovery to an employee who received compensation under the laws of another State, could not obtain additional compensation under the Louisiana statute.[134] Shortly,

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[130] Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932).

[131] Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935). The State where the employment contract was made was permitted to apply its workmen's compensation law despite the provision in the law of the State of injury making its law the exclusive remedy for injuries occurring there. *See* id. at 547 (stating the balancing test).

[132] Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

[133] In addition to Alaska Packers and Pacific Ins., *see* Carroll v. Lanza, 349 U.S. 408 (1955); Cardillo v. Liberty Mutual Co., 330 U.S. 469 (1947); Crider v. Zurich Ins. Co., 380 U.S. 39 (1965); Nevada v. Hall, 440 U.S. 410, 421-424 (1979).

[134] Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

however, the Court departed from this holding, permitting Wisconsin, the State of the injury, to supplement an award pursuant to the laws of Illinois, where the worker resided and where the employment contract had been entered into.[135] Although the second case could have been factually distinguished from the first,[136] the Court instead chose to depart from the principle of the first, saying that only if the laws of the first State making an award contained "unmistakable language" to the effect that those laws were exclusive of any remedy under the laws of any other State would supplementary awards be precluded.[137] While the overwhelming number of state court decisions since follow *McCartin*, and *Magnolia* has been little noticed, all the Justices have recently expressed dissatisfaction with the former case as a rule of the Full Faith and Credit Clause, although a majority of the Court followed it and permitted a supplementary award.[138]

Full Faith and Credit and Statutes of Limitation.—The Full Faith and Credit Clause is not violated by a state statute providing that all suits upon foreign judgments shall be brought within five years after such judgment shall have been obtained, where the statute has been construed by the state courts as barring suits on foreign judgments, only if the plaintiff could not revive his judgment in the state where it was originally obtained.[139]

FULL FAITH AND CREDIT: MISCELLANY

Full Faith and Credit in Federal Courts

The rule of 28 U.S.C. §§ 1738-1739 pertains not merely to recognition by state courts of the records and judicial proceedings of courts of sister States but to recognition by "every court within the United States," including recognition of the records and proceedings of the courts of any territory or any country subject to the jurisdiction of the United States. The federal courts are bound to

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[135] Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).

[136] Employer and employee had entered into a contract of settlement under the Illinois act, the contract expressly providing that it did not affect any rights the employee had under Wisconsin law. Id. at 624.

[137] Id. at 627-628, 630.

[138] Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980). For the disapproval of *McCartin*, *see* id. at 269-272 (plurality opinion of four), 289 (concurring opinion of three), 291 (dissenting opinion of two). But the four Justice plurality would have instead overruled *Magnolia*, id. at 277-286, and adopted the rule of interest balancing used in deciding which State may apply its laws in the first place. The dissenting two Justices would have overruled *McCartin* and followed *Magnolia*. Id. at 290. The other Justices considered Magnolia the sounder rule but decided to follow *McCartin* because it could be limited to workmen's compensation cases, thus requiring no evaluation of changes throughout the reach of the Full Faith and Credit Clause. Id. at 286.

[139] Watkins v. Conway, 385 U.S. 188, 190-191 (1965).

give to the judgments of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.[140] Where suits to enforce the laws of one State are entertained in courts of another on principles of comity, federal district courts sitting in that State may entertain them and should, if they do not infringe federal law or policy.[141] However, the refusal of a territorial court in Hawaii, having jurisdiction of the action which was on a policy issued by a New York insurance company, to admit evidence that an administrator had been appointed and a suit brought by him on a bond in the federal court in New York wherein no judgment had been entered, did not violate this clause.[142]

The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgment of its courts is coextensive with its territorial jurisdiction.[143]

Evaluation Of Results Under Provision

The Court, after according an extrastate operation to statutes and judicial decisions in favor of defendants in transitory actions, proceeded next to confer the same protection upon certain classes of defendants in local actions in which the plaintiff's claim was the outgrowth of a relationship formed extraterritorially. But can the Court stop at this point? If it is true, as Chief Justice Marshall once remarked, that "the Constitution was not made for the benefit of plaintiffs alone," so also it is true that it was not made for the

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[140] Cooper v. Newell, 173 U.S. 555, 567 (1899), *See also* Pennington v. Gibson, 57 U.S. (16 How.) 65, 81 (1854); Cheever v. Wilson, 76 U.S. (9 Wall.) 108, 123 (1870); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1888); Swift v. McPherson, 232 U.S. 51 (1914); Baldwin v. Traveling Men's Ass'n, 283 U.S. 522 (1931); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Sanders v. Fertilizer Works, 292 U.S. 190 (1934); Durfee v. Duke, 375 U.S. 106 (1963); Allen v. McCurry, 449 U.S. 90 (1980); Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982).

[141] Milwaukee County v. White Co., 296 U.S. 268 (1935).

[142] Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902). *See also* Gibson v. Lyon, 115 U.S. 439 (1885).

[143] Embry v. Palmer, 107 U.S. 3, 9 (1883). *See also* Northern Assurance Co. v. Grand View Ass'n, 203 U.S. 106 (1906); Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909); Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55 (1909); West Side R.R. v. Pittsburgh Const. Co., 219 U.S. 92 (1911); Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924).

benefit of defendants alone. The day may come when the Court will approach the question of the relation of the Full Faith and Credit Clause to the extrastate operation of laws from the same angle as it today views the broader question of the scope of state legislative power. When and if this day arrives, state statutes and judicial decisions will be given such extraterritorial operation as seems reasonable to the Court to give them. In short, the rule of the dominance of legal policy of the forum State will be superseded by that of judicial review.[144]

The question arises whether the application to date, not by the Court alone but by Congress and the Court, of article IV, § 1, can be said to have met the expectations of its Framers. In the light of some things said at the time of the framing of the clause this may be doubted. The protest was raised against the clause that, in vesting Congress with power to declare the effect state laws should have outside the enacting State, it enabled the new government to usurp the powers of the States, but the objection went unheeded. The main concern of the Convention, undoubtedly, was to render the judgments of the state courts in civil cases effective throughout the Union. Yet even this object has been by no means completely realized, owing to the doctrine of the Court, that before a judgment of a state court can be enforced in a sister State, a new suit must be brought on it in the courts of the latter, and the further doctrine that with respect to such a suit, the judgment sued on is only evidence; the logical deduction from this proposition is that the sister State is under no constitutional compulsion to give it a forum. These doctrines were first clearly stated in the *McElmoyle* case and flowed directly from the new states' rights premises of the Court, but they are no longer in harmony with the prevailing spirit of constitutional construction nor with the needs of the times. Also, the clause seems always to have been interpreted on the basis of the assumption that the term "judicial proceedings" refers only to final judgments and does not include intermediate processes and writs, but the assumption would seem to be groundless, and if it is, then Congress has the power under the clause to provide for the service and execution throughout the United States of the judicial processes of the several States.

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[144] Reviewing some of the cases treated in this section, a writer in 1926 said: "It appears, then, that the Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts...although the precise circumstances under which it will regard itself as having jurisdiction for this purpose are far from clear." Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 562 (1926). It can hardly be said that the law has been subsequently clarified on this point.

Sec. 1—Full Faith and Credit

SCOPE OF POWERS OF CONGRESS UNDER PROVISION

Under the present system, suit ordinarily has to be brought where the defendant, the alleged wrongdoer, resides, which means generally where no part of the transaction giving rise to the action took place. What could be more irrational? "Granted that no state can of its own volition make its process run beyond its borders . . . is it unreasonable that the United States should by federal action be made a unit in the manner suggested?" [145]

Indeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the Full Faith and Credit Clause. Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

JUDGMENTS OF FOREIGN STATES

Doubtless Congress, by virtue of its powers in the field of foreign relations, might also lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present the duty to recognize judgments even in national courts rests only on comity and is qualified in the judgment of the Supreme Court, by a strict rule of parity. [146]

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[145] Cook, *The Power of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 430 (1919).

[146] No right, privilege, or immunity is conferred by the Constitution in respect to judgments of foreign states and nations. Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912). *See also* Hilton v. Guyot, 159 U.S. 113, 234 (1895), where a French judgment offered in defense was held not a bar to the suit. Four Justices dissented on the ground that "the application of the doctrine of *res judicata* does not rest in discretion; and it is for the Government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." At the same sitting of the Court, an action in a United States circuit court on a Canadian judgment was sustained on the same ground of reciprocity, Ritchie v. McMullen, 159 U.S. 235 (1895). *See also* Ingenohl v. Olsen & Co., 273 U.S. 541 (1927), where a decision of the Supreme Court of the Philippine Islands was reversed for refusal to enforce a judgment of the Supreme Court of the British colony of Hong Kong, which was rendered "after a fair trial by a court having jurisdiction of the parties." Another instance of international cooperation in the judicial field is furnished by letters rogatory. *See* 28 U.S.C. § 1781. Several States have similar provisions, 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 108-109 (1906).

SECTION 2. Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

Origin and Purpose

"The primary purpose of this clause, like the clauses between which it is located. . .was to help fuse into one Nation a collection of independent sovereign States."[147] Precedent for this clause was a much wordier and a somewhat unclear[148] clause of the articles of Confederation. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively,. . ."[149] In the Convention, the present clause was presented, reported by the Committee on Detail, and adopted all in the language ultimately approved.[150] Little commentary was addressed to it,[151] and we may assume with Justice Miller that "[t]here can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the articles of Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the

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[147] Toomer v. Witsell, 334 U.S. 385, 395 (1948).

[148] THE FEDERALIST, No. 42 (J. Cooke ed. 1961), 285-286 (Madison).

[149] 1 F. Thorpe ed., *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Cong., 2d Sess. (1909), 10.

[150] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 173, 187, 443 (rev. ed. 1937).

[151] "It may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which its is founded." THE FEDERALIST, No. 80 (J. Cooke ed. 1961), 537-538 (Hamilton).

class of civil rights meant by the phrase."[152] At least four theories have been proffered regarding the purpose of this clause. First, the clause is a guaranty to the citizens of the different States of equal treatment by Congress; in other words, it is a species of equal protection clause binding on the National Government. Though it received some recognition in the Dred Scott case,[153] particularly in the opinion of Justice Catron,[154] this theory is today obsolete.[155] Second, the clause is a guaranty to the citizens of each State of the natural and fundamental rights inherent in the citizenship of persons in a free society, the privileges and immunities of free citizens, which no State could deny to citizens of other States, without regard to the manner in which it treated its own citizens. This theory found some expression in a few state cases[156] and best accords with the natural law-natural rights language of Justice Washington in *Corfield v. Coryell*.[157]

If it had been accepted by the Court, this theory might well have endowed the Supreme Court with a reviewing power over restrictive state legislation as broad as that which it later came to exercise under the due process and equal protection clauses of the Fourteenth Amendment, but it was firmly rejected by the Court.[158] Third, the clause guarantees to the citizen of any State the rights

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[152] Slaughter House Cases, 83 U.S. (16 Wall.) 36, 75 (1873).

[153] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[154] Id. at 518, 527-529.

[155] Today, the due process clause of the Fifth Amendment imposes equal protection standards on the Federal Government. Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Shapiro v. Thompson, 394 U.S. 618, 641-642 (1969).

[156] Campbell v. Morris, 3 H. & McH. 288 (Md. 1797); Murray v. McCarty, 2 Munf. 373 (Va. 1811); Livingston v. Van Ingen, 9 Johns. Case. 507 (N.Y. 1812); Douglas v. Stephens, 1 Del. Ch. 465 (1821); Smith v. Moody, 26 Ind. 299 (1866).

[157] 6 Fed. Cas. 546, 550 (No. 3230) (C.C.E.D. Pa. 1823). (Justice Washington on circuit), quoted infra, "All Privileges and Immunities of Citizens in the Several States". "At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington." Hague v. CIO, 307 U.S. 496, 511 (1939) (Justice Roberts for the Court). This view of the clause was asserted by Justices Field and Bradley, Slaughter House Cases, 83 U.S. (16 Wall.) 97, 117-118 (1873) (dissenting opinions); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 760 (1884) (Justice Field concurring), *but see* infra, and was possibly understood so by Chief Justice Taney. Scott v. Sandford, 60 U.S. (19 How.) 393, 423 (1857). *And see* id. at 580 (Justice Curtis dissenting). The natural rights concept of privileges and immunities was strongly held by abolitionists and their congressional allies who drafted the similar clause into 1 of the Fourteenth Amendment. Graham, *Our 'Declaratory' Fourteenth Amendment*, reprinted in H. GRAHAM, EVERYMAN'S CONSTITUTION—HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE CONSPIRACY THEORY, AND AMERICAN CONSTITUTIONALISM 295 (1968).

[158] McKane v. Durston, 153 U.S. 684, 687 (1894); *and see* cases cited infra.

which he enjoys as such even when he is sojourning in another State; that is, it enables him to carry with him his rights of State citizenship throughout the Union, unembarrassed by state lines. This theory, too, the Court rejected.[159] Fourth, the clause merely forbids any State to discriminate against citizens of other States in favor of its own. It is this narrow interpretation that has become the settled one. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws."[160]

The recent cases emphasize that interpretation of the clause is tied to maintenance of the Union. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[161] While the clause "was intended to create a national economic union," it also protects noneconomic interests relating to the Union.[162]

Hostile discrimination against all nonresidents infringes the clause,[163] but controversies between a State and its own citizens

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[159] City of Detroit v. Osborne, 135 U.S. 492 (1890).

[160] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (Justice Field for the Court; *but see* supra); *and see* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77 (1873); Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907); Whitfield v. Ohio, 297 U.S. 431 (1936).

[161] Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978). *See also* Austin v. New Hampshire, 420 U.S. 656, 660-665 (1975) (clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." Id. at 662); Hicklin v. Orbeck, 437 U.S. 518, 523-524 (1978).

[162] Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281-282 (1985). *See also* Doe v. Bolton, 410 U.S. 179, 200 (1973) (discrimination against out-of-state residents seeking medical care violates clause).

[163] Blake v. McClung, 172 U.S. 239, 246 (1898); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

are not covered by the provision.[164] However, a state discrimination in favor of residents of one of its municipalities implicates the clause, even though the disfavored class consists of in-state as well as out-of-state inhabitants.[165] The clause should not be read so literally, the Court held, as to permit States to exclude out-of-state residents from benefits through the simple expediency of delegating authority to political subdivisions.[166]

How Implemented

This clause is self-executory, that is to say, its enforcement is dependent upon the judicial process. It does not authorize penal legislation by Congress. Federal statutes prohibiting conspiracies to deprive any person of rights or privileges secured by state laws,[167] or punishing infractions by individuals of the right of citizens to reside peacefully in the several States and to have free ingress into and egress from such States,[168] have been held void.

Citizens of Each State

A question much mooted before the Civil War was whether the term could be held to include free Negroes. In the *Dred Scott* case,[169] the Court answered it in the negative. "Citizens of each State," Chief Justice Taney argued, meant citizens of the United States as understood at the time the Constitution was adopted, and Negroes were not then regarded as capable of citizenship. The only category of national citizenship added under the Constitution comprised aliens, naturalized in accordance with acts of Congress.[170] In dissent, Justice Curtis not only denied the Chief Justice's assertion that there were no Negro citizens of States in 1789 but further argued that while Congress alone could determine what classes of aliens should be naturalized, the several States retained the right to extend citizenship to classes of persons born within their borders

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[164] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873); Cove v. Cunningham, 133 U.S. 107 (1890). *But see* Zobel v. Williams, 457 U.S. 55, 71 (1982) (Justice O'Connor concurring).

[165] United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

[166] Id. at 217. The holding illustrates what the Court has referred to as the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 280 n. 8 (1985) (quoting Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)). *See, e.g.*, Dean Milk Co. v. City of Madison, 424 U.S. 366 (1976) (city protectionist ordinance that disadvantages both out-of-state producers and some in-state producers violates Commerce Clause).

[167] United States v. Harris, 106 U.S. 629, 643 (1883). *See also* Baldwin v. Franks, 120 U.S. 678 (1887).

[168] United States v. Wheeler, 254 U.S. 281 (1920).

[169] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[170] Id. at 403-411.

who had not previously enjoyed citizenship and that one upon whom state citizenship was thus conferred became a citizen of the State in the full sense of the Constitution.[171] So far as persons born in the United States, and subject to the jurisdiction thereof are concerned, the question was put at rest by the Fourteenth Amendment.

Corporations.—At a comparatively early date, the claim was made that a corporation chartered by a State and consisting of its citizens was entitled to the benefits of the comity clause in the transaction of business in other States. It was argued that the Court was bound to look beyond the act of incorporation and see who were the incorporators. If it found these to consist solely of citizens of the incorporating State, it was bound to permit them through the agency of the corporation to exercise in other States such privileges and immunities as the citizens thereof enjoyed. In *Bank of Augusta v. Earle*,[172] this view was rejected. The Court held that the comity clause was never intended "to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself."[173] A similar result was reached in *Paul v. Virginia*,[174] but by a different course of reasoning. The Court there held that a corporation, in this instance, an insurance company, was "the mere creation of local law" and could "have no legal existence beyond the limits of the sovereignty"[175] which created it; even recognition of its existence by other States rested exclusively in their discretion. More recent cases have held that this discretion is qualified by other provisions of the Constitution notably the Commerce Clause and the Fourteenth Amendment.[176] By reason of its similarity to the corporate form of organization, a Massachusetts trust has been denied the protection of this clause.[177]

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[171] Id. at 572-590.

[172] 38 U.S. (13 Pet.) 519 (1839).

[173] Id. at 586.

[174] 75 U.S. (8 Wall.) 168 (1869).

[175] Id. at 181.

[176] Crutcher v. Kentucky, 141 U.S. 47 (1891).

[177] Hemphill v. Orloff, 277 U.S. 537 (1928).

All Privileges and Immunities of Citizens in the Several States

The classical judicial exposition of the meaning of this phrase is that of Justice Washington in *Corfield v. Coryell*,[178] which was decided by him on circuit in 1823. The question at issue was the validity of a New Jersey statute which prohibited "any person who is not, at the time, an actual inhabitant and resident in this State" from raking or gathering "clams, oysters or shells" in any of the waters of the State, on board any vessel "not wholly owned by some person, inhabitant of and actually residing in this State.... The inquiry is," wrote Justice Washington, "what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, ..."[179] He specified the following rights as answering this description: "Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government must justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefits of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; ...."[180]

After thus defining broadly the private and personal rights which were protected, Justice Washington went on to distinguish them from the right to a share in the public patrimony of the State. "[W]e cannot accede" the opinion proceeds, "to the proposition ... that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own

[178] 6 Fed. Cas. 546 (No. 3,230) (C.C.E.D. Pa., 1823).
[179] Id. at 551-552.
[180] Id. at 552.

citizens." [181] The right of a State to the fisheries within its borders he then held to be in the nature of a property right, held by the State "for the use of the citizens thereof;" the State was under no obligation to grant "co-tenancy in the common property of the State, to the citizens of all the other States." [182] The precise holding of this case was confirmed in *McCready v. Virginia*; [183] the logic of *Geer v. Connecticut* [184] extended the same rule to wild game, and *Hudson Water Co. v. McCarter* [185] applied it to the running water of a State. In *Toomer v. Witsell*, [186] however, the Court refused to apply this rule to free-swimming fish caught in the three-mile belt off the coast of South Carolina. It held instead that "commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause" and that a severely discriminatory license fee exacted from nonresidents was unconstitutional. [187]

The virtual demise, however, of the state ownership theory of animals and natural resources [188] compelled the Court to review and revise its mode of analysis of state restrictions that distinguished between residents and nonresidents [189] in respect to hunting and fishing and working with natural resources. A two-pronged test emerged. First, the Court held, it must be determined whether an activity in which a nonresident wishes to engage is within the protection of the clause. Such an activity must be "fundamental," must, that is, be essential or basic, "interference with which would frustrate the purposes of the formation of the Union, . . ." Justice Washington's opinion on Circuit in *Coryell* afforded the Court the standard; while recognizing that the opinion relied on notions of natural rights, the Court thought he used the term "fundamental" in the modern sense as well. Such activities as the pursuit of com-

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[181] Id.

[182] Id.

[183] 94 U.S. 391 (1877).

[184] 161 U.S. 519 (1896).

[185] 209 U.S. 349 (1908).

[186] 334 U.S. 385 (1948).

[187] Id. at 403. In Mullaney v. Anderson, 342 U.S. 415 (1952), an Alaska statute providing for the licensing of commercial fishermen in territorial waters and levying a license fee of $50.00 on nonresident and only $5.00 on resident fishermen was held void under Art. IV, § 2 on the authority of *Toomer v. Witsell*.

[188] The cases arose in the commerce clause context. *See* Douglas v. Seacoast Products, 431 U.S. 265, 284 (1977) (dictum). Geer v. Connecticut, 161 U.S. 519 (1896), was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979); Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), was overruled in Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941 (1982).

[189] Although the clause specifically refers to "citizens," the Court treats the terms "citizens" and "residents" as "essentially interchangeable." Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975); Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978).

mon callings within the State, the ownership and disposition of privately held property within the State, and the access to the courts of the State, had been recognized in previous cases as fundamental and protected against unreasonable burdening; but sport and recreational hunting, the issue in the particular case, was not a fundamental activity. It had nothing to do with one's livelihood and implicated no other interest recognized as fundamental.[190] Subsequent cases have recognized that the right to practice law[191] and the right to seek employment on public contracts[192] are to be considered fundamental activity.

Second, finding a fundamental interest protected under the clause, in the particular case the right to pursue an occupation or common calling, the Court employed a two-pronged analysis to determine whether the State's distinction between residents and nonresidents was justified. Thus, the State was compelled to show that nonresidents constituted a peculiar source of the evil at which the statute was aimed and that the discrimination bore a substantial relationship to the particular "evil" they are said to represent, e.g., that it is "closely tailored" to meet the actual problem. An Alaska statute giving residents preference over nonresidents in hiring for work on the oil and gas pipelines within the State failed both elements of the test.[193] No state justification for exclusion of new residents from the practice of law on grounds not applied to long-term residents has been approved by the Court.[194]

Universal practice has also established a political exception to the clause to which the Court has given its approval. "A State may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office."[195]

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[190] Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978). The quotation is id. at 387.

[191] Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

[192] United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

[193] Hicklin v. Orbeck, 437 U.S. 518 (1978). Activity relating to pursuit of an occupation or common calling the Court recognized had long been held to be protected by the clause. The burden of showing constitutional justification was clearly placed on the State, id. at 526-528, rather than giving the statute the ordinary presumption of constitutionality. *See* Mullaney v. Anderson, 342 U.S. 415, 418 (1952).

[194] Barnard v. Thorstenn, 489 U.S. 546 (1989); Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). For the application of this test, *see* Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296-99 (1998).

[195] Blake v. McClung, 172 U.S. 239, 256 (1898). Of course as to suffrage, *see* Dunn v. Blumstein, 405 U.S. 330 (1972), but not as to candidacy, the principle is now qualified under the equal protection clause of the Fourteenth Amendment. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (citing

Discrimination in Private Rights

Not only has judicial construction of the comity clause excluded certain privileges of a public nature from its protection, but the courts also have established the proposition that the purely private and personal rights to which the clause admittedly extends are not in all cases beyond the reach of state legislation which differentiates citizens and noncitizens. Broadly speaking, these rights are held subject to the reasonable exercise by a State of its police power, and the Court has recognized that there are cases in which discrimination against nonresidents may be reasonably resorted to by a State in aid of its own public health, safety and welfare. To that end a State may reserve the right to sell insurance to persons who have resided within the State for a prescribed period of time.[196] It may require a nonresident who does business within the State[197] or who uses the highways of the State[198] to consent, expressly or by implication, to service of process on an agent within the State. Without violating this section, a State may limit the dower rights of a nonresident to lands of which the husband died seized while giving a resident dower in all lands held during the marriage,[199] or may leave the rights of nonresident married persons in respect of property within the State to be governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.[200] But a State may not give a preference to resident creditors in the administration of the property of an insolvent foreign corporation.[201] An act of the Confederate Government, enforced by a State, to sequester a debt owed by one of its residents to a citizen of another State was held to be a flagrant violation of this clause.[202]

Access to Courts

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each State to the citizens of all other States to the same extent that it is allowed to its own citizens.[203] The constitutional require-

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Kanapaux v. Ellisor, 419 U.S. 891 (1974); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), aff'd. 414 U.S. 802 (1973)).

[196] LaTourette v. McMaster, 248 U.S. 465 (1919).

[197] Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[198] Hess v. Pawloski, 274 U.S. 352, 356 (1927).

[199] Ferry v. Spokane P. & S. Ry., 258 U.S. 314 (1922), followed in Ferry v. Corbett, 258 U.S. 609 (1922).

[200] Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1856).

[201] Blake v. McClung, 172 U.S. 239, 248 (1898).

[202] Williams v. Bruffy, 96 U.S. 176, 184 (1878).

[203] Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233 (1934).

ment is satisfied if the nonresident is given access to the courts of the State upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically the same as those accorded to resident citizens.[204] The Supreme Court upheld a state statute of limitations which prevented a nonresident from suing in the State's courts after expiration of the time for suit in the place where the cause of action arose[205] and another such statute which suspended its operation as to resident plaintiffs, but not as to nonresidents, during the period of the defendant's absence from the State.[206] A state law making it discretionary with the courts to entertain an action by a nonresident of the State against a foreign corporation doing business in the State was sustained since it was applicable alike to citizens and noncitizens residing out of the State.[207] A statute permitting a suit in the courts of the State for wrongful death occurring outside the State, only if the decedent was a resident of the State, was sustained, because it operated equally upon representatives of the deceased whether citizens or noncitizens.[208] Being patently nondiscriminatory, a Uniform Reciprocal State Law to secure the attendance of witnesses from within or without a State in criminal proceedings, whereunder an Illinois resident, while temporarily in Florida, was summoned to appear at a hearing for determination as to whether he should be surrendered to a New York officer for testimony in the latter State, is not violative of this clause.[209]

Taxation

In the exercise of its taxing power, a State may not discriminate substantially between residents and nonresidents. In *Ward v. Maryland*,[210] the Court set aside a state law which imposed specific taxes upon nonresidents for the privilege of selling within the State goods which were produced in other States. Also found to be incompatible with the comity clause was a Tennessee license tax, the amount of which was dependent upon whether the person taxed had his chief office within or without the State.[211] In *Travis*

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[204] Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920).

[205] Id. at 563.

[206] Chemung Canal Bank v. Lowery, 93 U.S. 72, 76 (1876).

[207] Douglas v. New York, N.H. & H. R.R., 279 U.S. 377 (1929).

[208] Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907).

[209] New York v. O'Neill, 359 U.S. 1 (1959). Justices Douglas and Black dissented.

[210] 79 U.S. (12 Wall.) 418, 424 (1871). *See also* Downham v. Alexandria Council, 77 U.S. (10 Wall.) 173, 175 (1870).

[211] Chalker v. Birmingham & Nw. Ry., 249 U.S. 522 (1919).

v. Yale & Towne Mfg. Co.,[212] the Court, while sustaining the right of a State to tax income accruing within its borders to nonresidents,[213] held the particular tax void because it denied to nonresidents exemptions which were allowed to residents. The "terms 'resident' and 'citizen' are not synonymous," wrote Justice Pitney, "... but a general taxing scheme ... if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other States; ..."[214] Where there were no discriminations between citizens and noncitizens, a state statute taxing the business of hiring persons within the State for labor outside the State was sustained.[215]

The Court returned to the privileges-and-immunities restrictions upon disparate state taxation of residents and nonresidents in *Lunding v. New York Tax Appeals Tribunal*.[216] In this case, the State denied nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments. While observing that approximate equality between residents and nonresidents was required by the clause, the Court acknowledged that precise equality was neither necessary nor in most instances possible. But it was required of the challenged State that it demonstrate a "substantial reason" for the disparity, and the discrimination must bear a "substantial relationship" to that reason.[217] A State, under this analysis, may not deny nonresidents a general tax exemption provided to residents that would reduce their tax burdens, but it could limit specific expense deductions based on some relationship between the expenses and their in-state property or income. Here, the State flatly denied the exemption. Moreover, the Court rejected various arguments that had been presented, finding that most of those arguments, while they might support targeted denials or partial denials, simply reiterated the State's contention that it need not afford any exemptions at all. This section of the Constitution does not prevent a territorial government, exercising powers delegated by Congress, from imposing a discriminatory license tax on nonresident fishermen operating within its waters.[218]

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[212] 252 U.S. 60 (1920).

[213] Id. at 62-64. *See also* Shaffer v. Carter, 252 U.S. 37 (1920). In Austin v. New Hampshire, 420 U.S. 656 (1975), the Court held void a state commuter income tax, inasmuch as the State imposed no income tax on its own residents and thus the tax fell exclusively on nonresidents' income and was not offset even approximately by other taxes imposed upon residents alone.

[214] 252 U.S. 60, 78-79 (1920).

[215] Williams v. Fears, 179 U.S. 270, 274 (1900).

[216] 522 U.S. 287 (1998).

[217] 522 U.S. at 298.

[218] Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924).

However, what at first glance may appear to be a discrimination may turn out not to be when the entire system of taxation prevailing in the enacting State is considered. On the basis of overall fairness, the Court sustained a Connecticut statute which required nonresident stockholders to pay a state tax measured by the full market value of their stock while resident stockholders were subject to local taxation on the market value of that stock reduced by the value of the real estate owned by the corporation.[219] Occasional or accidental inequality to a nonresident taxpayer is not sufficient to defeat a scheme of taxation whose operation is generally equitable.[220] In an early case the Court brushed aside as frivolous the contention that a State violated this clause by subjecting one of its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.[221]

Clause 2. A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

INTERSTATE RENDITION

Duty to Surrender Fugitives From Justice

Although this provision is not in its nature self-executing, and there is no express grant to Congress of power to carry it into effect, that body passed a law shortly after the Constitution was adopted, imposing upon the Governor of each State the duty to deliver up fugitives from justice found in such State.[222] The Supreme Court has accepted this contemporaneous construction as estab-

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[219] Travellers' Ins. Co. v. Connecticut, 185 U.S. 364, 371 (1902).

[220] Maxwell v. Bugbee, 250 U.S. 525 (1919).

[221] Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879). *Cf.* Colgate v. Harvey, 296 U.S. 404 (1935), in which discriminatory taxation of bank deposits outside the State owned by a citizen of the State was held to infringe a privilege of national citizenship, in contravention of the Fourteenth Amendment. The decision in *Colgate v. Harvey* was overruled in Madden v. Kentucky, 309 U.S. 83, 93 (1940).

[222] 1 Stat. 302 (1793), 18 U.S.C. § 3182. The Act requires rendition of fugitives at the request of a demanding "Territory," as well as of a State, thus extending beyond the terms of the clause. In New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909), the Court held that the legislative extension was permissible under the territorial clause. *See* Puerto Rico v. Branstad, 483 U.S. 219, 229-230 (1987).

lishing the validity of this legislation.[223] The duty to surrender is not absolute and unqualified; if the laws of the State to which the fugitive has fled have been put in force against him, and he is imprisoned there, the demands of those laws may be satisfied before the duty of obedience to the requisition arises.[224] But, in *Kentucky v. Dennison*,[225] the Court held that this statute was merely declaratory of a moral duty; that the Federal Government "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; . . .",[226] and consequently that a federal court could not issue a mandamus to compel the governor of one State to surrender a fugitive to another. Long considered a constitutional derelict, *Dennison* was finally formally overruled in 1987.[227] Now, States and Territories may invoke the power of federal courts to enforce against state officers this and other rights created by federal statute, including equitable relief to compel performance of federally-imposed duties.[228]

Fugitive From Justice Defined.—To be a fugitive from justice within the meaning of this clause, it is not necessary that the party charged should have left the State after an indictment found or for the purpose of avoiding a prosecution anticipated or begun. It is sufficient that the accused, having committed a crime within one State and having left the jurisdiction before being subjected to criminal process, is found within another State.[229] The motive which induced the departure is immaterial.[230] Even if he were brought involuntarily into the State where found by requisition

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[223] Roberts v. Reilly, 116 U.S. 80, 94 (1885). *See also* Innes v. Tobin, 240 U.S. 127 (1916). Said Justice Story: "[T]he natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution;" and again "it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby." Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618-619 (1842).

[224] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

[225] 65 U.S. (24 How.) 66 (1861); *cf.* Prigg v. Pennsylvania 41 U.S. (16 Pet.) 539, 612 (1842).

[226] 65 U.S. (24 How.) 66, 107 (1861). Congress in 1934 plugged the loophole created by this decision by making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution in certain cases. 48 Stat. 782, 18 U.S.C. § 1073.

[227] Puerto Rico v. Branstad, 483 U.S. 219 (1987). "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development." Id. at 230.

[228] Id. at 230.

[229] Roberts v. Reilly, 116 U.S. 80 (1885). *See also* Strassheim v. Daily, 221 U.S. 280 (1911); Appleyard v. Massachusetts, 203 U.S. 222 (1906); Ex parte Reggel, 114 U.S. 642, 650 (1885).

[230] Drew v. Thaw, 235 U.S. 432, 439 (1914).

from another State, he may be surrendered to a third State upon an extradition warrant.[231] A person indicted a second time for the same offense is nonetheless a fugitive from justice by reason of the fact that after dismissal of the first indictment, on which he was originally indicted, he left the State with the knowledge of, or without objection by, state authorities.[232] But a defendant cannot be extradited if he was only constructively present in the demanding State at the time of the commission of the crime charged.[233] For the purpose of determining who is a fugitive from justice, the words "treason, felony or other crime" embrace every act forbidden and made punishable by a law of a State,[234] including misdemeanors.[235]

Procedure for Removal.—Only after a person has been charged with a crime in the regular course of judicial proceedings is the governor of a State entitled to make demand for his return from another State.[236] The person demanded has no constitutional right to be heard before the governor of the State in which he is found on the question whether he has been substantially charged with crime and is a fugitive from justice.[237] The constitutionally required surrender is not to be interfered with by *habeas corpus* upon speculations as to what ought to be the result of a trial.[238] Nor is it proper thereby to inquire into the motives controlling the actions of the governors of the demanding and surrendering States.[239] Matters of defense, such as the running of the statute of limitations,[240] or the contention that continued confinement in the prison of the demanding State would amount to cruel and unjust punishment,[241] cannot be heard on *habeas corpus* but should be tested in the courts of the demanding State, where all parties may be heard, where all pertinent testimony will be readily available, and where suitable relief, if any, may be fashioned. A defendant will, however, be discharged on *habeas corpus* if he shows by clear and satisfactory evidence that he was outside the demanding State at the time

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[231] Innes v. Tobin, 240 U.S. 127 (1916).

[232] Bassing v. Cady, 208 U.S. 386 (1908).

[233] Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903).

[234] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 103 (1861).

[235] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 375 (1873).

[236] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 104 (1861); Pierce v. Creecy, 210 U.S. 387 (1908). *See also* Matter of Strauss, 197 U.S. 324, 325 (1905); Marbles v. Creecy, 215 U.S. 63 (1909); Strassheim v. Daily, 221 U.S. 280 (1911).

[237] Munsey v. Clough, 196 U.S. 364 (1905); Pettibone v. Nichols, 203 U.S. 192 (1906).

[238] Drew v. Thaw, 235 U.S. 432 (1914).

[239] Pettibone v. Nichols, 203 U.S. 192 (1906).

[240] Biddinger v. Commissioner of Police, 245 U.S. 128 (1917). *See also* Rodman v. Pothier, 264 U.S. 399 (1924).

[241] Sweeney v. Woodall, 344 U.S. 86 (1952).

of the crime.[242] If, however, the evidence is conflicting, *habeas corpus* is not a proper proceeding to try the question of alibi.[243] The *habeas* court's role is, therefore, very limited.[244]

Trial of Fugitives After Removal.—There is nothing in the Constitution or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though he was brought from another State by unlawful violence,[245] or by abuse of legal process,[246] and a fugitive lawfully extradited from another State may be tried for an offense other than that for which he was surrendered.[247] The rule is different, however, with respect to fugitives surrendered by a foreign government, pursuant to treaty. In that case the offender may be tried only "for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."[248]

Clause 3. No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

FUGITIVES FROM LABOR

This clause contemplated the existence of a positive unqualified right on the part of the owner of a slave which no state law could in any way regulate, control, or restrain. Consequently the owner of a slave had the same right to seize and repossess him in another State, as the local laws of his own State conferred upon him, and a state law which penalized such seizure was held unconstitutional.[249] Congress had the power and the duty, which it exer-

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[242] Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903). *See also* South Carolina v. Bailey, 289 U.S. 412 (1933).

[243] Munsey v. Clough, 196 U.S. 364, 375 (1905).

[244] Michigan v. Doran, 439 U.S. 282, 289 (1978). In California v. Superior Court, 482 U.S. 400 (1987), the Court reiterated that extradition is a "summary procedure."

[245] Ker v. Illinois, 119 U.S. 436, 444 (1886); Mahon v. Justice, 127 U.S. 700, 707, 712, 714 (1888).

[246] Cook v. Hart, 146 U.S. 183, 193 (1892); Pettibone v. Nichols, 203 U.S. 192, 215 (1906).

[247] Lascelles v. Georgia, 148 U.S. 537, 543 (1893).

[248] United States v. Rauscher, 119 U.S. 407, 430 (1886).

[249] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842).

cised by the Act of February 12, 1793,[250] to carry into effect the rights given by this section,[251] and the States had no concurrent power to legislate on the subject.[252] However, a state statute providing a penalty for harboring a fugitive slave was held not to conflict with this clause since it did not affect the right or remedy either of the master or the slave; by it the State simply prescribed a rule of conduct for its own citizens in the exercise of its police power.[253]

SECTION 3. Clause 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned was well as of the Congress.

DOCTRINE OF THE EQUALITY OF STATES

"Equality of constitutional right and power is the condition of all the States of the Union, old and new."[254] This doctrine, now a truism of constitutional law, did not find favor in the Constitutional Convention. That body struck out from this section, as reported by the Committee on Detail, two sections to the effect that "new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States concerning the public debt which shall be subsisting."[255] Opposing this action, Madison insisted that "the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States."[256] Nonetheless, after further expressions of opinion *pro* and *con*, the Convention voted nine States to two to delete the requirement of equality.[257]

Prior to this time, however, Georgia and Virginia had ceded to the United States large territories held by them, upon condition that new States should be formed therefrom and admitted to the

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[250] 1 Stat. 302 (1793).

[251] Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

[252] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842).

[253] Moore v. Illinois, 55 U.S. (14 How.) 13, 17 (1853).

[254] Escanaba Co. v. City of Chicago, 107 U.S. 678, 689 (1883).

[255] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 454 (rev. ed. 1937).

[256] Id.

[257] Id. The present provision was then adopted as a substitute. Id. at 455.

Union on an equal footing with the original States.[258] Since the admission of Tennessee in 1796, Congress has included in each State's act of admission a clause providing that the State enters the Union "on an equal footing with the original States in all respects whatever."[259] With the admission of Louisiana in 1812, the principle of equality was extended to States created out of territory purchased from a foreign power.[260] By the Joint Resolution of December 29, 1845, Texas, then an independent Nation, "was admitted into the Union on an equal footing with the original States in all respects whatever."[261]

However, if the doctrine rested merely on construction of the declarations in the admission acts, then the conditions and limitations imposed by Congress and agreed to by the States in order to be admitted would nonetheless govern, since they must be construed along with the declarations. Again and again, however, in adjudicating the rights and duties of States admitted after 1789, the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union.[262] That the doctrine is of constitutional stature was made evident at least by the time of the decision in *Pollard's Lessee*, if not before.[263] *Pollard's Lessee* involved conflicting claims by the United States and Alabama of ownership of certain partially inundated lands on the shore of the Gulf of Mexico in Alabama. The enabling act for Alabama had contained both a declaration of equal footing and a reservation to the United States of these lands.[264] Rather than an issue of mere land ownership, the Court saw the question as one

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[258] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845). The Continental Congress in responding in the Northwest Ordinance, on July 13, 1787, provided that when each of the designated States in the territorial area achieved a population of 60,000 free inhabitants it was to be admitted "on an equal footing with the original States, in all respects whatever[.]" *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. V*, 5 JOURNALS OF CONGRESS 752-754 (1823 ed.), reprinted in C. Tansill ed., *Documents Illustrative of the Formation of the Union of the American States*, H. DOC. NO. 398, 69th Cong., 1st Sess. (1927), 47, 54.

[259] 1 Stat. 491 (1796). Prior to Tennessee's admission, Vermont and Kentucky were admitted with different but conceptually similar terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

[260] 2 Stat. 701, 703 (1812).

[261] Justice Harlan, speaking for the Court, in United States v. Texas, 143 U.S. 621, 634 (1892) (citing 9 Stat. 108).

[262] Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914); Illinois Central R.R. v. Illinois, 146 U.S. 387, 434 (1892); Knight v. U.S. Land Association, 142 U.S. 161, 183 (1891); Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65 (1873).

[263] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 588 (1845).

[264] 3 Stat. 489, 492 (1819).

concerning sovereignty and jurisdiction of the States. Inasmuch as the original States retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, retention by the United States of either title to or jurisdiction over common lands in the new States would bring those States into the Union on less than an equal footing with the original States. This, the Court would not permit. "Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it, before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. . . . [T]o Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; *and no compact that might be made between her and the United States could diminish or enlarge these rights.*" [265]

Finally, in 1911, the Court invalidated a restriction on the change of location of the State capital, which Congress had imposed as a condition for the admission of Oklahoma, on the ground that Congress may not embrace in an enabling act conditions relating wholly to matters under state control. [266] In an opinion, from which Justices Holmes and McKenna dissented, Justice Lurton argued: "The power is to admit 'new States into this Union,' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission." [267]

The equal footing doctrine is a limitation only upon the terms by which Congress admits a State. [268] That is, States must be admitted on an equal footing in the sense that Congress may not exact conditions solely as a tribute for admission, but it may, in the enabling or admitting acts or subsequently impose requirements

[265] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228-229 (1845) (emphasis supplied). *And see* id. at 222-223.

[266] Coyle v. Smith, 221 U.S. 559 (1911).

[267] Id. at 567.

[268] South Carolina v. Katzenbach, 383 U.S. 301, 328-329 (1966). There is a broader implication, however, in Baker v. Carr, 369 U.S. 186, 226 n. 53 (1962).

that would be or are valid and effectual if the subject of congressional legislation after admission.[269] Thus, Congress may embrace in an admitting act a regulation of commerce among the States or with Indian tribes or rules for the care and disposition of the public lands or reservations within a State. "[I]n every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress."[270]

Until recently the requirement of equality has applied primarily to political standing and sovereignty rather than to economic or property rights.[271] Broadly speaking, every new State is entitled to exercise all the powers of government which belong to the original States of the Union.[272] It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its limits even as to federal lands, except where the Federal Government has reserved[273] or the State has ceded some degree of jurisdiction to the United States, and, of course, no State can enact a law which would conflict with the constitutional powers of the United States. Consequently, it has jurisdiction to tax private activities carried on within the public domain (although not to tax the Federal lands), if the tax does not constitute an unconstitutional burden on the Federal Government.[274] Statutes applicable to territories, e.g., the Northwest Territory Ordinance of 1787, cease to have any operative force when the territory, or any part thereof, is admitted to the

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[269] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224-225, 229-230 (1845); Coyle v. Smith, 221 U.S. 559, 573-574 (1911). *See also* Bolln v. Nebraska, 176 U.S. 83, 89 (1900); Ward v. Race Horse, 163 U.S. 504, 514 (1895); Escanaba Co. v. City of Chicago, 107 U.S. 678, 688 (1882); Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1857).

[270] Coyle v. Smith, 221 U.S. 559, 574 (1911). Examples include Stearns v. Minnesota, 179 U.S. 223 (1900) (congressional authority to dispose of and to make rules and regulations respecting the property of the United States); United States v. Sandoval, 231 U.S. 28 (1913) (regulating Indian tribes and intercourse with them); United States v. Chavez, 290 U.S. 357 (1933) (same); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9-10 (1888) (prevention of interference with navigability of waterways under commerce clause).

[271] United States v. Texas, 339 U.S. 707, 716 (1950); Stearns v. Minnesota, 179 U.S. 223, 245 (1900).

[272] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); McCabe v. Atchison T. & S.F. Ry., 235 U.S. 151 (1914).

[273] Van Brocklin v. Tennessee, 117 U.S. 151, 167 (1886).

[274] Wilson v. Cook, 327 U.S. 474 (1946).

Union, except as adopted by state law.[275] When the enabling act contains no exclusion of jurisdiction as to crimes committed on Indian reservations by persons other than Indians, state courts are vested with jurisdiction.[276] But the constitutional authority of Congress to regulate commerce with Indian tribes is not inconsistent with the equality of new States,[277] and conditions inserted in the New Mexico Enabling Act forbidding the introduction of liquor into Indian territory were therefore valid.[278] Similarly, Indian treaty rights to hunt, fish, and gather on lands ceded to the Federal Government were not extinguished by statehood. These "usufructuary" rights were subject to reasonable state regulation, and hence were not irreconcilable with state sovereignty over natural resources.[279]

Admission of a State on an equal footing with the original States involves the adoption as citizens of the United States of those whom Congress makes members of the political community and who are recognized as such in the formation of the new State.[280]

Judicial Proceedings Pending on Admission of New States

Whenever a territory is admitted into the Union, the cases pending in the territorial court which are of exclusive federal cognizance are transferred to the federal court having jurisdiction over the area; cases not cognizable in the federal courts are transferred to the tribunals of the new State, and those over which federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by the party possessing the option under existing law.[281] Where Congress neglected to make provision for disposition of certain pending cases in an enabling act for the admission of a State to the Union, a subsequent act supplying the omission was held valid.[282] After a case, begun in a United States court of a territory, is transferred to a state court under the oper-

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[275] Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845); Sands v. Manistee River Imp. Co., 123 U.S. 288, 296 (1887); *see also* Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1858); Huse v. Glover, 119 U.S. 543 (1886); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9 (1888); Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912).

[276] Draper v. United States, 164 U.S. 240 (1896), following United States v. McBratney, 104 U.S. 621 (1882).

[277] Dick v. United States, 208 U.S. 340 (1908); Ex parte Webb, 225 U.S. 663 (1912).

[278] United States v. Sandoval, 231 U.S. 28 (1913).

[279] Minnesota v. Mille Lacs Band of Chippewa Indians, 119 S. Ct. 1187, 1204-05 (1999) (overruling Ward v. Race Horse, 163 U.S. 504 (1896)).

[280] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 170 (1892).

[281] Baker v. Morton, 79 U.S. (12 Wall.) 150, 153 (1871).

[282] Freeborn v. Smith, 69 U.S. (2 Wall.) 160 (1865).

ation of the enabling act and the state constitution, the appellate procedure is governed by the state statutes and procedures.[283]

The new State, without the express or implied assent of Congress, cannot enact that the records of the former territorial court of appeals should become records of its own courts or provide by law for proceedings based thereon.[284]

Property Rights of States to Soil Under Navigable Waters

The "equal footing" doctrine has had an important effect on the property rights of new States to soil under navigable waters. In *Pollard's Lessee v. Hagan*,[285] as was observed above, the Court held that the original States had reserved to themselves the ownership of the shores of navigable waters and the soils under them, and that under the principle of equality the title to the soils beneath navigable water passes to a new State upon admission. The principle of this case supplies the rule of decision in many property-claims cases.[286]

After refusing to extend the inland-water rule of *Pollard's Lessee* to the three mile marginal belt under the ocean along the coast,[287] the Court applied the principle in reverse in *United States v. Texas*.[288] Since the original States had been found not to own the soil under the three mile belt, Texas, which concededly did own this soil before its annexation to the United States, was held to have surrendered its dominion and sovereignty over it, upon entering the Union on terms of equality with the existing States. To this extent, the earlier rule that unless otherwise declared by Congress the title to every species of property owned by a territory passes

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[283] John v. Paullin, 231 U.S. 583 (1913).

[284] Hunt v. Palao, 45 U.S. (4 How.) 589 (1846). *Cf.* Benner v. Porter, 50 U.S. (9 How.) 235, 246 (1850).

[285] 44 U.S. (3 How.) 212, 223 (1845). *See also* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

[286] *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (confirming language in earlier cases recognizing state sovereignty over tidal but nonnavigable lands); Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (applying presumption against congressional intent to defeat state title to find inadequate federal reservation of lake bed); Idaho v. United States, 533 U.S. 262 (2001) (presumption rebutted by indications – some occurring after statehood – that Congress intended to reserve certain submerged lands for benefit of an Indian tribe); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (doctrine requires utilization of state common law rather than federal to determine ownership of land underlying river that is navigable but not an interstate boundary); Shively v. Bowlby, 152 U.S. 1 (1894) (whether Oregon or a pre-statehood grantee from the United States of riparian lands near mouth of Columbia River owned soil below high-water mark).

[287] United States v. California, 332 U.S. 19, 38 (1947); United States v. Louisiana, 339 U.S. 699 (1950).

[288] 339 U.S. 707, 716 (1950). *See* United States v. Maine, 420 U.S. 515 (1975) (unanimously reaffirming the California, Louisiana, and Texas cases).

to the State upon admission [289] has been qualified. However, when Congress, through passage of the Submerged Lands Act of 1953, [290] surrendered its paramount rights to natural resources in the marginal seas to certain States, without any corresponding cession to all States, the transfer was held to entail no abdication of national sovereignty over control and use of the oceans in a manner destructive of the equality of the States. [291]

While the territorial status continues, the United States has power to convey property rights, such as rights in soil below the high-water mark along navigable waters, [292] or the right to fish in designated waters, [293] which will be binding on the State.

Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

PROPERTY AND TERRITORY: POWERS OF CONGRESS

Methods of Disposing of Property

The Constitution is silent as to the methods of disposing of property of the United States. In *United States v. Gratiot*, [294] in which the validity of a lease of lead mines on government lands was put in issue, the contention was advanced that "disposal is not letting or leasing," and that Congress has no power "to give or authorize leases." The Court sustained the leases, saying "the disposal must be left to the discretion of Congress." [295] Nearly a cen-

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[289] Brown v. Grant, 116 U.S. 207, 212 (1886).

[290] 67 Stat. 29, 43 U.S.C. §§ 1301-1315.

[291] Alabama v. Texas, 347 U.S. 272, 274-277, 281 (1954). Justice Black and Douglas dissented.

[292] Shively v. Bowlby, 152 U.S. 1, 47 (1894). *See also* Joy v. St. Louis, 201 U.S. 332 (1906).

[293] United States v. Winans, 198 U.S. 371, 378 (1905); Seufert Bros. v. United States, 249 U.S. 194 (1919). A fishing right granted by treaty to Indians does not necessarily preclude the application to Indians of state game laws regulating the time and manner of taking fish. New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916). *See also* Metlakatla Indians v. Egan, 369 U.S. 45, 54, 57-59 (1962): Kake Village v. Egan, 369 U.S. 60, 64-65, 67-69, 75-76 (1962). But it has been held to be violated by the exaction of a license fee which is both regulatory and revenue producing. Tulee v. Washington, 315 U.S. 681 (1942).

[294] 39 U.S. (14 Pet.) 526 (1840).

[295] Id. at 533, 538.

tury later this power to dispose of public property was relied upon to uphold the generation and sale of electricity by the Tennessee Valley Authority. The reasoning of the Court ran thus: the potential electrical energy made available by the construction of a dam in the exercise of its constitutional powers is property which the United States is entitled to reduce to possession; to that end it may install the equipment necessary to generate such energy. In order to widen the market and make a more advantageous disposition of the product, it may construct transmission lines and may enter into a contract with a private company for the interchange of electric energy.[296]

Public Lands: Federal and State Powers Over

No appropriation of public lands may be made for any purpose except by authority of Congress.[297] However, Congress was held to have acquiesced in the long-continued practice of withdrawing land from the public domain by Executive Orders.[298] In 1976 Congress enacted legislation that established procedures for withdrawals and that explicitly disclaimed continued acquiescence in any implicit executive withdrawal authority.[299] The comprehensive authority of Congress over public lands includes the power to prescribe the times, conditions, and mode of transfer thereof and to designate the persons to whom the transfer shall be made,[300] to declare the dignity and effect of titles emanating from the United States,[301] to determine the validity of grants which antedate the government's acquisition of the property,[302] to exempt lands acquired under the homestead laws from previously contracted debts,[303] to withdraw land from settlement and to prohibit grazing thereon,[304] to prevent unlawful occupation of public property and to declare what are

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[296] Ashwander v. TVA, 297 U.S. 288, 335-340 (1936). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

[297] United States v. Fitzgerald, 40 U.S. (15 Pet.) 407, 421 (1841). *See also* California v. Deseret Water, Oil & Irrigation Co., 243 U.S. 415 (1917); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).

[298] Sioux Tribe v. United States, 316 U.S. 317 (1942); United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915).

[299] Federal Land Policy and Management Act, Pub. L. 94-579, § 704(a); 90 Stat. 2792 (1976).

[300] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); *see also* Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902).

[301] Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839). *See also* Field v. Seabury, 60 U.S. (19 How.) 323, 332 (1857).

[302] Tameling v. United States Freehold & Immigration Co., 93 U.S. 644, 663 (1877). *See also* Maxwell Land-Grant Case, 121 U.S. 325, 366 (1887).

[303] Ruddy v. Rossi, 248 U.S. 104 (1918).

[304] Light v. United States, 220 U.S. 523 (1911). *See also* The Yosemite Valley Case, 82 U.S. (15 Wall.) 77 (1873).

nuisances, as affecting such property, and provide for their abatement,[305] and to prohibit the introduction of liquor on lands purchased and used for an Indian colony.[306] Congress may limit the disposition of the public domain to a manner consistent with its views of public policy. A restriction inserted in a grant of public lands to a municipality which prohibited the grantee from selling or leasing to a private corporation the right to sell or sublet water or electric energy supplied by the facilities constructed on such land was held valid.[307]

Unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands, the Court restated the applicable principles governing Congress' power under this clause. It empowers Congress to act as both proprietor and legislature over the public domain; Congress has complete power to make those "needful rules" which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the clause, its legislation overrides conflicting state laws.[308] Absent action by Congress, however, States may in some instances exercise some jurisdiction over activities on federal lands.[309]

No State can tax public lands of the United States within its borders,[310] nor can state legislation interfere with the power of Congress under this clause or embarrass its exercise.[311] Thus, by virtue of a Treaty of 1868, according self-government to Navajos living on an Indian Reservation in Arizona, the tribal court, rather than the courts of that State, had jurisdiction over a suit for a debt owed by an Indian resident thereof to a non-Indian conducting a store on the Reservation under federal license.[312] The question whether title to land which has once been the property of the United States has passed from it must be resolved by the laws of the United States; after title has passed, "that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."[313] In construing a conveyance by the United States of land within a

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[305] Camfield v. United States, 167 U.S. 518, 525 (1897). *See also* Jourdan v. Barrett, 45 U.S. (4 How.) 169 (1846): United States v. Waddell, 112 U.S. 76 (1884).

[306] United States v. McGowan, 302 U.S. 535 (1938).

[307] United States v. City of San Francisco, 310 U.S. 16 (1940).

[308] Kleppe v. New Mexico, 426 U.S. 529 (1976).

[309] California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).

[310] Van Brocklin v. Tennessee, 117 U.S. 151 (1886); *cf.* Wilson v. Cook, 327 U.S. 474 (1946).

[311] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872). *See also* Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902).

[312] Williams v. Lee, 358 U.S. 217 (1959).

[313] Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 517 (1839).

State, the settled and reasonable rule of construction of the State affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.[314] But a state statute enacted subsequently to a federal grant cannot operate to vest in the State rights which either remained in the United States or passed to its grantee.[315]

Territories: Powers of Congress Over

In the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act.[316] It may legislate directly with respect to the local affairs of a territory or it may transfer that function to a legislature elected by the citizens thereof,[317] which will then be invested with all legislative power except as limited by the Constitution of the United States and acts of Congress.[318] In 1886, Congress prohibited the enactment by territorial legislatures of local or special laws on enumerated subjects.[319] The constitutional guarantees of private rights are applicable in territories which have been made a part of the United States by congressional action[320] but not in unincorporated territories.[321] Con-

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[314] Oklahoma v. Texas, 258 U.S. 574, 595 (1922).

[315] United States v. Oregon, 295 U.S. 1, 28 (1935).

[316] Simms v. Simms, 175 U.S. 162, 168 (1899). *See also* United States v. McMillan, 165 U.S. 504, 510 (1897); El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87 (1909); First Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1880).

[317] Binns v. United States, 194 U.S. 486, 491 (1904). *See also* Sere v. Pitot, 10 U.S. (6 Cr.) 332, 336 (1810); Murphy v. Ramsey, 114 U.S. 15, 44 (1885).

[318] Walker v. New Mexico & S.P.R.R., 165 U.S. 593, 604 (1897); Simms v. Simms, 175 U.S. 162, 163 (1899); Wagoner v. Evans, 170 U.S. 588, 591 (1898).

[319] 24 Stat. 170 (1886).

[320] Downes v. Bidwell, 182 U.S. 244, 271 (1901). *See also* Mormon Church v. United States, 136 U.S. 1, 14 (1890); ICC v. United States ex rel. Humboldt Steamship Co., 224 U.S. 474 (1912).

[321] Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922) (collectively, the *Insular Cases*). The guarantees of fundamental rights apply to persons in Puerto Rico, id. at 312-313, but what these are and how they are to be determined, in light of *Balzac*'s holding that the right to a civil jury trial was not protected. The vitality of the *Insular Cases* has been questioned by some Justices, Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion); Torres v. Puerto Rico, 442 U.S. 465, 474, 475 (1979) (concurring opinion of four Justices), but there is no doubt the Court adheres to it, United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990); Harris v. Rosario, 446 U.S. 651 (1980), and the developing caselaw using the cases as the proper analysis. Applying stateside rights in Puerto Rico are Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (procedural due process); Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (equal protection principles); Torres v. Puerto Rico, 442 U.S. 465 (1979) (search and seizure); Harris v. Rosario, supra (same); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7-8 (1982) (equality of voting rights); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 331 n. 1 (1986) (First Amendment speech). *See also* Califano v. Torres, 435 U.S. 1, 4 n. 6 (1978) (right to travel assumed). Puerto Rico is, of course, not the only territory that is the subject of the

gress may establish, or may authorize the territorial legislature to create, legislative courts whose jurisdiction is derived from statutes enacted pursuant to this section other than from article III.[322] Such courts may exercise admiralty jurisdiction despite the fact that such jurisdiction may be exercised in the States only by constitutional courts.[323]

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

GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT

The first clause of this section, in somewhat different language, was contained in the Virginia Plan introduced in the Convention and was obviously attributable to Madison.[324] Through the various permutations into its final form,[325] the object of the clause seems

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doctrine of the *Insular Cases*. *E.g.*, Ocampo v. United States, 234 U.S. 91 (1914) (Philippines and Sixth Amendment jury trial); Hawaii v. Mankichi, 190 U.S. 197 (1903) (grand jury indictment and trial by jury).

[322] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). *See also* Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 447 (1872); Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 655 (1874); Reynolds v. United States, 98 U.S. 145, 154 (1879); The ″City of Panama″, 101 U.S. 453, 460 (1880); McAllister v. United States, 141 U.S. 174, 180 (1891); United States v. McMillan, 165 U.S. 504, 510 (1897); Romeu v. Todd, 206 U.S. 358, 368 (1907).

[323] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828).

[324] "Resd. that a Republican government ... ought to be guaranteed by the United States to each state." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (rev. ed. 1937). In a letter in April, 1787, to Randolph, who formally presented the Virginia Plan to the Convention, Madison had suggested that "an article ought to be inserted expressly guaranteeing the tranquility of the states against internal as well as external danger.... Unless the Union be organized efficiently on republican principles innovations of a much more objectionable form may be obtruded." 2 WRITINGS OF JAMES MADISON 336 (G. Hunt ed., 1900). On the background of the clause, *see* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION ch. 1 (1972).

[325] Thus, on June 11, the language of the provision was on Madison's motion changed to: "Resolved that a republican constitution and its existing laws ought to be guaranteed to each state by the United States." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 193-194, 206 (rev. ed. 1937). Then, on July 18, Gouverneur Morris objected to this language on the ground that "[h]e should be very unwilling that such laws as exist in R. Island ought to be guaranteed to each State of the Union." 2 id. at 47. Madison then suggested language "that the Constitutional authority of the States shall be guaranteed to them respectively against domestic as well as foreign violence," whereas Randolph wanted to add to this the language "and that no State be at liberty to form any other than a Republican Govt." Wilson then moved, "as a better expression of the idea," almost the present language of the section, which was adopted. Id. at 47-49.

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clearly to have been more than an authorization for the Federal Government to protect States against foreign invasion or internal insurrection,[326] a power seemingly already conferred in any case.[327] No one can now resurrect the full meaning of the clause and intent which moved the Framers to adopt it, but with the exception of the reliance for a brief period during Reconstruction the authority contained within the confines of the clause has been largely unexplored.[328]

In *Luther v. Borden*,[329] the Supreme Court established the doctrine that questions arising under this section are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character."[330] *Texas v. White*[331] held that the action of the President in setting up provisional governments at the conclusion of the war was justified, if at all, only as an exercise of his powers as Commander-in-Chief and that such governments were to be regarded merely as provisional regimes to perform the functions of government pending action by Congress. On the ground that the issues were not justiciable, the Court in the early part of this century refused to pass on a number of challenges to state governmental reforms and thus made the clause in effect noncognizable by the courts in any matter,[332] a status from which the Court's

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[326] Thus, Randolph on June 11, supporting Madison's version pending then, said that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." 1 id. at 206. Again, on July 18, when Wilson and Mason indicated their understanding that the object of the proposal was "merely" to protect States against violence, Randolph asserted: "The Resoln. has 2 Objects. 1. to secure Republican government. 2. to suppress domestic commotions. He urged the necessity of both these provisions." 2 id. at 47. Following speakers alluded to the dangers of monarchy being created peacefully as necessitating the provision. Id. at 48. *See* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION ch. 2 (1972).

[327] *See* article I, § 8, cl. 15.

[328] *See generally* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972).

[329] 48 U.S. (7 How.) 1 (1849).

[330] Id. at 42.

[331] 74 U.S. (7 Wall.) 700, 729 (1869). In Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868), the State attempted to attack Reconstruction legislation on the premise that it already had a republican form of government and that Congress was thus not authorized to act. The Court viewed the congressional decision as determinative.

[332] Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. City of Portland, 223 U.S. 151 (1912); Davis v. Ohio, 241 U.S. 565 (1916); Ohio v. Akron Park Dist., 281 U.S. 74 (1930); O'Neill v. Leamer, 239 U.S. 244 (1915); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937). But in certain earlier cases the Court had disposed of guarantee clause questions on the merits. Forsyth v. Hammond, 166 U.S. 506 (1897); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

opinion in *Baker v. Carr*,[333] despite its substantial curbing of the political question doctrine, did not release it.[334]

Similarly, in *Luther v. Borden*,[335] the Court indicated that it rested with Congress to determine the means proper to fulfill the guarantee of protection to the States against domestic violence. Chief Justice Taney declared that Congress might have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere, but that instead Congress had by the act of February 28, 1795,[336] authorized the President to call out the militia in case of insurrection against the government of any State. It followed, said Taney, that the President "must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress",[337] which determination was not subject to review by the courts.

In recent years, the authority of the United States to use troops and other forces in the States has not generally been derived from this clause and it has been of little importance.

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[333] 369 U.S. 186, 218-232 (1962). In the Court's view, guarantee clause questions were nonjusticiable because resolution of them had been committed to Congress and not because they involved matters of state governmental structure.

[334] More recently, the Court speaking through Justice O'Connor has raised without deciding the possibility that the guarantee clause is justiciable and is a constraint upon Congress' power to regulate the activities of the States. New York v. United States, 505 U.S. 144, 183–85 (1992); Gregory v. Ashcroft, 501 U.S. 452, 463 (1991). The opinions draw support from a powerful argument for utilizing the guarantee clause as a judicially enforceable limit on federal power. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

[335] 48 U.S. (7 How.) 1 (1849).

[336] 1 Stat. 424.

[337] Luther v. Borden, 48 U.S. (7 How.) 1, 43 (1849).

ARTICLE V

MODE OF AMENDMENT

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MODE OF AMENDMENT

ARTICLE V

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

AMENDMENT OF THE CONSTITUTION

Scope of the Amending Power

When this Article was before the Constitutional Convention, a motion to insert a provision that "no State shall without its consent be affected in its internal policy" was made and rejected.[1] A further attempt to impose a substantive limitation on the amending power was made in 1861, when Congress submitted to the States a proposal to bar any future amendments which would authorize Congress to "interfere, within any State, with the domestic institutions thereof . . . ."[2] Three States ratified this article before the outbreak of the Civil War made it academic.[3] Members of Congress

[1] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 630 (rev. ed. 1937).

[2] 57 CONG. GLOBE 1263 (1861).

[3] H. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, H. DOC. 353, pt. 2, 54th Congress, 2d Sess. (1897), 363.

opposed passage by Congress of the Thirteenth Amendment on the basis that the amending process could not be utilized to work such a major change in the internal affairs of the States, but the protest was in vain.[4] Many years later the validity of both the Eighteenth and Nineteenth Amendments was challenged because of their content. The arguments against the former took a wide range. Counsel urged that the power of amendment is limited to the correction of errors in the framing of the Constitution and that it does not comprehend the adoption of additional or supplementary provisions. They contended further that ordinary legislation cannot be embodied in a constitutional amendment and that Congress cannot constitutionally propose any amendment which involves the exercise or relinquishment of the sovereign powers of a State.[5] The Nineteenth Amendment was attacked on the narrower ground that a State which had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing, i.e., persons chosen by voters whom the State itself had not authorized to vote for Senators.[6] Brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid.

Proposing a Constitutional Amendment

Thirty-three proposed amendments to the Constitution have been submitted to the States pursuant to this Article, all of them upon the vote of the requisite majorities in Congress and none, of course, by the alternative convention method.[7] In the Convention, much controversy surrounded the issue of the process by which the document then being drawn should be amended. At first, it was voted that "provision ought to be made for the amendment [of the Constitution] whensoever it shall seem necessary" without the agency of Congress being at all involved.[8] Acting upon this instruction, the Committee on Detail submitted a section providing that upon the application of the legislatures of two-thirds of the States Congress was to call a convention for purpose of amending the Constitution.[9] Adopted,[10] the section was soon reconsidered on the motion of Framers of quite different points of view, some who worried that the provision would allow two-thirds of the States to subvert

[4] 66 CONG. GLOBE 921, 1424-1425, 1444-1447, 1483-1488 (1864).
[5] National Prohibition Cases, 253 U.S. 350 (1920).
[6] Leser v. Garnett, 258 U.S. 130 (1922).
[7] A recent scholarly study of the amending process and the implications for our polity is R. BERNSTEIN, AMENDING AMERICA (1993).
[8] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 22, 202-203, 237; 2 id. at 85.
[9] Id. at 188.
[10] Id. at 467-468.

the others [11] and some who thought that Congress would be the first to perceive the need for amendment and that to leave the matter to the discretion of the States would mean that no alterations but those increasing the powers of the States would ever be proposed. [12] Madison's proposal was adopted, empowering Congress to propose amendments either on its own initiative or upon application by the legislatures of two-thirds of the States. [13] When this provision came back from the Committee on Style, however, Gouverneur Morris and Gerry succeeded in inserting the language providing for a convention upon the application of the legislatures of two-thirds of the States. [14]

Proposals by Congress.—Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to. When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument. [15] Instead, the House decided to propose them as supplementary articles, a method followed since. [16] It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals. [17] In the *National Prohibition Cases*, [18] the Court ruled that in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership. [19] The approval of the President is not necessary for a proposed amendment. [20]

The Convention Alternative.—Because it has never successfully been invoked, the convention method of amendment is sur-

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[11] Id. at 557-558 (Gerry).
[12] Id. at 558 (Hamilton).
[13] Id. at 559
[14] Id. at 629-630. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the State as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum etc. which in Constitutional regulations ought to be as much as possible avoided."
[15] 1 ANNALS OF CONGRESS 433-436 (1789).
[16] Id. at 717.
[17] Id. at 430.
[18] 253 U.S. 350, 386 (1920).
[19] Id.
[20] Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

rounded by a lengthy list of questions.[21] When and how is a convention to be convened? Must the applications of the requisite number of States be identical or ask for substantially the same amendment or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions and others lurk to be revealed on deeper consideration.[22] This method has been close to utilization several times. Only one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators.[23] Two States were lacking in a petition drive for a constitutional limitation on income tax rates.[24] The drive for an amendment to limit the Supreme Court's legislative apportionment decisions came within one State of the required number, and a proposal for a balanced budget amendment has been but two States short of the requisite number for some time.[25] Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the States there will be a response by Congress.

Ratification.—In 1992, the Nation apparently ratified a long-quiescent 27th Amendment, to the surprise of just about everyone. Whether the new Amendment has any effect in the area of its subject matter, the effective date of congressional pay raises, the adoption of this provision has unsettled much of the supposed learning on the issue of the timeliness of pendency of constitutional amendments.

It has been accepted that Congress may, in proposing an amendment, set a reasonable time limit for its ratification. Beginning with the Eighteenth Amendment, save for the Nineteenth, Congress has included language in all proposals stating that the amendment should be inoperative unless ratified within seven

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[21] The matter is treated comprehensively in C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st Sess. (Comm. Print; House Judiciary Committee) (1957). A thorough and critical study of activity under the petition method can be found in R. CAPLAN, CONSTITUTIONAL BRINKMANSHIP—AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988).

[22] Id. *See also* Federal Constitutional Convention: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers, 90th Congress, 1st Sess. (1967).

[23] C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st Sess. (Comm. Print; House Judiciary Committee) (1957), 7, 89.

[24] Id. at 8-9, 89.

[25] R. CAPLAN, CONSTITUTIONAL BRINKMANSHIP—AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 73-78, 78-89 (1988).

years.[26] All the earlier proposals had been silent on the question, and two amendments proposed in 1789, one submitted in 1810 and another in 1861, and most recently one in 1924 had gone to the States and had not been ratified. In *Coleman v. Miller*,[27] the Court refused to pass upon the question whether the proposed child labor amendment, the one submitted to the States in 1924, was open to ratification thirteen years later. This it held to be a political question which Congress would have to resolve in the event three fourths of the States ever gave their assent to the proposal.

In *Dillon v. Gloss*,[28] the Court upheld Congress' power to prescribe time limitations for state ratifications and intimated that proposals which were clearly out of date were no longer open for ratification. Granting that it found nothing express in Article V relating to time constraints, the Court yet allowed that it found intimated in the amending process a "strongly suggest[ive]" argument that proposed amendments are not open to ratification for all time or by States acting at widely separate times.[29]

Three related considerations were put forward. "First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."[30]

Continuing, the Court observed that this conclusion was the far better one, because the consequence of the opposite view was that the four amendments proposed long before, including the two sent out to the States in 1789 "are still pending and in a situation where their ratification in some of the States many years since by

[26] Seven-year periods were included in the texts of the proposals of the 18th, 20th, 21st, and 22d amendments; apparently concluding in proposing the 23d that putting the time limit in the text merely cluttered up the amendment, Congress in it and subsequent amendments including the time limits in the authorizing resolution. After the extension debate over the Equal Rights proposal, Congress once again inserted into the text of the amendment the time limit with respect to the proposal of voting representation in Congress for the District of Columbia.

[27] 307 U.S. 433 (1939).

[28] 256 U.S. 368 (1921).

[29] Id. at 374.

[30] Id. at 374-375.

representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable."[31]

What seemed "untenable" to a unanimous Court in 1921 proved quite acceptable to both executive and congressional branches in 1992. After a campaign calling for the resurrection of the 1789 proposal, which was originally transmitted to the States as one of the twelve original amendments, enough additional States ratified to make up a three-fourths majority, and the responsible executive official proclaimed the amendment as ratified as both Houses of Congress concurred in resolutions.[32]

That there existed a "reasonable" time period for ratification was strongly controverted.[33] The Office of Legal Counsel of the Department of Justice prepared for the White House counsel an elaborate memorandum that disputed all aspects of the *Dillon* opinion.[34] First, *Dillon*'s discussion of contemporaneity was discounted as dictum.[35] Second, the three "considerations" relied on in *Dillon* were deemed unpersuasive. Thus, the Court simply assumes that, since proposal and ratification are steps in a single process, the process must be short rather than lengthy, the argument that an amendment should reflect necessity says nothing about the length of time available, inasmuch as the more recent ratifying States obviously thought the pay amendment was necessary, and the fact that an amendment must reflect consensus does not so much as intimate contemporaneous consensus.[36] Third, the OLC memorandum argued that the proper mode of interpretation of Article V was to "provide a clear rule that is capable of mechanical application,

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[31] Id. One must observe that all the quoted language is dicta, the actual issue in *Dillon* being whether Congress could include in the text of a proposed amendment a time limit. In Coleman v. Miller, 307 U.S. 433, 453-454 (1939), Chief Justice Hughes, for a plurality, accepted the Dillon dictum, despite his opinion's forceful argument for judicial abstinence on constitutional-amendment issues. The other four Justices in the Court majority thought Congress had complete and sole control over the amending process, subject to no judicial review. Id. at 459.

[32] Supra, "Congressional Pay"; infra, "Twenty-Seventh Amendment".

[33] Thus, Professor Tribe wrote: "Article V says an amendment 'shall be valid to all Intents and Purposes, as part of this Constitution' when 'ratified' by three-fourths of the states—not that it might face a veto for tardiness. Despite the Supreme Court's suggestion, no speedy ratification rule may be extracted from Article V's text, structure or history." Tribe, *The 27th Amendment Joins the Constitution*, WALL STREET JOURNAL, May 13, 1992, A15.

[34] 16 Ops. of the Office of Legal Coun. 102 (1992) (prelim.pr.).

[35] Id. at 109-110. *Coleman*'s endorsement of the dictum in the Hughes opinion was similarly pronounced dictum. Id. at 110. Both characterizations, as noted above, are correct.

[36] Id. at 111-112.

without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process. Accordingly, any interpretation that would introduce confusion must be disfavored."[37] The rule ought to be, echoing Professor Tribe, that an amendment is ratified when three-fourths of the States have approved it.[38] The memorandum vigorously pursues a "plain-meaning" rule of constitutional construction. Article V says nothing about time limits, and elsewhere in the Constitution when the Framers wanted to include time limits they did so. The absence of any time language means there is no requirement of contemporaneity or of a "reasonable" period.[39]

Now that the Amendment has been proclaimed and has been accepted by Congress, where does this development leave the argument over the validity of proposals long distant in time? One may assume that this precedent stands for the proposition that proposals remain viable forever. It may, on the one hand, stand for the proposition that certain proposals, because they reflect concerns that are as relevant today, or perhaps in some future time, as at the time of transmission to the States, remain open to ratification. Certainly, the public concern with congressional pay made the Twenty-seventh Amendment particularly pertinent. The other 1789 proposal, relating to the number of representatives, might remain viable under this standard, whereas the other proposals would not. On the other hand, it is possible to argue that the precedent is an "aberration," that its acceptance owed more to a political and philosophical argument between executive and legislative branches and to the defensive posture of Congress in the political context of 1992 that led to an uncritical acceptance of the Amendment. In that latter light, the development is relevant to but not dispositive of the controversy. And, barring some judicial interpretation, that is likely to be where the situation rests.

Nothing in the status of the precedent created by the Twenty-seventh Amendment suggests that Congress may not, when it proposes an amendment, include, either in the text or in the accompanying resolution, a time limitation, simply as an exercise of its necessary and proper power.

Whether once it has prescribed a ratification period Congress may extend the period without necessitating action by already-ratified States embroiled Congress, the States, and the courts in argu-

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[37] Id. at 113.

[38] Id. at 113-116.

[39] Id. at 103-106. The OLC also referenced previous debates in Congress in which Members had assumed this proposal and the others remained viable. Id.

ment with respect to the proposed Equal Rights Amendment.[40] Proponents argued and opponents doubted that the fixing of a time limit and the extending of it were powers committed exclusively to Congress under the political question doctrine and that in any event Congress had power to extend. It was argued that inasmuch as the fixing of a reasonable time was within Congress' power and that Congress could fix the time either in advance or at some later point, based upon its evaluation of the social and other bases of the necessities of the amendment, Congress did not do violence to the Constitution when, once having fixed the time, it subsequently extended the time. Proponents recognized that if the time limit was fixed in the text of the amendment Congress could not alter it because the time limit as well as the substantive provisions of the proposal had been subject to ratification by a number of States, making it unalterable by Congress except through the amending process again. Opponents argued that Congress, having by a two-thirds vote sent the amendment and its authorizing resolution to the States, had put the matter beyond changing by passage of a simple resolution, that States had either acted upon the entire package or at least that they had or could have acted affirmatively upon the promise of Congress that if the amendment had not been ratified within the prescribed period it would expire and their assent would not be compelled for longer than they had intended. Congress did pass a resolution extending by three years the period for ratification.[41]

Litigation followed and a federal district court, finding the issue to be justiciable, held that Congress did not have the power to extend, but before the Supreme Court could review the decision the extended time period expired and mooted the matter.[42]

Also much disputed during consideration of the proposed Equal Rights Amendment was the question whether once a State had ratified it could thereafter withdraw or rescind its ratification, precluding Congress from counting that State toward completion of ratification. Four States had rescinded their ratifications and a fifth had declared that its ratification would be void unless the amendment was ratified within the original time limit.[43] The issue

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[40] *See* Equal Rights Amendment Extension: Hearings Before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d Sess. (1978); Equal Rights Amendment Extension: Hearings Before the House Judiciary Subcommittee on Civil and Constitutional Rights, 95th Congress, 1st/2d Sess. (1977-78).

[41] H.J. Res. 638, 95th Congress, 2d Sess. (1978); 92 Stat. 3799.

[42] Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho, 1981), *prob. juris. noted*, 455 U.S. 918 (1982), *vacated and remanded to dismiss*, 459 U.S. 809 (1982).

[43] Nebraska (March 15, 1973), Tennessee (April 23, 1974), and Idaho (February 8, 1977) all passed rescission resolutions without dispute about the actual passage. The Kentucky rescission was attached to another bill and was vetoed by the Lieu-

was not without its history. The Fourteenth Amendment was ratified by the legislatures of Ohio and New Jersey, both of which subsequently passed rescinding resolutions. Contemporaneously, the legislatures of Georgia, North Carolina, and South Carolina rejected ratification resolutions. Pursuant to the Act of March 2, 1867,[44] the governments of those States were reconstituted and the new legislatures ratified. Thus, there were presented both the question of the validity of a withdrawal and the question of the validity of a ratification following rejection. Congress requested the Secretary of State[45] to report on the number of States ratifying the proposal and the Secretary's response specifically noted the actions of the Ohio and New Jersey legislatures. The Secretary then issued a proclamation reciting that 29 States, including the two that had rescinded and the three which had ratified after first rejecting, had ratified, which was one more than the necessary three-fourths. He noted the attempted withdrawal of Ohio and New Jersey and observed that it was doubtful whether such attempts were effectual in withdrawing consent.[46] He therefore certified the amendment to be in force if the rescissions by Ohio and New Jersey were invalid. The next day Congress adopted a resolution listing all 29 States, including Ohio and New Jersey, as having ratified and concluded that the ratification process was completed.[47] The Secretary of State then proclaimed the Amendment as part of the Constitution.

In *Coleman v. Miller*,[48] the congressional action was interpreted as going directly to the merits of withdrawal after ratification and of ratification after rejection. "Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification." Although rescission was hotly debated with respect to the Equal Rights Amend-

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tenant Governor, acting as Governor, citing grounds that included a state constitutional provision prohibiting the legislature from passing a law dealing with more than one subject and a senate rule prohibiting the introduction of new bills within the last ten days of a session. Both the resolution and the veto message were sent by the Kentucky Secretary of State to the General Services Administration. South Dakota was the fifth State.

[44] 14 Stat. 428.

[45] The Secretary was then responsible for receiving notices of ratification and proclaiming adoption.

[46] 15 Stat. 706, 707.

[47] 15 Stat. 709.

[48] 307 U.S. 433, 488-450 (1939) (plurality opinion). For an alternative construction of the precedent, *see* Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 27 NOTRE DAME LAW. 185, 201-204 (1951). The legislature of New York attempted to withdraw its ratification of the 15th Amendment; although the Secretary of State listed New York among the ratifying States, noted the withdrawal resolution, there were ratifications from three-fourths of the States without New York. 16 Stat. 1131.

ment, the failure of ratification meant that nothing definitive emerged from the debate. The questions that must be resolved are whether the matter is justiciable, that is, whether under the political question doctrine resolution of the issue is committed exclusively to Congress, and whether there is judicial review of what Congress' power is in respect to deciding the matter of rescission. The Fourteenth Amendment precedent and *Coleman v. Miller* combine to suggest that resolution is a political question committed to Congress, but the issue is not settled.

The Twenty-seventh Amendment precedent is relevant here. The Archivist of the United States proclaimed the Amendment as having been ratified a day previous to the time both Houses of Congress adopted resolutions accepting ratification.[49] There is no necessary conflict, inasmuch as the Archivist and Congress concurred in their actions, but the Office of Legal Counsel of the Department of Justice opined that the *Coleman* precedent was not binding and that the Fourteenth Amendment action by Congress was an "aberration."[50] That is, the memorandum argued that the *Coleman* opinion by Chief Justice Hughes was for only a plurality of the Court and, moreover, was dictum since it addressed an issue not before the Court.[51] On the merits, OLC argued that Article V gave Congress no role other than to propose amendments and to specify the mode of ratification. An amendment is valid when ratified by three-fourths of the States, no further action being required. Although someone must determine when the requisite number have acted, OLC argued that the executive officer charged with the function of certifying, now the Archivist, has only the ministerial duty of counting the notifications sent to him. Separation of powers and federalism concerns also counseled against a congressional role, and past practice, in which all but the Fourteenth Amendment were certified by an executive officer, was noted as supporting a decision against a congressional role.[52]

What would be the result of adopting one view over the other?

First, finding that resolution of the question is committed to Congress merely locates the situs of the power, and says nothing about what the resolution should be. That Congress in the past has refused to accept rescissions is but the starting point, inasmuch as, unlike courts, Congress operates under no principle of *stare decisis* so that the decisions of one Congress on a subject do not bind

[49] F. R. Doc. 92-11951, 57 Fed. Reg. 21187; 138 CONG. REC. (daily ed.) S6948-49, H3505-06.

[50] 16 Ops. of the Office of Legal Coun. 102, 125 (1992) (prelim.pr.).

[51] Id. at 118-121.

[52] Id. at 121-126.

future Congresses. If Congress were to be faced with a decision about the validity of rescission, to what standards should it look?

That a question of constitutional interpretation may be "political" in the sense of being committed to one or to both of the "political" branches is not, of course, a judgment that in its resolution the political branch may decide without recourse to principle. Resolution of political questions is not subject to judicial review, so the prospect of court overruling is not one with which the decisionmaker need trouble himself. But both legislators and executive are bound by oath to observe the Constitution,[53] and consequently it is with the original document that the search for an answer must begin.

At the same time, it may well be that the Constitution affords no answer. Generally, in the exercise of judicial review, courts view the actions of the legislative and executive branches in terms not of the wisdom or desirability or propriety of their actions but in terms of the comportment of those actions with the constitutional grants of power and constraints upon those powers; if an action is within a granted power and violates no restriction, the courts will not interfere. How the legislature or the executive decides to deal with a question within the confines of the powers each constitutionally have is beyond judicial control.

Therefore, if the Constitution commits decision on an issue to, say, Congress, and imposes no standards to govern or control the reaching of that decision, in its resolution Congress may be restrained only by its sense of propriety or wisdom or desirability, i.e., may be free to make a determination solely as a policy matter. The reason that these issues are not justiciable is not only that they are committed to a branch for decision without intervention by the courts but also that the Constitution does not contain an answer. This interpretation, in the context of amending the Constitution, may be what Chief Justice Hughes was deciding for the plurality of the Court in *Coleman*.[54]

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[53] Article VI, parag. 3. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." United States v. Nixon, 418 U.S. 683, 703 (1974).

[54] Coleman v. Miller, 307 U.S. 433, 450, 453 (1939) (plurality opinion). Thus, considering the question of ratification after rejection, the Chief Justice found "no basis in either Constitution or statute" to warrant the judiciary in restraining state officers from notifying Congress of a State's ratification, so that it could decide to accept or reject. "Article 5, speaking solely of ratification, contains no provision as to rejection." And in considering whether the Court could specify a reasonable time for an amendment to be before the State before it lost its validity as a proposal, Chief Justice Hughes asked: "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute." His discussion of

Article V may be read to contain a governing constitutional principle, however. Thus, it can be argued that as written the provision contains only language respecting ratification and that inexorably once a State acts favorably on a resolution of ratification it has exhausted its jurisdiction over the subject and cannot rescind,[55] nor can Congress even authorize a State to rescind.[56] This conclusion is premised on Madison's argument that a State may not ratify conditionally, that it must adopt "*in toto* and *for ever*."[57] While the Madison principle may be unexceptionable in the context in which it was stated, it may be doubted that it transfers readily to the significantly different issue of rescission.

A more pertinent principle would seem to be that expressed in *Dillon v. Gloss*.[58] In that case, the action of Congress in fixing a seven-year-period within which ratification was to occur or the proposal would expire was attacked as vitiating the amendment. The Court, finding no express provision in Article V, nonetheless thought it "reasonably implied" therein "that the ratification must be within some reasonable time after the proposal." Three reasons underlay the Court's finding of this implication and they are suggestive on the question of rescission.[59]

Although addressed to a different issue, the Court's discussion of the length of time an amendment may reasonably pend before losing its viability is suggestive with respect to rescission. That is, first, with proposal and ratification as successive steps in a single endeavor, second, with the necessity of amendment forming the basis for adoption of the proposal, and, third, especially with the implication that an amendment's adoption should be "sufficiently

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what Congress could look to in fixing a reasonable time, id. at 453-454, is overwhelmingly policy-oriented. On this approach generally, *see* Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976).

[55] *See, e.g.*, the debate between Senator Conkling and Senator Davis on this point in 89 CONG. GLOBE 1477-1481 (1870).

[56] *Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment*, Memorandum of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, in Equal Rights Amendment Extension: Hearings Before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d Sess. (1978), 80, 91-99.

[57] During the debate in New York on ratification of the Constitution, it was suggested that the State approve the document on condition that certain amendments the delegates thought necessary be adopted. Madison wrote: "The Constitution requires an adoption in toto and for ever. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any condition whatever must viciate the ratification." 5 THE PAPERS OF ALEXANDER HAMILTON 184 (H. Syrett ed., 1962).

[58] 256 U.S. 368 (1921). Of course, we recognize, as indicated at various points above, that *Dillon*, and *Coleman* as well, insofar as they discuss points relied on here, express dictum and are not binding precedent. They are discussed solely for the persuasiveness of the views set out.

[59] Quoted supra.

contemporaneous" in the requisite number of States "to reflect the will of the people in all sections at relatively the same period," it would raise a large question were the ratification process to count one or more States which were acting to withdraw their expression of judgment that amendment was necessary at the same time other States were acting affirmatively. The "decisive expression of the people's will" that is to bind all might well in those or similar circumstances be found lacking. Employment of this analysis would not necessarily lead in specific circumstances to failures of ratification; the particular facts surrounding the passage of rescission resolutions, for example, might lead Congress to conclude that the requisite "contemporaneous" "expression of the people's will" was not undermined by the action.

And employment of this analysis would still seem, under these precedents, to leave to Congress the crucial determination of the success or failure of ratification. At the same time it was positing this analysis in the context of passing on the question of Congress' power to fix a time limit, the Court in *Dillon v. Gloss* observed that Article V left to Congress the authority "to deal with subsidiary matters of detail as the public interest and changing conditions may require."[60] And in *Coleman v. Miller*, Chief Justice Hughes went further in respect to these "matters of detail" being "within the congressional province" in the resolution of which the decision by Congress "would not be subject to review by the courts."[61]

Thus, it may be that if the *Dillon v. Gloss* construction is found persuasive, Congress would have constitutional standards to guide its decision on the validity of rescission. At the same time, if these precedents reviewed above are adhered to, and strictly applied, it appears that the congressional determination to permit or to disallow rescission would not be subject to judicial review.

Adoption of the alternative view, that Congress has no role but that the appropriate executive official has the sole responsibility, would entail different consequences. That official, now the Archivist, appears to have no discretion but to certify once he receives

[60] Id. at 375-376. It should be noted that the Court seemed to retain the power for itself to pass on the congressional decision, saying "[o]f the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt" and noting later than no question existed that the seven-year period was reasonable. Id.

[61] 307 U.S. 433, 452-454 (1939) (plurality opinion). It is, as noted above, not entirely clear to what extent the Hughes plurality exempted from judicial review congressional determinations made in the amending process. Justice Black's concurrence thought the Court "treated the amending process of the Constitution in some respects as subject to judicial review, in others as subject to the final authority of Congress" and urged that the *Dillon v. Gloss* "reasonable time" construction be disapproved. Id. at 456, 458.

state notification.[62] The official could, of course, request a Department of Justice legal opinion on some issue, such as the validity of rescissions. That is the course advocated by the executive branch, naturally, but it is one a little difficult to square with the ministerial responsibility of the Archivist.[63] In any event, there would seem to be no support for a political question preclusion of judicial review under these circumstances. Whether the Archivist certifies on the mere receipt of a ratification resolution or does so only after ascertaining the resolution's validity, it would appear that it is action subject to judicial review.[64]

Congress has complete freedom of choice between the two methods of ratification recognized by Article V: by the legislatures of the States or by conventions in the States. In *United States v. Sprague*,[65] counsel advanced the contention that the Tenth Amendment recognized a distinction between powers reserved to the States and powers reserved to the people, and that state legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several States. The Eighteenth Amendment being of the latter character, the ratification by state legislatures, so the argument ran, was invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exception into it by implication.

The term "legislatures" as used in Article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several States. It does not comprehend the popular referendum, which has subsequently become a part of the legislative process in many of the States. A State may not validly condition ratification of a proposed constitutional amendment on its approval by such a referendum.[66] In the words of the Court: "[T]he

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[62] United States ex rel. Widenmann v. Colby, 265 F. 998, 999 (D.C. Cir. 1920), *aff'd mem.* 257 U.S. 619 (1921); United States v. Sitka, 666 F. Supp. 19, 22 (D. Conn. 1987), *aff'd*, 845 F.2d 43 (2d Cir.), *cert. den.*, 488 U.S. 827 (1988). *See* 96 CONG. REC. 3250 (Message from President Truman accompanying Reorg. Plan No. 20 of 1950); 16 Ops. of the Office of Legal Coun. 102, 117 (1992) (prelim.pr.).

[63] Id. at 116-118. Thus, OLC says that the statute "clearly requires that, before performing this ministerial function, the Archivist must determine whether he has received 'official notice' that an amendment has been adopted 'according to the provisions of the Constitution.' This is the question of law that the Archivist may properly submit to the Attorney General for resolution." Id. at 118. But if his duty is "ministerial," it seems, the Archivist may only notice the fact of receipt of a state resolution; if he may, in consultation with the Attorney General, determine whether the resolution is valid, that is considerably more than a "ministerial" function.

[64] Under the Administrative Procedure Act, doubtless, 5 U.S.C. §§ 701-706, though there may well be questions about one possible exception, the "committed to agency discretion" provision. Id. at § 701(a) (2).

[65] 282 U.S. 716 (1931).

[66] Hawke v. Smith, 253 U.S. 221, 231 (1920).

function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[67]

Authentication and Proclamation.—Formerly, official notice from a state legislature, duly authenticated, that it had ratified a proposed amendment went to the Secretary of State, upon whom it was binding, "being certified by his proclamation, [was] conclusive upon the courts" as against any objection which might be subsequently raised as to the regularity of the legislative procedure by which ratification was brought about.[68] This function of the Secretary was first transferred to a functionary called the Administrator of General Services,[69] and then to the Archivist of the United States.[70] In *Dillon v. Gloss*,[71] the Supreme Court held that the Eighteenth Amendment became operative on the date of ratification by the thirty-sixth State, rather than on the later date of the proclamation issued by the Secretary of State, and doubtless the same rule holds as to a similar proclamation by the Archivist.

Judicial Review Under Article V

Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several States was conclusive upon the courts,[72] it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in *Coleman v. Miller*.[73] This case came up on a writ of *certiorari* to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labor amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that

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[67] Leser v. Garnett, 258 U.S. 130, 137 (1922).

[68] Act of April 20, 1818, § 2, 3 Stat. 439. The language quoted in the text is from Leser v. Garnett, 258 U.S. 130, 137 (1922).

[69] 65 Stat. 710-711, § 2; Reorg. Plan No. 20 of 1950, § 1(c), 64 Stat. 1272.

[70] National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

[71] 256 U.S. 368, 376 (1921).

[72] Leser v. Garnett, 258 U.S. 130 (1922).

[73] 307 U.S. 433 (1939). *Cf.* Fairchild v. Hughes, 258 U.S. 126 (1922), wherein the Court held that a private citizen could not sue in the federal courts to secure an indirect determination of the validity of a constitutional amendment about to be adopted.

the amendment had been previously rejected by the state legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the States, and (3) that the lieutenant governor had no right to cast the deciding vote in the Kansas Senate in favor of ratification.

Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement with regard to the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[74] In an opinion reported as "the opinion of the Court," but in which it appears that only two Justices joined Chief Justice Hughes, who wrote it, it was declared that the writ of mandamus was properly denied, because the question whether a reasonable time had elapsed since submission of the proposal was a nonjusticiable political question, the kinds of considerations entering into deciding being fit for Congress to evaluate, and the question of the effect of a previous rejection upon a ratification was similarly nonjusticiable, because the 1868 Fourteenth Amendment precedent of congressional determination "has been accepted."[75] But with respect to the contention that the lieutenant governor should not have been permitted to cast the deciding vote in favor of ratification, the Court found itself evenly divided, thus accepting the judgment of the Kansas Supreme Court that the state officer had acted validly.[76] However, the unexplained decision

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[74] Coleman v. Miller, 307 U.S. 433, 456, 459 (1939) (Justices Black, Roberts, Frankfurter, and Douglas concurring). Because the four believed that the parties lacked standing to bring the action, id. at 456, 460 (Justice Frankfurter dissenting on this point, joined by the other three Justices), the further discussion of the applicability of the political question doctrine is, strictly speaking, dicta. Justice Stevens, then a circuit judge, also felt free to disregard the opinion because a majority of the Court in Coleman "refused to accept that position." Dyer v. Blair, 390 F. Supp. 1291, 1299-1300 (N.D.Ill. 1975) (three-judge court). *See also* Idaho v. Freeman, 529 F. Supp. 1107, 1125-1126 (D.C.D.Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

[75] Coleman v. Miller, 307 U.S. 433, 447-456 (1939) (Chief Justice Hughes joined by Justices Stone and Reed).

[76] Justices Black, Roberts, Frankfurter, and Douglas thought this issue was nonjusticiable too. Id. at 456. Although all nine Justices joined the rest of the decision, *see* id. at 470, 474 (Justice Butler, joined by Justice McReynolds, dissenting), one

by Chief Justice Hughes and his two concurring Justices that the issue of the lieutenant' governor's vote was justiciable indicates at the least that their position was in disagreement with the view of the other four Justices in the majority that all questions surrounding constitutional amendments are nonjusticiable.[77]

However, *Coleman* does stand as authority for the proposition that at least some decisions with respect to the proposal and ratifications of constitutional amendments are exclusively within the purview of Congress, either because they are textually committed to Congress or because the courts lack adequate criteria of determination to pass on them.[78] But to what extent the political question doctrine encompasses the amendment process and what the standards may be to resolve that particular issue remain elusive of answers.

Justice did not participate in deciding the issue of the lieutenant governor's participation; apparently, Justice McReynolds was the absent Member. Note, 28 Geo. L. J. 199, 200 n.7 (1940). Thus, Chief Justice Hughes and Justices Stone, Reed, and Butler would have been the four finding the issue justiciable.

[77] The strongest argument to the effect that constitutional amendment questions are justiciable is Rees, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 886-901 (1980), and his student note, Comment, *Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court*, 37 LA. L. REV. 896 (1977). Two perspicacious scholars of the Constitution have come to opposite conclusions on the issue. *Compare* Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 414-416 (1983) (there is judicial review), *with* Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 435-436 (1983). Much of the scholarly argument, up to that time, is collected in the ERA-time-extension hearings. Supra. The only recent judicial precedents directly on point found justiciability on at least some questions. Dyer v. Blair, 390 F. Supp. 1291 (N.D.Ill. 1975) (three-judge court); Idaho v. Freeman, 529 F. Supp. 1107 (D.Idaho 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

[78] In Baker v. Carr, 369 U.S. 186, 214 (1962), the Court, in explaining the political question doctrine and categorizing cases, observed that *Coleman* "held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." Both characteristics were features that the Court in *Baker*, 369 U.S. at 217, identified as elements of political questions, *e.g.*, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards or resolving it." Later formulations have adhered to this way of expressing the matter. Powell v. McCormack, 395 U.S. 486 (1969); O'Brien v. Brown, 409 U.S. 1 (1972); Gilligan v. Morgan, 413 U.S. 1 (1973). However, it could be argued that, whatever the Court may say, what it did, particularly in *Powell* but also in *Baker*, largely drains the political question doctrine of its force. *See* Uhler v. AFL-CIO, 468 U.S. 1310 (1984) (Justice Rehnquist on Circuit) (doubting *Coleman*'s vitality in amendment context). *But see* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (opinion of Justices Rehnquist, Stewart, Stevens, and Chief Justice Burger) (relying heavily upon *Coleman* to find an issue of treaty termination nonjusticiable). *Compare* id. at 1001 (Justice Powell concurring) (viewing *Coleman* as limited to its context).

ARTICLE VI

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

CONTENTS

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

ARTICLE VI

Clause 1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

PRIOR DEBTS

There have been no interpretations of this clause.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

NATIONAL SUPREMACY

Marshall's Interpretation of the National Supremacy Clause

Although the Supreme Court had held, prior to Marshall's appointment to the Bench, that the Supremacy Clause rendered null and void a state constitutional or statutory provision which was inconsistent with a treaty executed by the Federal Government,[1] it was left for him to develop the full significance of the clause as applied to acts of Congress. By his vigorous opinions in *McCulloch v. Maryland*[2] and *Gibbons v. Ogden*,[3] he gave the principle a vitality which survived a century of vacillation under the doctrine of dual federalism. In the former case, he asserted broadly that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws

[1] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
[2] 17 U.S. (4 Wheat.) 316 (1819).
[3] 22 U.S. (9 Wheat.) 1 (1824).

enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."[4] From this he concluded that a state tax upon notes issued by a branch of the Bank of the United States was void.

In *Gibbons v. Ogden*, the Court held that certain statutes of New York granting an exclusive right to use steam navigation on the waters of the State were null and void insofar as they applied to vessels licensed by the United States to engage in coastal trade. Said the Chief Justice: "In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of an act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[5]

Task of the Supreme Court Under the Clause: Preemption

In applying the Supremacy Clause to subjects which have been regulated by Congress, the primary task of the Court is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute. When Congress legislates with regard to a subject, the extent and nature of the legal consequences of the regulation are federal questions, the answers to which are to be derived from a consideration of the language and policy of the state. If Congress expressly provides for exclusive federal dominion or if it expressly provides for concurrent federal-state jurisdiction, the task of the Court is simplified, though, of course, there may still be doubtful areas in which interpretation will be necessary.

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[4] 17 U.S. (4 Wheat.) 436 (1819).

[5] 22 U.S. (9 Wheat.) 210-211 (1824). *See* the Court's discussion of *Gibbons* in Douglas v. Seacoast Products, 431 U.S. 265, 274-279 (1977).

Where Congress is silent, however, the Court must itself decide whether the effect of the federal legislation is to oust state jurisdiction.[6]

The Operation of the Supremacy Clause

When Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield.[7] Although the preemptive effect of federal legislation is best known in areas governed by the Commerce Clause, the same effect is present, of course, whenever Congress legislates constitutionally. And the operation of the Supremacy Clause may be seen as well when the authority of Congress is not express but implied, not plenary but dependent upon state acceptance. The latter may be seen in a series of cases concerning the validity of state legislation enacted to bring the States within the various programs authorized by Congress pursuant to the Social Security Act.[8] State participation in the programs is voluntary, technically speaking, and no State is compelled to enact legislation comporting with the requirements of federal law. Once a State is participating, however, any of its legislation which is contrary to federal requirements is void under the Supremacy Clause.[9]

Federal Immunity Laws and State Courts.—An example of the former circumstance is the operation of federal immunity acts[10] to preclude the use in state courts of incriminating statements and testimony given by a witness before a committee of Congress or a

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[6] Treatment of preemption principles and standards is set out under the Commerce Clause, which is the greatest source of preemptive authority.

[7] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-211 (1824). *See, e.g.*, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992); Morales v. TWA, 112 S. Ct. 2031 (1992); Maryland v. Louisiana, 451 U.S. 725, 746 (1981); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

[8] By the Social Security Act of 1935, 49 Stat. 620, 42 U.S.C. § 301 et seq., Congress established a series of programs operative in those States which joined the system and enacted the requisite complying legislation. Although participation is voluntary, the federal tax program underlying in effect induces state participation. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 585-598 (1937).

[9] On the operation of federal spending programs upon state laws, *see* South Dakota v. Dole, 483 U.S. 203 (1987) (under highway funding programs). On the preemptive effect of federal spending laws, *see* Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256 (1985). An early example of States being required to conform their laws to the federal standards is King v. Smith, 392 U.S. 309 (1968). Private parties may compel state acquiescence in federal standards to which they have agreed by participation in the programs through suits under a federal civil rights law (42 U.S.C. § 1983). Maine v. Thiboutot, 448 U.S. 1 (1980). The Court has imposed some federalism constraints in this area by imposing a "clear statement" rule on Congress when it seeks to impose new conditions on States. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 11, 17-18 (1981).

[10] Which operate to compel witnesses to testify even over self-incrimination claims by giving them an equivalent immunity.

federal grand jury.[11] Because Congress in pursuance of its paramount authority to provide for the national defense, as complemented by the Necessary and Proper Clause, is competent to compel testimony of persons which is needful for legislation, it is competent to obtain such testimony over a witness's self-incrimination claim by immunizing him from prosecution on evidence thus revealed not only in federal courts but in state courts as well.[12]

Priority of National Claims Over State Claims.—Anticipating his argument in *McCulloch v. Maryland*,[13] Chief Justice Marshall in 1805 upheld an act of 1792 asserting for the United States a priority of its claims over those of the States against a debtor in bankruptcy.[14] Consistent therewith, federal enactments providing that taxes due to the United States by an insolvent shall have priority in payment over taxes due by him to a State also have been sustained.[15] Similarly, the Federal Government was held entitled to prevail over a citizen enjoying a preference under state law as creditor of an enemy alien bank in the process of liquidation by state authorities.[16] A federal law providing that when a veteran dies in a federal hospital without a will or heirs his personal property shall vest in the United States as trustee for the General Post Fund was held to operate automatically without prior agreement of the veteran with the United States for such disposition and to take precedence over a state claim founded on its escheat law.[17]

Obligation of State Courts Under the Supremacy Clause

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation "is imperative upon the state judges, in their official and not merely in their private capacities. From the

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[11] Adams v. Maryland, 347 U.S. 179 (1954).

[12] Ullmann v. United States, 350 U.S. 422, 434-436 (1956). *See also* Reina v. United States, 364 U.S. 507, 510 (1960).

[13] 17 U.S. (4 Wheat.) 316 (1819).

[14] United States v. Fisher, 6 U.S. (2 Cr.) 358 (1805).

[15] Spokane County v. United States, 279 U.S. 80, 87 (1929). A state requirement that notice of a federal tax lien be filed in conformity with state law in a state office in order to be accorded priority was held to be controlling only insofar as Congress by law had made it so. Remedies for collection of federal taxes are independent of legislative action of the States. United States v. Union Central Life Ins. Co., 368 U.S. 291 (1961). *See also* United States v. Buffalo Savings Bank, 371 U.S. 228 (1963) (State may not avoid priority rules of a federal tax lien by providing that the discharge of state tax liens are to be part of the expenses of a mortgage foreclosure sale); United States v. Pioneer American Ins. Co., 374 U.S. 84 (1963) (Matter of federal law whether a lien created by state law has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien).

[16] Brownell v. Singer, 347 U.S. 403 (1954).

[17] United States v. Oregon, 366 U.S. 643 (1961).

very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land'."[18] State courts are bound then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and laws and treaties but also the interpretations of their meanings by the United States Supreme Court.[19] While States need not specially create courts competent to hear federal claims or necessarily to give courts authority specially, it violates the Supremacy Clause for a state court to refuse to hear a category of federal claims when the court entertains state law actions of a similar nature.[20] The existence of inferior federal courts sitting in the States and exercising often concurrent jurisdiction of subjects has created problems with regard to the degree to which state courts are bound by their rulings. Though the Supreme Court has directed and encouraged the lower federal courts to create a corpus of federal common law,[21] it has not spoken to the effect of such lower court rulings on state courts.

Supremacy Clause Versus the Tenth Amendment

The logic of the Supremacy Clause would seem to require that the powers of Congress be determined by the fair reading of the express and implied grants contained in the Constitution itself, without reference to the powers of the States. For a century after Marshall's death, however, the Court proceeded on the theory that the Tenth Amendment had the effect of withdrawing various matters of internal police from the reach of power expressly committed to Congress. This point of view was originally put forward in *New York City v. Miln*,[22] which was first argued but not decided before Marshall's death. The *Miln* case involved a New York statute which required the captains of vessels entering New York Harbor with aliens aboard to make a report in writing to the Mayor of the

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[18] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816). State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction. Claflin v. Houseman, 93 U.S. 130 (1876); Second Employers' Liability Cases, 223 U.S. 1 (1912); Testa v. Katt, 330 U.S. 386 (1947).

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

[20] Howlett v. Rose, 496 U.S. 356 (1990); Felder v. Casey, 487 U.S. 131 (1988). The Court's re-emphasis upon "dual federalism" has not altered this principle. *See, e.g.*, Printz v. United States, 521 U.S. 898, 905-10 (1997).

[21] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957); Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

[22] 36 U.S. (11 Pet.) 102 (1837).

City, giving certain prescribed information. It might have been distinguished from *Gibbons v. Ogden* on the ground that the statute involved in the earlier case conflicted with an act of Congress, whereas the Court found that no such conflict existed in this case. But the Court was unwilling to rest its decision on that distinction.

Speaking for the majority, Justice Barbour seized the opportunity to proclaim a new doctrine. "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."[23] Justice Story, in dissent, stated that Marshall had heard the previous argument and reached the conclusion that the New York statute was unconstitutional.[24]

The conception of a "complete, unqualified and exclusive" police power residing in the States and limiting the powers of the National Government was endorsed by Chief Justice Taney ten years later in the *License Cases*.[25] In upholding state laws requiring licenses for the sale of alcoholic beverages, including those imported from other States or from foreign countries, he set up the Supreme Court as the final arbiter in drawing the line between the mutually exclusive, reciprocally limiting fields of power occupied by the national and state governments.[26]

Until recently, it appeared that in fact and in theory the Court had repudiated this doctrine,[27] but in *National League of Cities v.*

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[23] Id. at 139.

[24] Id. at 161.

[25] 46 U.S. (5 How.) 504 (1847).

[26] Id. at 573-574.

[27] Representative early cases include NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937); United States v. Darby, 312 U.S. 100 (1941). Among the cases incompatible with the theory was Maryland v. Wirtz, 392 U.S. 183 (1968).

Usery,[28] it revived part of this state police power limitation upon the exercise of delegated federal power. However, the decision was by a closely divided Court and subsequent interpretations closely cabined the development and then overruled the case.

Following the demise of the doctrine of "dual federalism" in the 1930s, the Court confronted the question whether Congress had the power to regulate state conduct and activities to the same extent, primarily under the Commerce Clause, as it did to regulate private conduct and activities to the exclusion of state law.[29] In *United States v. California*,[30] upholding the validity of the application of a federal safety law to a state-owned railroad being operated as a non-profit entity, the Court, speaking through Justice Stone, denied the existence of an implied limitation upon Congress' "plenary power to regulate commerce" when a state instrumentality was involved. "The state can no more deny the power if its exercise has been authorized by Congress than can an individual." While the State in operating the railroad was acting as a sovereign and within the powers reserved to the States, the Court said, its exercise was "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."[31]

A series of cases followed in which the Court refused to construct any state immunity from regulation when Congress acted pursuant to a delegated power.[32] The culmination of this series had been thought to be *Maryland v. Wirtz*,[33] in which the Court upheld the constitutionality of applying the federal wage and hour law to nonprofessional employees of state-operated schools and hos-

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[28] 426 U.S. 833 (1976).

[29] On the doctrine of "dual federalism," *see* the commentary by the originator of the phrase, Professor Corwin. E. CORWIN, THE TWILIGHT OF THE SUPREME COURT—A HISTORY OF OUR CONSTITUTIONAL THEORY 10-51 (1934); THE COMMERCE POWER VERSUS STATES RIGHTS 115-172 (1936); A CONSTITUTION OF POWERS IN A SECULAR STATE 1-28 (1951).

[30] 297 U.S. 175 (1936).

[31] Id. at 183-185.

[32] California v. United States, 320 U.S. 577 (1944) (federal regulation of shipping terminal facilities owned by State); California v. Taylor, 353 U.S. 553 (1957) (Railway Labor Act applies on state-owned railroad); Case v. Bowles, 327 U.S. 92 (1946); Hubler v. Twin Falls County, 327 U.S. 103 (1946) (federal wartime price regulations applied to state transactions; Congress' power effectively to wage war); Board of Trustees v. United States, 289 U.S. 48 (1933) (State university required to pay federal customs duties on imported educational equipment); Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941) (federal condemnation of state lands for flood control project); Sanitary Dist. v. United States, 206 U.S. 405 (1925) (prohibition of State from diverting water from Great Lakes).

[33] 392 U.S. 183 (1968). Justices Douglas and Stewart dissented. Id. at 201.

pitals. In an opinion by Justice Harlan, the Court saw a clear connection between working conditions in these institutions and interstate commerce. Labor conditions in schools and hospitals affect commerce; strikes and work stoppages involving such employees interrupt and burden the flow across state lines of goods purchased by state agencies, and the wages paid have a substantial effect. The Commerce Clause being thus applicable, the Justice wrote, Congress was not constitutionally required to "yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general 'doctrine implied in the Federal Constitution that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other."' ... [I]t is clear that the Federal Government when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character.... [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." [34]

Wirtz was specifically reaffirmed in *Fry v. United States*, [35] in which the Court upheld the constitutionality of presidentially imposed wage and salary controls, pursuant to congressional statute, on all state governmental employees. In dissent, however, Justice Rehnquist propounded a doctrine which was to obtain majority approval in *League of Cities*. [36] In that opinion, he said for the Court:

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[34] Id. at 195, 196-197.

[35] 421 U.S. 542 (1975).

[36] Id. at 549. Essentially, the Justice was required to establish an affirmative constitutional barrier to congressional action. Id. at 552-553. That is, if one asserts only the absence of congressional authority, one's chances of success are dim because of the breadth of the commerce power. But when he asserts that, say, the First or Fifth Amendment bars congressional action concededly within its commerce power, one interposes an affirmative constitutional defense that has a chance of success. It was the Justice's view that the State was "asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." Id. at 553. But whence the affirmative barrier? "[I]t is not the Tenth Amendment *by its terms*...." Id. at 557 (emphasis supplied). Rather, the Amendment was an example of the Framers' understanding that the sovereignty of the States imposed an implied affirmative barrier to the assertion of otherwise valid congressional powers. Id. at 557-559. But the difficulty with this construction is that the equivalence sought to be established by Justice Rehnquist lies *not* between an individual asserting a constitutional limit on delegated powers and a State asserting the same thing but *is* rather between an individual asserting a lack of authority and a State asserting a lack of authority; this equivalence is evident on the face of the Tenth Amendment, which states that the powers not delegated to the United States "are reserved to the States respectively, *or to the people*." (emphasis supplied). The States are thereby accorded no greater interest in restraining the exercise of non-

"[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[37] The standard apparently, in judging between permissible and impermissible federal regulation, is whether there is federal interference with "functions essential to separate and independent existence."[38] In the context of this case, state decisions with respect to the pay of their employees and the hours to be worked were essential aspects of their "freedom to structure integral operations in areas of traditional governmental functions."[39] The line of cases, exemplified by *United States v. California*, was distinguished and preserved on the basis that the state activities there regulated were so unlike the traditional activities of a State that Congress could reach them;[40] *Case v. Bowles* was held distinguishable on the basis that Congress had acted pursuant to its war powers, and to have rejected the power would have impaired national defense;[41] *Fry* was distinguished on the bases that it was emergency legislation tailored to combat a serious national emergency, the means were limited in time and effect, the freeze did not displace state discretion in structuring operations or force a restructuring, and the federal action "operated to reduce the pressure upon state budgets rather than increase them."[42] *Wirtz* was overruled; it permitted Congress to intrude into the conduct of integral and traditional state governmental functions and could not therefore stand.[43]

League of Cities did not prove to be much of a restriction upon congressional power in subsequent decisions. First, its principle was held not to reach to state regulation of private conduct that affects interstate commerce, even as to such matters as state jurisdiction over land within its borders.[44] Second, it was held not to immunize state conduct of a business operation, that is, proprietary activity not like "traditional governmental activities."[45] Third, it was held not to preclude Congress from regulating the way States regulate private activities within the State, even though such state

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delegated power than are the people. *See* Massachusetts v. Mellon, 262 U.S. 447 (1823).

[37] National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[38] Id.

[39] Id. at 852.

[40] Id. at 854.

[41] Id. at 854 n.18.

[42] Id. at 852-853.

[43] Id. at 853-855.

[44] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

[45] United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982).

activity is certainly traditional governmental action, on the theory that because Congress could displace or preempt state regulation it may require the States to regulate in a certain way if they wish to continue to act in this field.[46] Fourth, it was held not to limit Congress when it acts in an emergency or pursuant to its war powers, so that Congress may indeed reach even traditional governmental activity.[47] Fifth, it was held not to apply at all to Congress' enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.[48] Sixth, it apparently was to have no application to the exercise of Congress' spending power with conditions attached.[49] Seventh, not because of the way the Court framed the statement of its doctrinal position, which is absolutist, but because of the way it accommodated precedent and because of Justice Blackmun's concurrence, it was always open to interpretation that Congress was enabled to reach traditional governmental activities not involving employer-employee relations or is enabled to reach even these relations if the effect is "to reduce the pressures upon state budgets rather than increase them."[50] In his concurrence, Justice Blackmun suggested his lack of agreement with "certain possible implications" of the opinion and recast it as a "balancing approach" which "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[51] Indeed, Justice Blackmun's deviation from *League of Cities* in the subsequent cases usually made the difference in the majority dispute.

The Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Auth.*,[52] and seemingly returned to

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[46] FERC v. Mississippi, 456 U.S. 742 (1982).

[47] National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).

[48] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Rome v. United States, 446 U.S. 156, 178-180 (1980).

[49] In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 n.13 (1981), the Court suggested rather ambiguously that *League of Cities* may restrict the federal spending power, citing its reservation of the cases in *League of Cities*, 426 U.S. 852 n.17, but citing also spending clause cases indicating a rational basis standard of review of conditioned spending. Earlier, the Court had summarily affirmed a decision holding that the spending power was not affected by the case. North Carolina ex rel. Morrow v. Califano, 445 F.Supp. 532 (E.D.N.C. 1977) (three-judge court), *affd.* 435 U.S. 962 (1978). No hint of such a limitation is contained in more recent decisions (to be sure, in the aftermath of *League of Cities*' demise). New York v. United States, 505 U.S. 144, 167, 171-72, 185 (1992); South Dakota v. Dole, 483 U.S. 203, 210-212 (1987).

[50] National League of Cities v. Usery, 426 U.S. 833, 846-851 (1976). The quotation in the text is at 853 (one of the elements distinguishing the case from *Fry*).

[51] Id. at 856.

[52] 469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having

the conception of federal supremacy embodied in *Wirtz* and *Fry*. For the most part, the Court indicated, States must seek protection from the impact of federal regulation in the political processes, and not in any limitations imposed on the commerce power or found in the Tenth Amendment. Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren."[53] State autonomy is both limited and protected by the terms of the Constitution itself, hence—ordinarily, at least—exercise of Congress' enumerated powers is not to be limited by "*a priori* definitions of state sovereignty."[54] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[55] There are direct limitations in Art. I, § 10, and "Section 8 . . . works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation."[56] On the other hand, the principal restraints on congressional exercise of the commerce power are to be found not in the Tenth Amendment, in the Commerce Clause itself, or in "judicially created limitations on federal power," but in the structure of the Federal Government and in the political processes.[57] "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."[58] While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits."[59] Thus, argu-

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changed to complete rejection. Justice Blackmun's opinion of the Court was joined by Justices Brennan, White, Marshall, and Stevens. Writing in dissent were Justices Powell (joined by Chief Justice Burger and by Justices Rehnquist and O'Connor), O'Connor (joined by Justices Powell and Rehnquist), and Rehnquist.

[53] Id. at 557.

[54] Id. at 548.

[55] Id. at 549.

[56] Id. at 548.

[57] "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." Id. at 550. The Court cited as prime examples the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.

[58] Id. at 554.

[59] Id. at 556.

ably, the Court has not totally abandoned the *National League of Cities* premise that there are limits on the extent to which federal regulation may burden States as States. Rather, it has stipulated that any such limits on exercise of federal power must be premised on a failure of the political processes to protect state interests, and "must be tailored to compensate for [such] failings ... rather than to dictate a 'sacred province of state autonomy.'" [60]

Further indication of what must be alleged in order to establish affirmative limits to commerce power regulation was provided in *South Carolina v. Baker*. [61] The Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraordinary defects in the national political process" before the Court will intervene. A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." [62] Thus, the general rule is that "limits on Congress' authority to regulate state activities ... are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." [63]

Dissenting in *Garcia*, Justice Rehnquist predicted that the doctrine propounded by the dissenters and by those Justices in *National League of Cities* "will ... in time again command the support of a majority of the Court." [64] As the membership of the Court changed, it appeared that the prediction was proving true. [65] Confronted with the opportunity in *New York v. United States*, [66] to reexamine *Garcia*, the Court instead distinguished it, [67] striking down a federal law on the basis that Congress could not "commandeer" the legislative and administrative processes of state gov-

[60] Id. at 554.
[61] 485 U.S. 505 (1988).
[62] Id. at 512-513.
[63] Id. at 512.
[64] Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 579-580 (1985).
[65] The shift was pronounced in Gregory v. Ashcroft, 501 U.S. 452 (1991), in which the Court, cognizant of the constraints of *Garcia*, chose to apply a "plain statement" rule to construction of a statute seen to be intruding into the heart of state autonomy. Id. at 463. To do otherwise, said Justice O'Connor, was to confront "a potential constitutional problem" under the Tenth Amendment and the guarantee clause of Article IV, § 4. Id. at 463-464.
[66] 505 U.S 144 (1992).
[67] The line of cases exemplified by *Garcia* was said to concern the authority of Congress to subject state governments to generally applicable laws, those covering private concerns as well as the States, necessitating no revisiting of those cases. 505 U.S. at 160.

ernment to compel the administration of federal programs.[68] The line of analysis pursued by the Court makes clear, however, the result when a *Garcia* kind of federal law is reviewed.

That is, because the dispute involved the division of authority between federal and state governments, Justice O'Connor wrote for the Court, one could inquire whether Congress acted under a delegated power or one could ask whether Congress had invaded a state province protected by the Tenth Amendment. But, said the Justice, "the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[69]

Powers delegated to the Nation, therefore, are subject to limitations that reserve power to the States. This limitation is not found in the text of the Tenth Amendment, which is, the Court stated, "but a truism,"[70] but is a direct constraint on Article I powers when an incident of state sovereignty is invaded.[71] The "take title" provision was such an invasion. Both the Federal Government and the States owe political accountability to the people. When Congress encourages States to adopt and administer a federally-prescribed program, both governments maintain their accountability for their decisions. When Congress compels the States to act, state officials will bear the brunt of accountability that properly belongs at the national level.[72] The "take title" provision, because it presented the States with "an unavoidable command", transformed state governments into "regional offices" or "administrative agencies" of the Federal Government, impermissibly undermined the accountability owing the people and was void.[73] Whether viewed as lying outside Congress' enumerated powers or as infringing the core of state sovereignty reserved by the Tenth Amendment, "the provision is inconsistent with the federal structure of our Government established by the Constitution."[74]

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[68] Struck down was a provision of law providing for the disposal of radioactive wastes generated in the United States by government and industry. Placing various responsibilities on the States, the provision sought to compel performance by requiring that any State that failed to provide for the permanent disposal of wastes generated within its borders must take title to, take possession of, and assume liability for the wastes, id. at 505 U.S. at 161, obviously a considerable burden.

[69] Id. at 156.

[70] Id. (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

[71] 505 U.S. at 156.

[72] Id. at 168-69.

[73] Id. at 175-77, 188.

[74] Id. at 177.

Federal laws of general applicability, therefore, are surely subject to examination under the *New York* test rather than under the *Garcia* structural standard. The exercise of Congress' commerce powers will likely be reviewed under a level of close scrutiny in the foreseeable future.

Expanding upon its anti-commandeering rule, the Court in *Printz v. United States*[75] established "categorically" the rule that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[76] At issue in *Printz* was a provision of the Brady Handgun Violence Prevention Act, which required, pending the development by the Attorney General of a national system by which criminal background checks on prospective firearms purchasers could be conducted, the chief law enforcement officers of state and local governments to conduct background checks to ascertain whether applicants were ineligible to purchase handguns. Confronting the absence of any textual basis for a "categorical" rule, the Court looked to history, which in its view demonstrated a paucity of congressional efforts to impose affirmative duties upon the States.[77] More important, the Court relied on the "structural Constitution" to demonstrate that the Constitution of 1787 had not taken from the States "a residuary and inviolable sovereignty,"[78] that it had, in fact and theory, retained a system of "dual sovereignty"[79] reflected in many things but most notably in the constitutional conferral "upon Congress of not all governmental powers, but only discrete, enumerated ones," which was expressed in the Tenth Amendment. Thus, while it had earlier rejected the commandeering of legislative assistance, the Court now made clear that administrative officers and resources were also fenced off from federal power.

The scope of the rule thus expounded was unclear. Particularly, Justice O'Connor in concurrence observed that Congress retained the power to enlist the States through contractual arrangements and on a voluntary basis. More pointedly, she stated that "the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on

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[75] 521 U.S. 898 (1997).

[76] 521 U.S. at 933 (internal quotation marks omitted) (quoting New York v. United States, 505 U.S. 144, 188 (1992)).

[77] 521 U.S. at 904-18. Notably, the Court expressly exempted from this rule the continuing role of the state courts in the enforcement of federal law. Id. at 905-08.

[78] 521 U.S. at 919 (quoting THE FEDERALIST, No. 39 (Madison).

[79] 521 U.S. at 918.

state and local authorities pursuant to its Commerce Clause powers are similarly invalid."[80]

A partial answer was provided in *Reno v. Condon*,[81] in which the Court upheld the Driver's Privacy Protection Act against a charge that it offended the anti-commandeering rule of *New York* and *Printz*. The Act in general limits disclosure and resale without a driver's consent of personal information contained in the records of state motor vehicle departments, and requires disclosure of that information for specified government record-keeping purposes. While conceding that the Act "will require time and effort on the part of state employees," the Court found this imposition permissible because the Act regulates state activities directly rather than requiring states to regulate private activities.[82]

Federal Instrumentalities and Personnel and State Police Power

Federal instrumentalities and agencies have never enjoyed the same degree of immunity from state police regulation as from state taxation. The Court has looked to the nature of each regulation to determine whether it is compatible with the functions committed by Congress to the federal agency. This problem has arisen most often with reference to the applicability of state laws to the operation of national banks. Two correlative propositions have governed the decisions in these cases. The first was stated by Justice Miller in *First National Bank v. Commonwealth*.[83] "[National banks are] subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts are all based on State law. It is only when the State law incapacitates the banks discharging their duties to the government that it becomes unconstitutional."[84] In *Davis v. Elmira Savings Bank*,[85] the Court stated the second proposition thus: "National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties

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[80] 521 U.S. at 936 (citing 42 U.S.C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice)).

[81] 528 U.S. 141 (2000).

[82] 528 U.S. at 150-51.

[83] 76 U.S. (9 Wall.) 353 (1870).

[84] Id. at 362.

[85] 161 U.S. 275 (1896).

or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created." [86]

Similarly, a state law, insofar as it forbids national banks to use the word "saving" or "savings" in their business and advertising is void by reason of conflict with the Federal Reserve Act authorizing such banks to receive savings deposits. [87] However, federal incorporation of a railroad company of itself does not operate to exempt it from control by a State as to business consummated wholly therein. [88] Also, Treasury Department regulations, designed to implement the federal borrowing power (Art. I, § 8, cl. 2) by making United States Savings Bonds attractive to investors and conferring exclusive title thereto upon a surviving joint owner, override contrary state community property laws whereunder a one-half interest in such property remains part of the estate of a decedent co-owner. [89] Similarly, the Patent Office having been granted by Congress an unqualified authorization to license and regulate the conduct throughout the United States of nonlawyers as patent agents, a State, under the guise of prohibiting unauthorized practice of law, is preempted from enjoining such activities of a licensed agent as entail the rendering of legal opinions as to patentability or infringement of patent rights and the preparation and prosecution of application for patents. [90]

The extent to which States may go in regulating contractors who furnish goods or services to the Federal Government is not as clearly established as is their right to tax such dealers. In 1943, a closely divided Court sustained the refusal of the Pennsylvania Milk Control Commission to renew the license of a milk dealer who, in violation of state law, had sold milk to the United States for consumption by troops at an army camp located on land belonging to the State, at prices below the minimum established by the Commission. [91] The majority was unable to find in congressional legislation, or in the Constitution, unaided by congressional enactment, any immunity from such price fixing regulations. On the same day, a different majority held that California could not penalize a milk dealer for selling milk to the War Department at less

[86] Id. at 283.
[87] Franklin Nat'l Bank v. New York, 347 U.S. 273 (1954).
[88] Reagan v. Mercantile Trust Co., 154 U.S. 413 (1894).
[89] Free v. Bland, 369 U.S. 663 (1962).
[90] Sperry v. Florida, 373 U.S. 379 (1963).
[91] Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943).

than the minimum price fixed by state law where the sales and deliveries were made in a territory which had been ceded to the Federal Government by the State and were subject to the exclusive jurisdiction of the former.[92] On the other hand, by virtue of its conflict with standards set forth in the Armed Services Procurement Act, 41 U.S.C. § 152, for determining the letting of contracts to responsible bidders, a state law licensing contractors cannot be enforced against one selected by federal authorities for work on an Air Force base.[93]

Most recently, the Court has done little to clarify the doctrinal difficulties.[94] The Court looked to a "functional" analysis of state regulations, much like the rule covering state taxation. "A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals."[95] In determining whether a regulation discriminates against the Federal Government, "the entire regulatory system should be analyzed."[96]

The Doctrine of Federal Exemption From State Taxation

McCulloch v. Maryland.—Five years after the decision in *McCulloch v. Maryland* that a State may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in *Osborn v. United States Bank*.[97] In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was "contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the Court."[98] To which Marshall replied: "It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control,

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[92] Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285 (1943). *See also* Paul v. United States, 371 U.S. 245 (1963).

[93] Leslie Miller, Inc. v. Arkansas, 353 U.S. 187 (1956).

[94] North Dakota v. United States, 495 U.S. 423 (1990). The difficulty is that the case was five-to-four with a single Justice concurring with a plurality of four to reach the result. Id. at 444. Presumably, the concurrence agreed with the rationale set forth here, disagreeing only in other respects.

[95] Id. at 435. Four dissenting Justices agreed with this principle, but they also would invalidate a state law that "actually and substantially interferes with specific federal programs." Id. at 448, 451-452.

[96] Id. That is, only when the overall effect, when balanced against other regulations applicable to similarly situated persons who do not deal with the government, imposes a discriminatory burden will they be invalidated. The concurring Justice was doubtful of this standard. Id. at 444 (Justice Scalia concurring).

[97] 22 U.S. (9 Wheat.) 738 (1824).

[98] Id. at 865.

which is said to be so objectionable in this instance."[99] Secondly, the appellants relied "greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government. . . . Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors."[100] Marshall accepted this analogy but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the Government were entitled to immunity from taxation upon such transactions.[101] Thus, not only was the decision of *McCulloch v. Maryland* reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

Applicability of Doctrine to Federal Securities.—The first significant extension of the doctrine of the immunity of federal instrumentalities from state taxation came in *Weston v. Charleston*,[102] where Chief Justice Marshall also found in the Supremacy Clause a bar to state taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from state taxation.[103] A modified version of this section remains on the statute books today.[104] The right of Congress to exempt legal tender notes to the same extent as bonds was sustained in *Bank v. Supervisors*,[105] over the objection that such notes circulate as money and should be taxable in the same way as coin. But a state tax on checks issued by the Treasurer of the United States for interest accrued upon government bonds was sustained since it did not in any way affect the credit of the National Government.[106] Similarly, the assessment for an *ad valorem* property tax of an open account for money due under a federal contract,[107] and the inclusion of the value of United States bonds owed by a decedent,

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[99] Id.

[100] Id. at 866.

[101] Id. at 867.

[102] 27 U.S. (2 Pet.) 449 (1829), followed in New York ex rel. Bank of Commerce v. New York City, 67 U.S. (2 Bl.) 620 (1863).

[103] 12 Stat. 709, 710, 1 (1863).

[104] 31 U.S.C. § 3124. The exemption under the statute is no broader than that which the Constitution requires. First Nat'l Bank v. Bartow County Bd. of Tax Assessors, 470 U.S. 583 (1985). The relationship of this statute to another, 12 U.S.C. § 548, governing taxation of shares of national banking associations, has occasioned no little difficulty. American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983); Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983).

[105] 74 U.S. (7 Wall.) 26 (1868).

[106] Hibernia Savings Society v. San Francisco, 200 U.S. 310, 315 (1906).

[107] Smith v. Davis, 323 U.S. 111 (1944).

in measuring an inheritance tax,[108] were held valid, since neither tax would substantially embarrass the power of the United States to secure credit.[109] A state property tax levied on mutual savings banks and federal savings and loan associations and measured by the amount of their capital, surplus, or reserve and undivided profits, but without deduction of the value of their United States securities, was voided as a tax on obligations of the Federal Government. Apart from the fact that the ownership interest of depositors in such institutions was different from that of corporate stockholders, the tax was imposed on the banks which were solely liable for payment thereof.[110]

Income from federal securities is also beyond the reach of the state taxing power as the cases now stand.[111] Nor can such a tax be imposed indirectly upon the stockholders on such part of the corporate dividends as corresponds to the part of the corporation's income which is not assessed, i.e., income from tax exempt bonds.[112] A State may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property of net income of the corporation, including tax exempt United States securities or the income derived therefrom.[113] The designation of a tax is not controlling.[114] Where a so-called "license tax" upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.[115]

Taxation of Government Contractors.—In the course of his opinion in *Osborn v. United States Bank*,[116] Chief Justice Marshall posed the question: "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the

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[108] Plummer v. Coler, 178 U.S. 115 (1900); Blodgett v. Silberman, 277 U.S. 1, 12 (1928).

[109] *Accord*: Rockford Life Ins. Co. v. Illinois Dep't of Revenue, 482 U.S. 182 (1987) (Tax including in an investor's net assets the value of federally-backed securities ("Ginnie Maes") upheld, since it would have no adverse effect on Federal Government's borrowing ability).

[110] Society for Savings v. Bowers, 349 U.S. 143 (1955).

[111] Northwestern Mut. Life Ins. Co. v. Wisconsin, 275 U.S. 136, 140 (1927).

[112] Miller v. Milwaukee, 272 U.S. 713 (1927).

[113] Provident Inst. v. Massachusetts, 73 U.S. (6 Wall.) 611 (1868); Society for Savings v. Coite, 73 U.S. (6 Wall.) 594 (1868); Hamilton Company v. Massachusetts, 73 U.S. (6 Wall.) 632 (1868); Home Ins. Co. v. New York, 134 U.S. 594 (1890); Werner Machine Co. v. Director of Taxation, 350 U.S. 492 (1956).

[114] Macallen v. Massachusetts, 279 U.S. 620, 625 (1929).

[115] Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U.S. 136 (1927).

[116] 22 U.S. (9 Wheat.) 738 (1824).

troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."[117] Today, the question insofar as taxation is concerned is answered in the affirmative. While the early cases looked toward immunity,[118] in *James v. Dravo Contracting Co.*,[119] by a 5-to-4 vote, the Court established the modern doctrine. Upholding a state tax on the gross receipts of a contractor providing services to the Federal Government, the Court said that "'[I]t is not necessary to cripple [the State's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.'"[120] A state-imposed sales tax upon the purchase of goods by a private firm having a cost-plus contract with the Federal Government was sustained, it not being critical to the tax's validity that it would be passed on to the Government.[121] Previously, it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line, who was engaged in carrying the mails as an independent contractor[122] and an excise tax on gasoline sold to a contractor with the Government and used to operate machinery in the construction of levees on the Mississippi River.[123] While the decisions have not set an unwavering line,[124] the Court has in recent years hewed to a very restrictive

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[117] Id. at 867.

[118] The dissent in James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937), observed that the Court was overruling "a century of precedents." *See, e.g.*, Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928) (voiding a state privilege tax on dealers in gasoline as applied to sales by a dealer to the Federal Government for use by Coast Guard). It was in Panhandle that Justice Holmes uttered his riposte to Chief Justice Marshall: "The power to tax is not the power to destroy while this Court sits." Id. at 223 (dissenting).

[119] 302 U.S. 134 (1937).

[120] Id. at 150 (quoting Willcuts v. Bunn, 282 U.S. 216, 225 (1931)).

[121] Alabama v. King & Boozer, 314 U.S. 1 (1941), overruling Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928), and Graves v. Texas Co., 298 U.S. 393 (1936). *See also* Curry v. United States, 314 U.S. 14 (1941). "The Constitution . . . does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." United States v. Boyd, 378 U.S. 39, 44 (1964) (sustaining sales and use taxes on contractors using tangible personal property to carry out government cost-plus contract).

[122] Alward v. Johnson, 282 U.S. 509 (1931).

[123] Trinityfarm Const. Co. v. Grosjean, 291 U.S. 466 (1934).

[124] United States v. Allegheny County, 322 U.S. 174 (1944) (voiding property tax that included in assessment the value of federal machinery held by private party); Kern-Limerick v. Scurlock, 347 U.S. 110 (1954) (voiding gross receipts sales tax applied to contractor purchasing article under agreement whereby he was to act as agent for Government and title to articles purchased passed directly from vendor to United States).

doctrine of immunity. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." [125] Thus, *New Mexico* sustained a state gross receipts tax and a use tax imposed upon contractors with the Federal Government which operated on "advanced funding," drawing on federal deposits so that only federal funds were expended by the contractors to meet their obligations. [126] Of course, Congress may statutorily provide for immunity from taxation of federal contractors generally or in particular programs. [127]

Taxation of Salaries of Employees of Federal Agencies.— Of a piece with *James v. Dravo Contracting Co.* was the decision in *Graves v. New York ex rel. O'Keefe*, [128] handed down two years later. Repudiating the theory "that a tax on income is legally or economically a tax on its source," the Court held that a State could levy a nondiscriminatory income tax upon the salary of an employee of a government corporation. In the opinion of the Court, Justice Stone intimated that Congress could not validly confer such an immunity upon federal employees. "The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes; and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible ex-

[125] United States v. New Mexico, 455 U.S. 720, 735 (1982). *See* South Carolina v. Baker, 485 U.S. 505, 523 (1988).

[126] "[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." United States v. New Mexico, 455 U.S. 720, 734 (1982). Arizona Dep't of Revenue v. Blaze Constr. Co., 119 S. Ct. 957 (1999) (the same rule applies when the contractual services are rendered on an Indian reservation).

[127] James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937); Carson v. Roane-Anderson Co., 342 U.S. 232, 234 (1952); United States v. New Mexico, 455 U.S. 720, 737 (1982). *Roane-Anderson* held that a section of the Atomic Energy Act barred the collection of state sales and use taxes in connection with sales to private companies of personal property used by them in fulfilling their contracts with the AEC. Thereafter, Congress repealed the section for the express purpose of placing AEC contractors on the same footing as other federal contractors, and the Court upheld imposition of the taxes. United States v. Boyd, 378 U.S. 39 (1964).

[128] 306 U.S. 466 (1939), followed in State Comm'n v. Van Cott, 306 U.S. 511 (1939). This case overruled by implication Dobbins v. Erie County, 41 U.S. (16 Pet.) 435 (1842), and New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937), which held the income of federal employees to be immune from State taxation.

tent a restriction on the taxing power which the Constitution has reserved to the state governments."[129] Chief Justice Hughes concurred in the result without opinion. Justices Butler and McReynolds dissented and Justice Frankfurter wrote a concurring opinion in which he reserved judgment as to "whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live."[130]

That question is academic, Congress having consented to state taxation of its employees' compensation as long as the taxation "does not discriminate against the . . . employee, because of the source of the . . . compensation."[131] This statute, the Court has held, "is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity."[132]

Ad Valorem Taxes Under the Doctrine.—Property owned by a federally chartered corporation engaged in private business is subject to state and local *ad valorem* taxes. This was conceded in *McCulloch v. Maryland*,[133] and confirmed a half century later with respect to railroads incorporated by Congress.[134] Similarly, a property tax may be levied against the lands under water which are owned by a person holding a license under the Federal Water Power Act.[135] However, when privately owned property erected by lessees on tax exempt state lands is taxed by a county at less than full value, and houses erected by contractors on land leased from a federal Air Force base are taxed at full value, the latter tax, sole-

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[129] Id. at 487.

[130] Id. at 492.

[131] 4 U.S.C. § 111. The statute, part of the Public Salary Tax Act of 1939, was considered and enacted contemporaneously with the alteration occurring in constitutional law, exemplified by *Graves*. That is, in Helvering v. Gerhardt, 304 U.S. 405 (1938), the Court had overruled precedents and held that Congress could impose nondiscriminatory taxes on the incomes of most state employees, and the 1939 Act had as its primary purpose the imposition of federal income taxes on the salaries of all state and local government employees. Feeling equity required it, Congress included a provision authorizing nondiscriminatory state taxation of federal employees. *Graves* came down while the provision was pending in Congress. *See* Davis v. Michigan Dept. of the Treasury, 489 U.S. 803, 810-814 (1989). For application of the Act to salaries of federal judges, *see* Jefferson County v. Acker, 527 U.S. 423 (1999) (upholding imposition of a local occupational tax).

[132] Id. at 813. This case struck down, as violative of the provision, a state tax imposed on federal retirement benefits but exempting state retirement benefits. *See also* Barker v. Kansas, 503 U.S. 594 (1992) (similarly voiding a state tax on federal military retirement benefits but not reaching state and local government retirees).

[133] 17 U.S. (4 Wheat.) 316, 426 (1819).

[134] Thomson v. Pacific R.R., 76 U.S. (9 Wall.) 579, 588, (1870); Union Pacific R.R. v. Peniston, 85 U.S. (18 Wall.) 5, 31 (1873).

[135] Susquehanna Power Co. v. Tax Comm'n (No. 1), 283 U.S. 291 (1931).

ly by reason of the discrimination against the United States and its lessees, is rendered void.[136] Likewise, when under state laws, a school district does not tax private lessees of state and municipal realty, whose leases are subject to termination at the lessor's option in the event of sale, but does levy a tax, measured by the entire value of the realty, on lessees of United States property utilized for private purposes and whose leases are terminable at the option of the United States in an emergency or upon sale, the discrimination voided the tax collected from the latter. "A state tax may not discriminate against the Government or those with whom it deals" in the absence of significant differences justifying levy of higher taxes on lessees of federal property.[137] Land conveyed by the United States to a corporation for dry dock purposes was subject to a general property tax, despite a reservation in the conveyance of a right to free use of the dry dock and a provision for forfeiture in case of the continued unfitness of the dry dock for use or the use of land for other purposes.[138] Also, where equitable title has passed to the purchaser of land from the Government, a State may tax the equitable owner on the full value thereof, despite retention of legal title;[139] but, in the case of reclamation entries, the tax may not be collected until the equitable title passes.[140] In the pioneer case of *Van Brocklin v. Tennessee*,[141] the State was denied the right to sell for taxes lands which the United States owned at the time the taxes were levied, but in which it had ceased to have any interest at the time of sale. Similarly, a State cannot assess land in the hands of private owners for benefits from a road improvement completed while it was owned by the United States.[142]

In 1944, with two dissents, the Court held that where the Government purchased movable machinery and leased it to a private contractor the lessee could not be taxed on the full value of the equipment.[143] Twelve years later, and with a like number of Justices dissenting, the Court upheld the following taxes imposed on federal contractors: (1) a municipal tax levied pursuant to a state

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[136] Moses Lake Homes v. Grant County, 365 U.S. 744 (1961).

[137] Phillips Chemical Co. v. Dumas School Dist., 361 U.S. 376, 383, 387 (1960). In Offutt Housing Co. v. Sarpy County, 351 U.S. 253 (1956), a housing company was held liable for county personal property taxes on the ground that the Government had consented to state taxation of the company's interest as lessee. Upon its completion of housing accommodations at an Air Force Base, the company had leased the houses and the furniture therein from the Federal Government.

[138] Baltimore Shipbuilding Co. v. Baltimore, 195 U.S. 375 (1904).

[139] Northern Pacific R.R. v. Myers, 172 U.S. 589 (1899); New Brunswick v. United States, 276 U.S. 547 (1928).

[140] Irwin v. Wright, 258 U.S. 219 (1922).

[141] 117 U.S. 151 (1886).

[142] Lee v. Osceola Imp. Dist., 268 U.S. 643 (1925).

[143] United States v. Allegheny County, 322 U.S. 174 (1944).

law which stipulated that when tax exempt real property is used by a private firm for profit, the latter is subject to taxation to the same extent as if it owned the property, and based upon the value of real property, a factory, owned by the United States and made available under a lease permitting the contracting corporation to deduct such taxes from rentals paid by it; the tax was collectible only by direct action against the contractor for a debt owed, and was not applicable to federal properties on which payments in lieu of taxes are made; (2) a municipal tax, levied under the authority of the same state law, based on the value of the realty owned by the United States, and collected from a cost-plus-fixed-fee contractor, who paid no rent but agreed not to include any part of the cost of the facilities furnished by the Government in the price of goods supplied under the contract; (3) another municipal tax levied in the same State against a federal subcontractor, and computed on the value of materials and work in process in his possession, notwithstanding that title thereto had passed to the United States following his receipt of installment payments.[144]

In sustaining the first tax, the Court held that it was imposed, not on the Government or on its property, but upon a private lessee, that it was computed by the value of the use to the contractor of the federally leased property, and that it was nondiscriminatory; that is, it was designed to equalize the tax burden carried by private business using exempt property with that of similar businesses using taxed property. Distinguishing the *Allegheny* case, the Court maintained that in this older decision, the tax invalidated was imposed directly on federal property and that the question of the legality of a privilege on use and possession of such property had been expressly reserved therein. Also insofar as the economic incidents of such tax on private use curtails the net rental accruing to the Government, such burden was viewed as insufficient to vitiate the tax.[145]

Deeming the second and third taxes similar to the first, the Court sustained them as taxes on the privilege of using federal property in the conduct of private business for profit. With reference to the second, the Court emphasized that the Government had reserved no right of control over the contractor and, hence, the latter could not be viewed as an agent of the Government entitled

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[144] United States v. City of Detroit, 355 U.S. 466 (1958). The Court more recently has stated that Allegheny County "in large part was overruled" by Detroit. United States v. New Mexico, 455 U.S. 720, 732 (1982).

[145] United States v. City of Detroit, 355 U.S. 478, 482, 483 (1958). *See also* California Bd. of Equalization v. Sierra Summit, 490 U.S. 844 (1989).

to the immunity derivable from that status.[146] As to the third tax, the Court asserted that there was no difference between taxing a private party for the privilege of using property he possesses, and taxing him for possessing property which he uses; for, in both instances, the use was private profit. Moreover, the economic burden thrust upon the Government was viewed as even more remote than in the administration of the first two taxes.[147]

Federal Property and Functions.—Property owned by the United States is, of course, wholly immune from state taxation.[148] No State can regulate, by the imposition of an inspection fee, any activity carried on by the United States directly through its own agents and employees.[149] An early case, the authority of which is now uncertain, held invalid a flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business.[150]

Federally Chartered Finance Agencies: Statutory Exemptions.—Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent.[151] Immediately after the Supreme Court construed the statute authorizing the States to tax national bank shares as allowing a tax on the preferred shares of such a bank held by the Reconstruction Finance Corporation,[152] Congress passed a law exempting such shares from taxation. The Court upheld this measure, saying: "When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant re-

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[146] United States v. Township of Muskegon, 355 U.S. 484 (1958).

[147] City of Detroit v. Murray Corp., 355 U.S. 489 (1958). In United States v. County of Fresno, 429 U.S. 452 (1977), these cases were reaffirmed and applied to sustain a tax imposed on the possessory interests of United States Forest Service employees in housing located in national forests within the county and supplied to the employees by the Forest Service as part of their compensation. A State or local government may raise revenues on the basis of property owned by the United States as long as it is in possession or use by the private citizen that is being taxed.

[148] Clallam County v. United States, 263 U.S. 341 (1923). *See also* Cleveland v. United States, 323 U.S. 329, 333 (1945); United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973); United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975).

[149] Mayo v. United States, 319 U.S. 441 (1943). A municipal tax on the privilege of working within the city, levied at the rate of one percent of earnings, although not deemed to be an income tax under state law, was sustained as such when collected from employees of a naval ordinance plant by reason of federal assent to that type of tax expressed in the Buck Act. 4 U.S.C. §§ 105-110. Howard v. Commissioners, 344 U.S. 624 (1953).

[150] Telegraph Co. v. Texas, 105 U.S. 460, 464 (1882).

[151] Des Moines Bank v. Fairweather, 263 U.S. 103, 106 (1923); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 669 (1899); First Nat'l Bank v. Adams, 258 U.S. 362 (1922); Michigan Nat'l Bank v. Michigan, 365 U.S. 467 (1961).

[152] Baltimore Nat'l Bank v. Tax Comm'n, 297 U.S. 209 (1936).

mained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will." [153] In *Pittman v. Home Owners' Corp.*, [154] the Court sustained the power of Congress under the Necessary and Proper Clause to immunize the activities of the Corporation from state taxation; and in *Federal Land Bank v. Bismarck Lumber Co.*, [155] the like result was reached with respect to an attempt by the State to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by foreclosure or mortgages. The State's principal argument proceeded thus: "Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositories and fiscal agents for the federal government and providing a market for government bonds; all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore § 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions." [156] The Court rejected this argument and invalidated the tax saying: "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. . . . It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental." [157]

Similarly, the lease by a federal land bank of oil and gas in a mineral estate, which it had reserved in land originally acquired through foreclosure and thereafter had conveyed to a third party, was held immune from a state personal property tax levied on the lease and on the royalties accruing thereunder. The fact that at the time of the conveyance and lease, the bank had recouped its entire loss resulting from the foreclosure did not operate to convert the mineral estate and lease into a non-governmental activity no longer entitled to exemption. [158] However, in the absence of federal legislation, a state law laying a percentage tax on the users of safety de-

[153] Maricopa County v. Valley Bank, 318 U.S. 357, 362, (1943).
[154] 308 U.S. 21 (1939).
[155] 314 U.S. 95 (1941).
[156] Id. at 101.
[157] Id. at 102.
[158] Federal Land Bank v. Kiowa County, 368 U.S. 146 (1961).

posit services, measured by the bank's charges therefore, was held valid as applied to national banks. The tax, being on the user, did not, the Court held, impose an intrinsically unconstitutional burden on a federal instrumentality.[159]

Royalties.—In 1928, the Court went so far as to hold that a State could not tax as income royalties for the use of a patent issued by the United States.[160] This proposition was soon overruled in *Fox Film Corp. v. Doyal*,[161] where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Likewise a State may lay a franchise tax on corporations, measured by the net income from all sources and applicable to income from copyright royalties.[162]

Immunity of Lessees of Indian Lands.—Another line of anomalous decisions conferring tax immunity upon lessees of restricted Indian lands was overruled in 1949. The first of these cases, *Choctaw, O. & G. R.R. v. Harrison*,[163] held that a gross production tax on oil, gas, and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next, the Court held the lease itself a federal instrumentality immune from taxation.[164] A modified gross production tax imposed in lieu of all ad valorem taxes was invalidated in two *per curiam* decisions.[165] In *Gillespie v. Oklahoma*,[166] a tax upon net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the State was held inapplicable to oil produced on restricted Indian lands.[167] In harmony with the trend to restricting immunity implied from the Constitution to activities of the Government itself, the Court overruled all these decisions in *Oklahoma Tax Comm'n v. Texas Co.* and held that a lessee of mineral rights in restricted Indian lands was subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant him immunity.[168]

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[159] Colorado Bank v. Bedford, 310 U.S. 41 (1940).

[160] Long v. Rockwood, 277 U.S. 142 (1928).

[161] 286 U.S. 123 (1932).

[162] Educational Films Corp. v. Ward, 282 U.S. 379 (1931).

[163] 235 U.S. 292 (1914).

[164] Indian Oil Co. v. Oklahoma, 240 U.S. 522 (1916).

[165] Howard v. Gipsy Oil Co., 247 U.S. 503 (1918); Large Oil Co. v. Howard, 248 U.S. 549 (1919).

[166] 257 U.S. 501 (1922).

[167] Oklahoma v. Barnsdall Corp., 296 U.S. 521 (1936).

[168] 336 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity lessees of Indian lands from state taxation, which he found

Summation and Evaluation

Although *McCulloch v. Maryland* and *Gibbons v. Ogden* were expressions of a single thesis, the supremacy of the National Government, their development after Marshall's death has been sharply divergent. During the period when *Gibbons v. Ogden* was eclipsed by the theory of dual federalism, the doctrine of *McCulloch v. Maryland* was not merely followed but greatly extended as a restraint on state interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the more extreme positions taken in reliance upon *McCulloch v. Maryland*. Today, the application of the Supremacy Clause is becoming, to an ever increasing degree, a matter of statutory interpretation; a determination whether state regulations can be reconciled with the language and policy of federal enactments. In the field of taxation, the Court has all but wiped out the private immunities previously implied from the Constitution without explicit legislative command. Broadly speaking, the immunity which remains is limited to activities of the Government itself, and to that which is explicitly created by statute, e.g., that granted to federal securities and to fiscal institutions chartered by Congress. But the term, activities, will be broadly construed.

Clause 3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

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to stem from early rulings that tribal lands are themselves immune. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); The New York Indians, 72 U.S. (5 Wall.) 761 (1867). One of the first steps taken to curtail the scope of the immunity was Shaw v. Oil Corp., 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to state taxation. Congress soon upset the decision, however, and its act was sustained in Board of County Comm'rs v. Seber, 318 U.S. 705 (1943).

OATH OF OFFICE

Power of Congress in Respect to Oaths

Congress may require no other oath of fidelity to the Constitution, but it may add to this oath such other oath of office as its wisdom may require.[169] It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law,[170] and the same rule holds in the case of the States.[171]

National Duties of State Officers

Commenting in *The Federalist* on the requirement that state officers, as well as members of the state legislatures, shall be bound by oath or affirmation to support the Constitution, Hamilton wrote: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and it will be rendered auxiliary to the enforcement of its laws."[172] The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention: "They [the States] are the instruments upon which the Union must frequently depend for the support and execution of their powers . . ."[173] Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,[174] and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789[175] not only left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different States and in concurrent possession of the rest, and by other sections state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, examples of the principle that federal law is law to be applied by the state courts, but also

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[169] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819).

[170] Ex parte Garland, 71 U.S. (4 Wall.) 333, 337 (1867).

[171] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867). *See also* Bond v. Floyd, 385 U.S. 116 (1966), where the Supreme Court held that antiwar statements made by a newly elected member of the Georgia House of Representatives were not inconsistent with the oath of office, pledging support to the federal Constitution.

[172] No. 27, (J. Cooke ed. 1961), 175 (emphasis in original). *See also*, id. at No. 45, 312-313 (Madison).

[173] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 404 (rev. ed. 1937).

[174] *See* Article I, § 3, cl. 1; § 4, cl. 1; 10; Article II, § 1, cl. 2; Article III, 2, cl. 2; Article IV, §§ 1, 2; Article V; Amendments 13, 14, 15, 17, 19, 25, and 26.

[175] 1 Stat. 73 (1789).

any justice of the peace or other magistrates of any of the States were authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. From the beginning, Congress enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[176] Pursuant to the same idea of treating state governmental organs as available to the National Government for administrative purposes, the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one State to another exclusively to the state executives.[177]

With the rise of the doctrine of States Rights and of the equal sovereignty of the States with the National Government, the availability of the former as instruments of the latter in the execution of its power came to be questioned.[178] In *Prigg v. Pennsylvania*,[179] decided in 1842, the constitutionality of the provision of the act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in *Kentucky v. Dennison*,[180] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it "the duty" of the Chief Executive of a State to render up a fugitive from justice upon the demand of the Chief Executive of the State from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In the *Prigg* case the Court, speaking by Justice Story, said that "while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."[181] Subsequent cases confirmed the point that Congress could authorize willing state offi-

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[176] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1187 (1938); Barnett, *Cooperation Between the Federal and State Governments*, 7 ORE. L. REV. 267 (1928). *See also* J. CLARK, THE RISE OF A NEW FEDERALISM (1938); E. CORWIN, COURT OVER CONSTITUTION 148-168 (1938).

[177] 1 Stat. 302 (1793).

[178] For the development of opinion, especially on the part of state courts, adverse to the validity of such legislation, *see* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 396-404 (1826).

[179] 41 U.S. (16 Pet.) 539 (1842).

[180] 65 U.S. (24 How.) 66 (1861).

[181] 41 U.S. (16 Pet.) 539, 622 (1842). *See also* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108 (1861). The word "magistrates" in this passage does not refer solely to judicial officers but reflects the usage in that era in which officers generally were denominated magistrates; the power thus upheld is not the related but separate issue of the utilization of state courts to enforce federal law.

cers to perform such federal duties.[182] Indeed, when Congress in the Selective Service Act of 1917 authorized enforcement to a great extent through state employees, the Court rejected "as too wanting in merit to require further notice" the contention that the Act was invalid because of this delegation.[183] State officials were frequently employed in the enforcement of the National Prohibition Act, and suits to abate nuisances as defined by the statute were authorized to be brought, in the name of the United States, not only by federal officials, but also by "any prosecuting attorney of any State or any subdivision thereof."[184]

In the *Dennison* case, however, it was held that while Congress could delegate it could not require performance of an obligation. The "duty" of state executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty." Said Chief Justice Taney for the Court: "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it[.] . . . It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution."[185]

Eighteen years later, in *Ex parte Siebold*,[186] the Court sustained the right of Congress, under Article I, § 4, cl. 1 of the Con-

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[182] United States v. Jones, 109 U.S. 513, 519 (1883); Robertson v. Baldwin, 165 U.S. 275, 280 (1897); Dallemagne v. Moisan, 197 U.S. 169, 174 (1905); Holmgren v. United States, 217 U.S. 509, 517 (1910); Parker v. Richard, 250 U.S. 235, 239 (1919).

[183] Selective Draft Law Cases, 245 U.S. 366, 389 (1918). The Act was 40 Stat. 76 (1917).

[184] 41 Stat. 314, § 22. In at least two States, the practice was approved by state appellate courts. Carse v. Marsh, 189 Cal. 743, 210 Pac. 257 (1922); United States v. Richards, 201 Wis. 130, 229 N.W. 675 (1930). On this and other issues under the Act, *see* Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 VA. L. REV. 86 (1922).

[185] 65 U.S. (24 How.) 66, 107-108 (1861).

[186] 100 U.S. 371 (1880).

stitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. While the doctrine of the holding was expressly confined to cases in which the National Government and the States enjoy "a concurrent power over the same subject matter," no attempt was made to catalogue such cases. Moreover, the outlook of Justice Bradley's opinion for the Court was decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns, even in a matter in which they are mutually concerned." To this Justice Bradley replied: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and fears and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." [187]

Conflict thus developed early between these two doctrinal lines. But it was the *Siebold* line that was to prevail. Enforcement of obligations upon state officials through mandamus or through injunctions was readily available, even when the State itself was immune, through the fiction of *Ex parte Young*, [188] under which a state official could be sued in his official capacity but without the immunities attaching to his official capacity. Although the obligations were, for a long period, in their origin based on the Federal Constitution, the capacity of Congress to enforce statutory obligations through judicial action was little doubted. [189] Nonetheless, it was only recently that the Court squarely overruled *Dennison*. "If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' ... basic constitutional prin-

[187] Id. at 392.

[188] 209 U.S. 123 (1908). *See also* Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876).

[189] Maine v. Thiboutot, 448 U.S. 1 (1980).

ciples now point as clearly the other way." [190] That case is doubly important, inasmuch as the Court spoke not only to the extradition clause and the federal statute directly enforcing it, but it also enforced a purely statutory right on behalf of a Territory that could not claim for itself rights under the clause. [191]

Even as the Court imposes new federalism limits upon Congress' powers to regulate the States as States, it has reaffirmed the principle that Congress may authorize the federal courts to compel state officials to comply with federal law, statutory as well as constitutional. "[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." [192]

No doubt, there is tension between the exercise of Congress' power to impose duties on state officials [193] and the developing doctrine under which the Court holds that Congress may not "commandeer" state legislative or administrative processes in the enforcement of federal programs. [194] However, the existence of the Supremacy Clause and the federal oath of office, as well as a body of precedent indicates that coexistence of the two lines of principles will be maintained.

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[190] Puerto Rico v. Branstad, 483 U.S. 219, 227 (1987) (*Dennison* "rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably").

[191] In including territories in the statute, Congress acted under the territorial clause rather than under the extradition clause. New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909).

[192] New York v. United States, 112 S. Ct. 2408, 2430 (1992). *See also* FERC v. Mississippi, 456 U.S. 742, 761-765 (1982); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979); Illinois v. City of Milwaukee, 406 U.S. 91, 106-108 (1972).

[193] The practice continues. *See* P.L. 94-435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (authorizing state attorneys general to bring *parens patriae* antitrust actions in the name of the State to secure monetary relief for damages to the citizens of the State); Medical Waste Tracking Act of 1988, P. L. 100-582, 102 Stat. 2955, 42 U.S.C. § 6992f (authorizing States to impose civil and possibly criminal penalties for violations of the Act); Brady Handgun Violence Prevention Act, P.L. 103-159, tit. I, 107 Stat. 1536, 18 U.S.C. § 922s (imposing on chief law enforcement officer of each jurisdiction to ascertain whether prospective firearms purchaser his disqualifying record).

[194] New York v. United States, 112 S. Ct. 2408 (1992).

RATIFICATION

ARTICLE VII

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

IN GENERAL

In *Owings v. Speed* [1] the question at issue was whether the Constitution of the United States operated upon an act of Virginia passed in 1788. The Court held it did not, stating in part:

"The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'"

"Both Governments could not be understood to exist at the same time. The New Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day proceeding that on which the Members of the new Congress were directed to assemble."

"The resolution of the Convention might originally have suggested a doubt, whether the Government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789 . . . ."

[1] 18 U.S. (5 Wheat.) 420, 422-423 (1820).

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ACTS OF CONGRESS
HELD UNCONSTITUTIONAL IN WHOLE OR
IN PART BY THE
SUPREME COURT OF THE UNITED STATES

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

1. Act of Sept. 24, 1789 (1 Stat. 81, § 13, in part).

Provision that ". . . [the Supreme Court] shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any . . . persons holding office, under authority of the United States" as applied to the issue of mandamus to the Secretary of State requiring him to deliver to plaintiff a commission (duly signed by the President) as justice of the peace in the District of Columbia held an attempt to enlarge the original jurisdiction of the Supreme Court, fixed by Article III, § 2.

Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

2. Act of Feb. 20, 1812 (2 Stat. 677).

Provisions establishing board of revision to annul titles conferred many years previously by governors of the Northwest Territory were held violative of the due process clause of the Fifth Amendment.

Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1868).

3. Act of Mar. 6, 1820 (3 Stat. 548, § 8, proviso).

The Missouri Compromise, prohibiting slavery within the Louisiana Territory north of 36° 30' except Missouri, held not warranted as a regulation of Territory belonging to the United States under Article IV, § 3, clause 2 (and see Fifth Amendment).

Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
Concurring: Taney, C.J.
Concurring specially: Wayne, Nelson, Grier, Daniel, Campbell, Catron.
Dissenting: McLean, Curtis.

4. Act of Feb. 25, 1862 (12 Stat. 345, § 1); July 11, 1862 (12 Stat. 532, § 1); March 3, 1863 (12 Stat. 711, § 3), each in part only.

"Legal tender clauses," making noninterest-bearing United States notes legal tender in payment of "all debts, public and private," so far as applied to debts contracted before passage of the act, held not within express or implied powers of Congress under Article I, § 8, and inconsistent with Article I, § 10, and Fifth Amendment.

Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); overruled in *Knox v. Lee (Legal Tender Cases)*, 79 U.S. (12 Wall.) 457 (1871).
Concurring: Chase, C.J., Nelson, Clifford, Grier, Field.
Dissenting: Miller, Swayne, Davis.

5. Act of May 20, 1862 (§ 35, 12 Stat. 394); Act of May 21, 1862 (12 Stat. 407); Act of June 25, 1864 (13 Stat. 187); Act of July 23, 1866 (14 Stat. 216); Revised Statutes Relating to the District of Columbia, Act of June 22, 1874, (§§ 281, 282, 294, 304, 18 Stat. pt. 2).

   Provisions of law requiring, or construed to require, racial separation in the schools of the District of Columbia, held to violate the equal protection component of the due process clause of the Fifth Amendment.

   Bolling v. Sharpe, 347 U.S. 497 (1954).

6. Act of Mar. 3, 1863 (12 Stat. 756, § 5).

   "So much of the fifth section . . . as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void" under the Seventh Amendment.

   The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1870).

7. Act of Mar. 3, 1863 (12 Stat. 766, § 5).

   Provision for an appeal from the Court of Claims to the Supreme Court--there being, at the time, a further provision (§ 14) requiring an estimate by the Secretary of the Treasury before payment of final judgment, held to contravene the judicial finality intended by the Constitution, Article III.

   Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865). (Case was dismissed without opinion; the grounds upon which this decision was made were stated in a posthumous opinion by Chief Justice Taney printed in the appendix to volume 117 U.S. 697.)

8. Act of June 30, 1864 (13 Stat. 311, § 13).

   Provision that "any prize cause now pending in any circuit court shall, on the application of all parties in interest . . . be transferred by that court to the Supreme Court. . .," as applied in a case where no action had been taken in the Circuit Court on the appeal from the district court, held to propose an appeal procedure not within Article III, § 2.

   The Alicia, 74 U.S. (7 Wall.) 571 (1869).

9. Act of Jan. 24, 1865 (13 Stat. 424).

   Requirement of a test oath (disavowing actions in hostility to the United States) before admission to appear as attorney in a federal court by virtue of any previous admission, held invalid as applied to an attorney who had been pardoned by the President for all offenses during the Rebellion--as ex post facto (Article I, § 9, clause 3) and an interference with the pardoning power (Article II, § 2, clause 1).

   Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867).

Concurring: Field, Wayne, Grier, Nelson, Clifford.
Dissenting: Miller, Swayne, Davis, Chase, C.J.

10. Act of Mar. 2, 1867 (14 Stat. 484, § 29).

General prohibition on sale of naphtha, etc., for illuminating purposes, if inflammable at less temperature than 110° F., held invalid "except so far as the section named operates within the United States, but without the limits of any State," as being a mere police regulation.

United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870).

11. Act of May 31, 1870 (16 Stat. 140, §§ 3, 4).

Provisions penalizing (1) refusal of local election official to permit voting by persons offering to qualify under State laws, applicable to any citizens; and (2) hindering of any person from qualifying or voting, held invalid under Fifteenth Amendment.

United States v. Reese, 92 U.S. 214 (1876).
Concurring: Waite, C.J., Miller, Field, Bradley, Swayne, Davis, Strong.
Dissenting: Clifford, Hunt.

12. Act of July 12, 1870 (16 Stat. 235).

Provision making Presidential pardons inadmissible in evidence in Court of Claims, prohibiting their use by that court in deciding claims or appeals, and requiring dismissal of appeals by the Supreme Court in cases where proof of loyalty had been made otherwise than as prescribed by law, held an interference with judicial power under Article III, § 1, and with the pardoning power under Article II, § 2, clause 1.

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
Concurring: Chase, C.J., Nelson, Swayne, Davis, Strong, Clifford, Field.
Dissenting: Miller, Bradley.

13. Act of Mar. 3, 1873 (ch. 258, § 2, 17 Stat. 599, recodified in 39 U.S.C. § 3001(e)(2)).

Comstock Act provision barring from the mails any unsolicited advertisement for contraceptives, as applied to circulars and flyers promoting prophylactics or containing information discussing the desirability and availability of prophylactics, violates the free speech clause of the First Amendment.

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).
Justices concurring: Marshall, White, Blackmun, Powell, Burger, C.J.
Justices concurring specially: Rehnquist, O'Connor, Stevens.

14. Act of June 22, 1874 (18 Stat. 1878, § 4).

Provision authorizing federal courts, in suits for forfeitures under revenue and custom laws, to require production of documents, with allegations expected to be proved therein to be taken as proved on

failure to produce such documents, was held violative of the search and seizure provision of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment.

Boyd v. United States, 116 U.S. 616 (1886).
Concurring: Bradley, Field, Harlan, Woods, Matthews, Gray, Blatchford.
Concurring specially: Miller, Waite, C.J.

15. Revised Statutes 1977 (Act of May 31, 1870, 16 Stat. 144).

Provision that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .," held invalid under the Thirteenth Amendment.

Hodges v. United States, 203 U.S. 1 (1906), overruled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968).
Concurring: Brewer, Brown, Fuller, Peckham, McKenna, Holmes, Moody, White, C.J.
Dissenting: Harlan, Day.

16. Revised Statutes 4937-4947 (Act of July 8, 1870, 16 Stat. 210), and Act of August 14, 1876 (19 Stat. 141).

Original trademark law, applying to marks "for exclusive use within the United States," and a penal act designed solely for the protection of rights defined in the earlier measure, held not supportable by Article I, § 8, clause 8 (copyright clause), nor Article I, § 8, clause 3, by reason of its application to intrastate as well as interstate commerce.

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

17. Revised Statutes 5132, subdivision 9 (Act of Mar. 2, 1867, 14 Stat. 539).

Provision penalizing "any person respecting whom bankruptcy proceedings are commenced . . . who, within 3 months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud . . . ," held a police regulation not within the bankruptcy power (Article I, § 4, clause 4).

United States v. Fox, 95 U.S. 670 (1878).

18. Revised Statutes 5507 (Act of May 31, 1870, 16 Stat. 141, 4).

Provision penalizing "every person who prevents, hinders, controls, or intimidates another from exercising . . . the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery . . .," held not authorized by the Fifteenth Amendment.

James v. Bowman, 190 U.S. 127 (1903).
Concurring: Brewer, Fuller, Peckham, Holmes, Day, White, C.J.

Dissenting: Harlan, Brown.

19. Revised Statutes 5519 (Act of Apr. 20, 1871, 17 Stat. 13, § 2).

Section providing punishment in case "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws . . .," held invalid as not being directed at state action proscribed by the Fourteenth Amendment.

United States v. Harris, 106 U.S. 629 (1883).
Concurring: Woods, Miller, Bradley, Gray, Field, Matthews, Blatchford, White, C.J.
Dissenting: Harlan.

20. Revised Statutes of the District of Columbia, § 1064 (Act of June 17, 1870, 16 Stat. 154,§ 3).

Provision that "prosecutions in the police court [of the District of Columbia] shall be by information under oath, without indictment by grand jury or trial by petit jury," as applied to punishment for conspiracy, held to contravene Article III, § 2, clause 3, requiring jury trial of all crimes.

Callan v. Wilson, 127 U.S. 540 (1888).

21. Act of Mar. 1, 1875 (18 Stat. 336, §§ 1, 2).

Provision "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude"--subject to penalty, held not to be supported by the Thirteenth or Fourteenth Amendments.

Civil Rights Cases, 109 U.S. 3 (1883), as to operation within States.
Concurring: Bradley, Miller, Field, Woods, Matthews, Gray, Blatchford, Waite, C.J.
Dissenting: Harlan.

22. Act of Mar. 3, 1875 (18 Stat. 479, § 2).

Provision that "if the party [i.e., a person stealing property from the United States] has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against [the] receiver that the property of the United States therein described has been embezzled, stolen, or purloined," held to contravene the Sixth Amendment.

Kirby v. United States, 174 U.S. 47 (1899).

Concurring: Harlan, Gray, Shiras, White, Peckham, Fuller, C.J.
Dissenting: Brown, McKenna.

23. Act of July 12, 1876 (19 Stat. 80, § 6, in part).

Provision that "postmasters of the first, second, and third classes . . . may be removed by the President by and with the advice and consent of the Senate," held to infringe the executive power under Article II, § 1, clause 1.

Myers v. United States, 272 U.S. 52 (1926).
Concurring: Taft, C.J., Van Devanter, Sutherland, Butler, Sanford, Stone.
Dissenting: Holmes, McReynolds, Brandeis.

24. Act of Aug. 11, 1888 (25 Stat. 411).

Directive, in a provision for the purchase or condemnation of a certain lock and dam in the Monongahela River, that ". . . in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated . . .," held to contravene the Fifth Amendment.

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

25. Act of May 5, 1892 (27 Stat. 25, § 4).

Provision of a Chinese exclusion act, that Chinese persons "convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding 1 year and thereafter removed from the United States . . . " (such conviction and judgment being had before a justice, judge, or commissioner upon a summary hearing), held to contravene the Fifth and Sixth Amendments.

Wong Wing v. United States, 163 U.S. 228 (1896).
Concurring: Shiras, Harlan, Gray, Brown, White, Peckham, Fuller, C.J.
Concurring in part and dissenting in part: Field.

26. Joint Resolution of August 4, 1894 (28 Stat. 1018, No. 41).

Provision authorizing the Secretary of the Interior to approve a second lease of certain land by an Indian chief in Minnesota (granted to lessor's ancestor by art. 9 of a treaty with the Chippewa Indians), held an interference with judicial interpretation of treaties under Article III, § 2, clause 1 (and repugnant to the Fifth Amendment).

Jones v. Meehan, 175 U.S. 1 (1899).

27. Act of Aug. 27, 1894 (28 Stat. 553-60, §§ 27-37).

Income tax provisions of the tariff act of 1894. "The tax imposed by §§ 27 and 37, inclusive . . . so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation [Article I, § 2, clause 3],

all those sections, constituting one entire scheme of taxation, are necessarily invalid" (158 U.S. 601, 637).

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), and rehearing, 158 U.S. 601 (1895).
Concurring: Fuller, C.J., Gray, Brewer, Brown, Shiras, Jackson.
Concurring specially: Field..
Dissenting: White, Harlan.

28. Act of Jan. 30, 1897, (29 Stat. 506).

Prohibition on sale of liquor ". . . to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government. . .," held a police regulation infringing state powers, and not warranted by the commerce clause, Article I, § 8, clause 3.

Matter of Heff, 197 U.S. 488 (1905), overruled in *United States v. Nice*, 241 U.S. 591 (1916).
Concurring: Brewer, Brown, White, Peckham, McKenna, Holmes, Day, Fuller, C.J.
Dissenting: Harlan.

29. Act of June 1, 1898 (30 Stat. 428).

Section 10, penalizing "any employer subject to the provisions of this act" who should "threaten any employee with loss of employment . . . because of his membership in . . . a labor corporation, association, or organization" (the act being applicable "to any common carrier . . . engaged in the transportation of passengers or property . . . from one State . . . to another State . . .," etc.), held an infringement of the Fifth Amendment and not supported by the commerce clause.

Adair v. United States, 208 U.S. 161 (1908).
Concurring: Harlan, Brewer, White, Peckham, Day, Fuller, C.J.
Dissenting: McKenna, Holmes.

30. Act of June 13, 1898 (30 Stat. 448, 459).

Stamp tax on foreign bills of lading, held a tax on exports in violation of Article I, § 9.

Fairbank v. United States, 181 U.S. 283 (1901).
Concurring: Brewer, Brown, Shiras, Peckham, Fuller, C.J.
Dissenting: Harlan, Gray, White, McKenna.

31. Same (30 Stat. 448, 460).

Tax on charter parties, as applied to shipments exclusively from ports in United States to foreign ports, held a tax on exports in violation of Article I, § 9.

United States v. Hvoslef, 237 U.S. 1 (1915).

32. Same (30 Stat. 448, 461).

Stamp tax on policies of marine insurance on exports, held a tax on exports in violation of Article I, § 9.

Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915).

33. Act of June 6, 1900 (31 Stat. 359, § 171).

Section of the Alaska Code providing for a six-person jury in trials for misdemeanors, held repugnant to the Sixth Amendment, requiring "jury" trial of crimes.

Rassmussen v. United States, 197 U.S. 516 (1905).
Concurring: White, Brewer, Peckham, McKenna, Holmes, Day, Fuller, C.J.
Concurring specially: Harlan, Brown.

34. Act of Mar. 3, 1901 (31 Stat. 1341, § 935).

Section of the District of Columbia Code granting the same right of appeal, in criminal cases, to the United States or the District of Columbia as to the defendant, but providing that a verdict was not to be set aside for error found in rulings during trial, held an attempt to take an advisory opinion, contrary to Article III, § 2.

United States v. Evans, 213 U.S. 297 (1909).

35. Act of June 11, 1906 (34 Stat. 232).

Act providing that "every common carrier engaged in trade or commerce in the District of Columbia . . . or between the several States . . . shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers . . . or by reason of any defect . . . due to its negligence in its cars, engines . . . roadbed," etc., held not supportable under Article I, § 8, clause 3 because it extended to intrastate as well as interstate commercial activities.

The Employers' Liability Cases, 207 U.S. 463 (1908). (The act was upheld as to the District of Columbia in *Hyde v. Southern Ry.*, 31 App. D.C. 466 (1908); and as to the Territories, in *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909).)
Concurring: White, Day.
Concurring specially: Peckham, Brewer, Fuller, C.J.
Dissenting: Moody, Harlan, McKenna, Holmes.

36. Act of June 16, 1906 (34 Stat. 269, § 2).

Provision of Oklahoma Enabling Act restricting relocation of the State capital prior to 1913, held not supportable by Article IV, § 3, authorizing admission of new States.

Coyle v. Smith, 221 U.S. 559 (1911).
Concurring: Lurton, White, Harlan, Day, Hughes, Van Devanter, Lamar.
Dissenting: McKenna, Holmes.

37. Act of Feb. 20, 1907 (34 Stat. 889, § 3).

Provision in the Immigration Act of 1907 penalizing "whoever . . . shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution . . . any alien woman or girl, within 3 years after she shall have entered the United States,"

held an exercise of police power not within the control of Congress over immigration (whether drawn from the commerce clause or based on inherent sovereignty).

Keller v. United States, 213 U.S. 138 (1909).
Concurring: Brewer, White, Peckham, McKenna, Day, Fuller, C.J.
Dissenting: Holmes, Harlan, Moody.

38. Act of Mar. 1, 1907 (34 Stat. 1028).

Provisions authorizing certain Indians "to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since . . . 1902, insofar as said acts . . . attempt to increase or extend the restrictions upon alienation . . . of allotments of lands of Cherokee citizens . . .," and giving a right of appeal to the Supreme Court, held an attempt to enlarge the judicial power restricted by Article III, § 2, to cases and controversies.

Muskrat v. United States, 219 U.S. 346 (1911).

39. Act of May 27, 1908 (35 Stat. 313, § 4).

Provision making locally taxable "all land [of Indians of the Five Civilized Tribes] from which restrictions have been or shall be removed," held a violation of the Fifth Amendment, in view of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, providing tax-exemption for allotted lands while title in original allottee, not exceeding 21 years.

Choate v. Trapp, 224 U.S. 665 (1912).

40. Act of Feb. 9, 1909, § 2, 35 Stat. 614, as amended.

Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of cocaine knew of its illegal importation into the United States held, in light of the fact that more cocaine is produced domestically than is brought into the country and in absence of any showing that defendant could have known his cocaine was imported, if it was, inapplicable to support conviction from mere possession of cocaine.

Turner v. United States, 396 U.S. 398 (1970).
Concurring specially: Black, Douglas.

41. Act of Aug. 19, 1911 (37 Stat. 28).

A proviso in § 8 of the Federal Corrupt Practices Act fixing a maximum authorized expenditure by a candidate for Senator "in any campaign for his nomination and election," as applied to a primary election, held not supported by Article I, § 4, giving Congress power to regulate the manner of holding elections for Senators and Representatives.

Newberry v. United States, 256 U.S. 232 (1921), overruled in *United States v. Classic*, 313 U.S. 299 (1941).

Concurring: McReynolds, McKenna, Holmes, Day, Van Devanter.
Concurring specially: Pitney, Brandeis, Clarke.
Dissenting: White (concurring in part), C.J.

42. Act of June 18, 1912 (37 Stat. 136, § 8).

Part of § 8 giving Juvenile Court of the District of Columbia (proceeding upon information) concurrent jurisdiction of desertion cases (which were, by law, punishable by fine or imprisonment in the workhouse at hard labor for 1 year), held invalid under the Fifth Amendment, which gives right to presentment by a grand jury in case of infamous crimes.

United States v. Moreland, 258 U.S. 433 (1922).
Concurring: McKenna, Day, Van Devanter, Pitney, McReynolds.
Dissenting: Brandeis, Holmes, Taft, C.J.

43. Act of Mar. 4, 1913 (37 Stat. 988, part of par. 64).

Provision of the District of Columbia Public Utility Commission Act authorizing appeal to the United States Supreme Court from decrees of the District of Columbia Court Appeals modifying valuation decisions of the Utilities Commission, held an attempt to extend the appellate jurisdiction of the Supreme Court to cases not strictly judicial within the meaning of Article III, § 2.

Keller v. Potomac Elec. Co., 261 U.S. 428 (1923).

44. Act of Sept. 1, 1916 (39 Stat. 675).

The original Child Labor Law, providing "that no producer . . . shall ship . . . in interstate commerce . . . any article or commodity the product of any mill . . . in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work more than 8 hours in any day or more than 6 days in any week . . .," held not within the commerce power of Congress.

Hammer v. Dagenhart, 247 U.S. 251 (1918).
Concurring: Day, Van Devanter, Pitney, McReynolds, White, C.J.
Dissenting: Holmes, McKenna, Brandeis, Clarke.

45. Act of Sept. 8, 1916 (39 Stat. 757, § 2(a), in part).

Provision of the income tax law of 1916, that a "stock dividend shall be considered income, to the amount of its cash value," held invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under Article I, § 2, clause 3.

Eisner v. Macomber, 252 U.S. 189 (1920).
Concurring: Pitney, McKenna, Van Devanter, McReynolds, White, C.J.
Dissenting: Holmes, Day, Brandeis, Clarke.

46. Act of Oct. 6, 1917 (40 Stat. 395).

The amendment of §§ 24 and 256 of the Judicial Code (which prescribe jurisdiction of district courts) "saving . . . to claimants the rights and remedies under the workmen's compensation law of any State," held an attempt to transfer federal legislative powers to the States--the Constitution, by Article III, § 2, and Article I, § 8, having adopted rules of general maritime law.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).
Concurring: McReynolds, McKenna, Day, Van Devanter, White, C.J.
Dissenting: Holmes, Pitney, Brandeis, Clarke.

47. Act of Sept. 19, 1918 (40 Stat. 960).

That part of the Minimum Wage Law of the District of Columbia which authorized the Wage Board "to ascertain and declare . . . (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals . . .," held to interfere with freedom of contract under the Fifth Amendment.

Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
Concurring: Sutherland, McKenna, Van Devanter, McReynolds, Butler.
Dissenting: Taft, C.J., Sanford, Holmes.

48. Act of Feb. 24, 1919 (40 Stat. 1065, § 213, in part).

That part of § 213 of the of Revenue Act of 1919 which provided that ". . . for the purposes of the title . . . the term 'gross income' . . . includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of . . . judges of the Supreme and inferior courts of the United States . . . the compensation received as such) . . ." as applied to a judge in office when the act was passed, held a violation of the guaranty of judges' salaries, in Article III, § 1.

Evans v. Gore, 253 U.S. 245 (1920). *Miles v. Graham*, 268 U.S. 501 (1925), held it invalid as applied to a judge taking office subsequent to the date of the act. Both cases were overruled by *O'Malley v. Woodrough*, 307 U.S. 277 (1939).
Concurring: Van Devanter, McKenna, Day, Pitney, McReynolds, Clarke, White, C.J.
Dissenting: Holmes, Brandeis.

49. Act of Feb. 24, 1919 (40 Stat. 1097, § 402(c)).

That part of the estate tax law providing that the "gross estate" of a decedent should include value of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he had at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment

at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a *bona fide* sale . . . "as applied to a transfer of property made prior to the act and intended to take effect in possession or enjoyment at death of grantor, but not in fact testamentary or designed to evade taxation, held confiscatory, contrary to Fifth Amendment.

Nichols v. Coolidge, 274 U.S. 531 (1927).
Concurring: McReynolds, Van Devanter, Sutherland, Butler, Taft, C.J.
Concurring specially (only in the result): Holmes, Brandeis, Sanford, Stone.

50. Act of Feb. 24, 1919, title XII (40 Stat. 1138, entire title).

The Child Labor Tax Act, providing that "every person . . . operating . . . any . . . factory . . . in which children under the age of 14 years have been employed or permitted to work . . . shall pay . . . in addition to all other taxes imposed by law, an excise tax equivalent to 10 percent of the entire net profits received . . . for such year from the sale . . . of the product of such . . . factory . . .," held beyond the taxing power under Article I, § 8, clause 1, and an infringement of state authority.

Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922).
Concurring: Taft, C.J., McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis.
Dissenting: Clarke.

51. Act of Oct. 22, 1919 (41 Stat. 298, § 2), amending Act of Aug. 10, 1917 (40 Stat. 277,§ 4).

(a) § 4 of the Lever Act, providing in part "that it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . ." and fixing a penalty, held invalid to support an indictment for charging an unreasonable price on sale--as not setting up an ascertainable standard of guilt within the requirement of the Sixth Amendment.

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).
Concurring: White, C.J., McKenna, Holmes, Van Devanter, McReynolds, Clarke.
Concurring specially: Pitney, Brandeis.

(b) That provision of § 4 making it unlawful "to conspire, combine, agree, or arrange with any other person to . . . exact excessive prices for any necessaries" and fixing a penalty, held invalid to support an indictment, on the reasoning of the *Cohen Grocery* case.

Weeds, Inc. v. United States, 255 U.S. 109 (1921).
Concurring: White, C.J., McKenna, Holmes, Van Devanter, McReynolds, Clarke.
Concurring specially: Pitney, Brandeis.

52. Act of Aug. 24, 1921 (42 Stat. 187, Future Trading Act).

(a) § 4 (and interwoven regulations) providing a "tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery, except . . . where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market' . . .," held not within the taxing power under Article I, § 8.

Hill v. Wallace, 259 U.S. 44 (1922).

(b) § 3, providing "That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each . . . option for a contract either of purchase or sale of grain . . .," held invalid on the same reasoning.

Trusler v. Crooks, 269 U.S. 475 (1926).

53. Act of Nov. 23, 1921 (42 Stat. 261, 245, in part).

Provision of Revenue Act of 1921 abating the deduction (4 percent of mean reserves) allowed from taxable income of life insurance companies in general by the amount of interest on their tax-exempts, and so according no relative advantage to the owners of the tax-exempt securities, held to destroy a guaranteed exemption.

National Life Ins. Co. v. United States, 277 U.S. 508 (1928).
Concurring: McReynolds, Van Devanter, Sutherland, Butler, Sanford, Taft, C.J.
Dissenting: Brandeis, Holmes, Stone.

54. Act of June 10, 1922 (42 Stat. 634).

A second attempt to amend §§ 24 and 256 of the Judicial Code, relating to jurisdiction of district courts, by saving "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State . . ." held invalid on authority of *Knickerbocker Ice Co. v. Stewart*.

Washington v. Dawson & Co., 264 U.S. 219 (1924).
Concurring: McReynolds, McKenna, Holmes, Van Devanter, Sutherland, Butler, Sanford, Taft, C.J.
Dissenting: Brandeis.

55. Act of June 2, 1924 (43 Stat. 313).

The gift tax provisions of the Revenue Act of 1924, applicable to gifts made during the calendar year, were held invalid under the Fifth Amendment insofar as they applied to gifts made before passage of the act.

Untermyer v. Anderson, 276 U.S. 440 (1928).

Concurring: McReynolds, Sanford, Van Devanter, Sutherland, Butler, Taft, C.J.
Dissenting: Holmes, Brandeis, Stone.

56. Act of Feb. 26, 1926 (44 Stat. 70, § 302, in part).

Stipulation creating a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death of donor and requiring the value thereof to be included in computing the death transfer tax on decedent's estate was held to effect an invalid deprivation of property without due process.

Heiner v. Donnan, 285 U.S. 312 (1932).
Concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts, Hughes, C.J.
Dissenting: Stone, Brandeis.

57. Act of Feb. 26, 1926 (44 Stat. 95, § 701).

Provision imposing a special excise tax of $1,000 on liquor dealers operating in States where such business is illegal, was held a penalty, without constitutional support following repeal of the Eighteenth Amendment.

United States v. Constantine, 296 U.S. 287 (1935).
Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler, Hughes, C.J.
Dissenting: Cardozo, Brandeis, Stone.

58. Act of Mar. 20, 1933 (48 Stat. 11, § 17, in part).

Clause in the Economy Act of 1933 providing ". . . all laws granting or pertaining to yearly renewable term war risk insurance are hereby repealed," held invalid to abrogate an outstanding contract of insurance, which is a vested right protected by the Fifth Amendment.

Lynch v. United States, 292 U.S. 571 (1934).

59. Act of May 12, 1933 (48 Stat. 31).

Agricultural Adjustment Act providing for processing taxes on agricultural commodities and benefit payments therefore to farmers, held not within the taxing power under Article I, § 8, clause 1.

United States v. Butler, 297 U.S. 1 (1936).
Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler, Hughes, C.J.
Dissenting: Stone, Brandeis, Cardozo.

60. Joint Resolution of June 5, 1933 (48 Stat. 113, § 1).

Abrogation of gold clause in Government obligations, held a repudiation of the pledge implicit in the power to borrow money (Article I, § 8, clause 2), and within the prohibition of the Fourteenth Amendment, against questioning the validity of the public debt. (The majority of the Court, however, held plaintiff not entitled to recover under the circumstances.)

Perry v. United States, 294 U.S. 330 (1935).
Concurring: Hughes, C.J., Brandeis, Roberts, Cardozo.
Concurring specially: Stone.
Dissenting: McReynolds, Van Devanter, Sutherland, Butler.

61. Act of June 16, 1933 (48 Stat. 195, the National Industrial Recovery Act).

(a) Title I, except § 9. Provisions relating to codes of fair competition, authorized to be approved by the President in his discretion "to effectuate the policy" of the act, held invalid as a delegation of legislative power (Article I, § 1) and not within the commerce power (Article I, § 8, clause 3).

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
Concurring: Hughes, C.J., Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts.
Concurring specially: Cardozo, Stone.

(b) § 9(c). Clause of the oil regulation section authorizing the President "to prohibit the transportation in interstate . . . commerce of petroleum . . . produced or withdrawn from storage in excess of the amount permitted . . . by any State law . . ." and prescribing a penalty for violation of orders issued thereunder, held invalid as a delegation of legislative power.

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
Concurring: Hughes, C.J., Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts.
Dissenting: Cardozo.

62. Act of June 16, 1933 (48 Stat. 307, § 13).

Temporary reduction of 15 percent in retired pay of judges, retired from service but subject to performance of judicial duties under the Act of Mar. 1, 1929 (45 Stat. 1422), was held a violation of the guaranty of judges' salaries in Article III, § 1.

Booth v. United States, 291 U.S. 339 (1934).

63. Act of Apr. 27, 1934 (48 Stat. 646 § 6), amending § 5(i) of Home Owners' Loan Act of 1933.

Provision for conversion of state building and loan associations into federal associations, upon vote of 51 percent of the votes cast at a meeting of stockholders called to consider such action, held an encroachment on reserved powers of State.

Hopkins Savings Ass'n v. Cleary, 296 U.S. 315 (1935).

64. Act of May 24, 1934 (48 Stat. 798).

Provision for readjustment of municipal indebtedness, though "adequately related" to the bankruptcy power, was held invalid as an interference with state sovereignty.

Ashton v. Cameron County Dist., 298 U.S. 513 (1936).
Concurring: McReynolds, Van Devanter, Sutherland, Butler, Roberts.
Dissenting: Cardozo, Brandeis, Stone, Hughes, C.J.

65. Act of June 19, 1934, ch. 652, 48 Stat. 1088, § 316, 18 U.S.C. § 1304.

Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, violates the First Amendment's protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999).
Justices concurring: Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justices concurring especially: Thomas.

66. Act of June 27, 1934 (48 Stat. 1283).

The Railroad Retirement Act, establishing a detailed compulsory retirement system for employees of carriers subject to the Interstate Commerce Act, held, not a regulation of commerce within the meaning of Article I, § 8, clause 3, and violative of the due process clause (Fifth Amendment).

Railroad Retirement Bd. v. Alton Ry., 295 U.S. 330 (1935).
Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler.
Dissenting: Hughes, C.J., Brandeis, Stone, Cardozo.

67. Act of June 28, 1934 (48 Stat. 1289, ch. 869).

The Frazier-Lemke Act, adding subsection (s) to § 75 of the Bankruptcy Act, designed to preserve to mortgagors the ownership and enjoyment of their farm property and providing specifically, in paragraph 7, that a bankrupt left in possession has the option at any time within 5 years of buying at the appraised value--subject meanwhile to no monetary obligation other than payment of reasonable rental, held a violation of property rights, under the Fifth Amendment.

Louisville Bank v. Radford, 295 U.S. 555 (1935).

68. Act of Aug. 24, 1935 (48 Stat. 750).

Amendments of Agricultural Adjustment Act held not within the taxing power, the amendments not having cured the defects of the original act held unconstitutional in *United States v. Butler*, 297 U.S. 1 (1936).

Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936).

69. Act of Aug. 29, 1935, ch. 814 § 5(e), 49 Stat. 982, 27 U.S.C. § 205(e).

The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels

is inconsistent with the protections afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the "overall irrationality" of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
Justices concurring: Thomas, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justice concurring specially: Stevens.

70. Act of Aug. 30, 1935 (49 Stat. 991).

Bituminous Coal Conservation Act of 1935, held to impose, not a tax within Article I, § 8, but a penalty not sustained by the commerce clause (Article I, § 8, clause 3).

Carter v. Carter Coal Co., 298 U.S. 238 (1936).
Concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts.
Concurring specially: Hughes, C.J.
Concurring in part and dissenting in part: Cardozo, Brandeis, Stone.

71. Act of Feb. 15, 1938, ch. 29, 52 Stat. 30.

District of Columbia Code § 22-1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute," violates the First Amendment.

Boos v. Barry, 485 U.S. 312 (1988).
Justices concurring: O'Connor, Brennan, Marshall, Stevens, Scalia.
Justices dissenting: Rehnquist, C.J., White, Blackmun.

72. Act of June 25, 1938 (52 Stat. 1040).

Federal Food, Drug, and Cosmetic Act of 1938, § 301(f), prohibiting the refusal to permit entry or inspection of premises by federal officers held void for vagueness and as violative of the due process clause of the Fifth Amendment.

United States v. Cardiff, 344 U.S. 174 (1952).
Concurring: Douglas, Black, Reed, Frankfurter, Jackson, Clark, Minton, Vinson, C.J.
Dissenting: Burton.

73. Act of June 30, 1938 (52 Stat. 1251).

Federal Firearms Act, § 2(f), establishing a presumption of guilt based on a prior conviction and present possession of a firearm, held to violate the test of due process under the Fifth Amendment.

Tot v. United States, 319 U.S. 463 (1943).
Concurring: Roberts, Reed, Frankfurter, Jackson, Rutledge, Stone, C.J.
Concurring specially: Black, Douglas.

74. Act of Aug. 10, 1939 (§ 201(d), 53 Stat. 1362, as amended, 42 U.S.C. § 402(g)).

Provision of Social Security Act that grants survivors' benefits based on the earnings of a deceased husband and father covered by the Act to his widow and to the couple's children in her care but that grants benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower held violative of the right to equal protection secured by the Fifth Amendment's due process clause, since it unjustifiably discriminates against female wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for male wage earners.

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

75. Act of Oct. 14, 1940 (54 Stat. 1169 § 401(g)); as amended by Act of January 20, 1944 (58 Stat. 4, § 1).

Provision of Aliens and Nationality Code (8 U.S.C. § 1481(a)(8)), derived from the Nationality Act of 1940, as amended, that citizenship shall be lost upon conviction by court martial and dishonorable discharge for deserting the armed services in time of war, held invalid as imposing a cruel and unusual punishment barred by the Eighth Amendment and not authorized by the war powers conferred by Article I, § 8, clauses 11 to 14.

Trop v. Dulles, 356 U.S. 86 (1958).
Concurring: Warren, C.J., Whittaker.
Concurring specially: Black, Douglas, Brennan.
Dissenting: Frankfurter, Burton, Clark, Harlan.

76. Act of Nov. 15, 1943 (57 Stat. 450).

Urgent Deficiency Appropriation Act of 1943, § 304, providing that no salary should be paid to certain named federal employees out of moneys appropriated, held to violate Article I, § 9, clause 3, forbidding enactment of bill of attainder or ex post facto law.

United States v. Lovett, 328 U.S. 303 (1946).
Concurring: Black, Douglas, Murphy, Rutledge, Burton, Stone, C.J.
Concurring specially: Frankfurter, Reed.

77. Act of Sept. 27, 1944 (58 Stat. 746, § 401(J)); and Act of June 27, 1952 (66 Stat. 163, 267-268, § 349(a)(10)).

§ 401(J) of Immigration and Nationality Act of 1940, added in 1944, and § 49(a)(10) of the Immigration and Nationality Act of 1952 depriving one of citizenship, without the procedural safeguards guaranteed by the Fifth and Sixth Amendments, for the offense of leaving or remaining outside the country, in time of war or national emergency, to evade military service held invalid.

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

Concurring: Goldberg, Black, Douglas, Warren, C.J.
Concurring specially: Brennan.
Dissenting: Harlan, Clark, Stewart, White.

78. Act of July 31, 1946 (ch. 707, § 7, 60 Stat. 719).

District court decision holding invalid under First and Fifth Amendments statute prohibiting parades or assemblages on United States Capitol grounds is summarily affirmed.

Chief of Capitol Police v. Jeanette Rankin Brigade, 409 U.S. 972 (1972).

79. Act of June 25, 1948 (62 Stat. 760).

Provision of Lindberg Kidnapping Act which provided for the imposition of the death penalty only if recommended by the jury held unconstitutional inasmuch as it penalized the assertion of a defendant's Sixth Amendment right to jury trial.

United States v. Jackson, 390 U.S. 570 (1968).
Concurring: Stewart, Douglas, Harlan, Brennan, Fortas, Warren, C.J.
Dissenting: White, Black.

80. Act of Aug. 18, 1949 (63 Stat. 617, 40 U.S.C. § 13k).

Provision, insofar as it applies to the public sidewalks surrounding the Supreme Court building, which bars the display of any flag, banner, or device designed to bring into public notice any party, organization, or movement, held violative of the free speech clause of the First Amendment.

United States v. Grace, 461 U.S. 171 (1983).
Concurring: White, Brennan, Blackmun, Powell, Rehnquist, O'Connor, Burger, C.J.
Concurring in part and dissenting in part: Marshall, Stevens.

81. Act of May 5, 1950 (64 Stat. 107).

Article 3(a) of the Uniform Code of Military Justice, subjecting civilian ex-servicemen to court martial for crime committed while in military service, held to violate Article III, § 2, and the Fifth and Sixth Amendments.

Toth v. Quarles, 350 U.S. 11 (1955).
Concurring: Black, Frankfurter, Douglas, Clark, Harlan, Warren, C.J.
Dissenting: Reed, Burton, Minton.

82. Act of May 5, 1950 (64 Stat. 107).

Insofar as Article 2(11) of the Uniform Code of Military Justice subjects civilian dependents accompanying members of the armed forces overseas in time of peace to trial, in capital cases, by court martial, it is violative of Article III, § 2, and the Fifth and Sixth Amendments.

Reid v. Covert, 354 U.S. 1 (1957).
Concurring: Black, Douglas, Warren, C.J.

Concurring specifically: Frankfurter, Harlan.
Dissenting: Clark, Burton.

Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed on land bases overseas by employees of the armed forces who have not been inducted or who have not voluntarily enlised therein, it is violative of the Sixth Amendment. *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter.
Concurring in Part and dissenting in Part: Whittaker, Stewart.

Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed by civilian dependents accompanying members of the armed forces overseas, it is violative of Article III, § 2, and the Fifth and Sixth Amendments. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter.
Concurring in part and dissenting in part: Whittaker, Stewart.

Insofar as the aforementioned provision is invoked in time of peace for the trial of a capital offense committed by a civilian employee of the armed forces overseas, it is violative of Article III, § 2, and the Fifth and Sixth Amendments. *Grisham v. Hagan*, 361 U.S. 278 (1960).

Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter.
Concurring in part and dissenting in part: Whittaker, Stewart.

83. Act of Aug. 16, 1950 (64 Stat. 451, as amended).

Statutory scheme authorizing the Postmaster General to close the mails to distributors of obscene materials held unconstitutional in the absence of procedural provisions to assure prompt judicial determination that protected materials were not being restrained.

Blount v. Rizzi, 400 U.S. 410 (1971).

84. Act of Aug. 28, 1950 (§ 202(c)(1)(D), 64 Stat. 483, 42 U.S.C. § 402(c)(1)(C)).

District court decision holding invalid as a violation of the equal protection component of the Fifth Amendment's due process clause a Social Security provision entitling a husband to insurance benefits through his wife's benefits, provided he received at least one-half of his support from her at the time she became entitled, but requiring no such showing of support for the wife to qualify for benefits through her husband, is summarily affirmed.

Califano v. Silbowitz, 430 U.S. 934 (1977).

85. Act of Aug. 28, 1950 (§ 202(f)(1)(E), 64 Stat. 485, 42 U.S.C. § 402(f)(1)(D)).

Social Security Act provision awarding survivor's benefits based on earnings of a deceased wife to widower only if he was receiving at least half of his support from her at the time of her death, whereas widow receives benefits regardless of dependency, held violative of equal protection element of Fifth Amendment's due process clause because of its impermissible sex classification.

Califano v. Goldfarb, 430 U.S. 199 (1977).
Concurring: Brennan, White, Marshall, Powell.
Concurring specially: Stevens.
Dissenting: Rehnquist, Stewart, Blackmun, Burger, C.J.

86. Act of Sept. 23, 1950 (Title I, § 5, 64 Stat. 992).

Provision of Subversive Activities Control Act making it unlawful for member of Communist front organization to work in a defense plant held to be an overbroad infringement of the right of association protected by the First Amendment.

United States v. Robel, 389 U.S. 258 (1967).
Concurring: Warren, C.J., Black, Douglas, Stewart, Fortas.
Concurring specially: Brennan.
Dissenting: White, Harlan.

87. Act of Sept. 23, 1950 (64 Stat. 993, § 6).

Subversive Activities Control Act of 1950, § 6, providing that any member of a Communist organization, which has registered or has been ordered to register, commits a crime if he attempts to obtain or use a passport, held violative of due process under the Fifth Amendment.

Aptheker v. Secretary of State, 378 U.S. 500 (1964).
Concurring: Goldberg, Brennan, Stewart, Warren, C.J.
Concurring specially: Black, Douglas.
Dissenting: Clark, Harlan, White.

88. Act of Sept. 28, 1950 (Title I, §§ 7, 8, 64 Stat. 993).

Provisions of Subversive Activities Control Act of 1950 requiring in lieu of registration by the Communist Party registration by Party members may not be applied to compel registration by, or to prosecute for refusal to register, alleged members who have asserted their privilege against self-incrimination, inasmuch as registration would expose such persons to criminal prosecution under other laws.

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

89. Act of Oct. 30, 1951 § 5(f)(ii), 65 Stat. 683, 45 U.S.C. § 231a(c)(3)(ii)).

Provision of Railroad Retirement Act similar to section voided in *Goldfarb* (no. 85, supra).

Railroad Retirement Bd. v. Kalina, 431 U.S. 909 (1977).

90. Act of June 27, 1952 (Title III, 349, 66 Stat. 267).

Provision of Immigration and Nationality Act of 1952 providing for revocation of United States citizenship of one who votes in a foreign election held unconstitutional under § 1 of the Fourteenth Amendment.

Afroyim v. Rusk, 387 U.S. 253 (1967).
Concurring: Black, Douglas, Brennan, Fortas, Warren, C.J.
Dissenting: Harlan, Clark, Stewart, White.

91. Act of June 27, 1952 (66 Stat. 163, 269, § 352(a)(1)).

§ 352(a)(1) of the Immigration and Nationality Act of 1952, depriving a naturalized person of citizenship for "having a continuous residence for three years" in state of his birth or prior nationality, held violative of the due process clause of the Fifth Amendment.

Schneider v. Rusk, 377 U.S. 163 (1964).
Concurring: Douglas, Black, Stewart, Goldberg, Warren, C.J.
Dissenting: Clark, Harlan, White.

92. Act of June 27, 1952 (ch. 477, § 244(e)(2), 66 Stat. 214, 8 U.S.C. § 1254 (c)(2).

Provision of the immigration law that permits either House of Congress to veto the decision of the Attorney General to suspend the deportation of certain aliens violates the bicameralism and presentation requirements of lawmaking imposed upon Congress by Article I, §§ 1 and 7.

INS v. Chadha, 462 U.S. 919 (1983).
Justices concurring: Burger, C.J., Brennan, Marshall, Blackmun, Stevens.
Justice concurring specially: Powell.
Justices dissenting: Rehnquist, White.

93. Act of Aug. 16, 1954 (68A Stat. 525, Int. Rev. Code of 1954, §§ 4401-4423).

Provisions of tax laws requiring gamblers to pay occupational and excise taxes may not be used over an assertion of one's privilege against self-incrimination either to compel extensive reporting of activities, leaving the registrant subject to prosecution under the laws of all the States with the possible exception of Nevada, or to prosecute for failure to register and report, because the scheme abridged the Fifth Amendment privilege.

Marchetti v. United States, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968).
Concurring: Harlan, Black, Douglas, White, Fortas.
Concurring specially: Brennan, Stewart.
Dissenting: Warren., C.J.

94. Act of Aug. 16, 1954 (68A Stat. 560, Marijuana Tax Act, §§ 4741, 4744, 4751, 4753).

Provisions of tax laws requiring possessors of marijuana to register and to pay a transfer tax may not be used over an assertion of the privilege against self-incrimination to compel registration or to prosecute for failure to register.

Leary v. United States, 395 U.S. 6 (1969).
Concurring specially: Warren, C.J., Stewart.

95. Act of Aug. 16, 1954 (68A Stat. 728, Int. Rev. Code of 1954, §§ 5841, 5851).

Provisions of tax laws requiring the possessor of certain firearms, which it is made illegal to receive or to possess, to register with the Treasury Department may not be used over an assertion of the privilege against self-incrimination to prosecute one for failure to register or for possession of an unregistered firearm since the statutory scheme abridges the Fifth Amendment privilege.

Haynes v. United States, 390 U.S. 85 (1968).
Concurring: Harlan, Black, Douglas, Brennan, Stewart, White, Fortas.
Dissenting: Warren, C.J.

96. Act of Aug. 16, 1954 (68A Stat. 867, Int. Rev. Code of 1954, § 7302).

Provision of tax laws providing for forfeiture of property used in violating internal revenue laws may not be constitutionally used in face of invocation of privilege against self-incrimination to condemn money in possession of gambler who had failed to comply with the registration and reporting scheme held void in *Marchetti v. United States*, 390 U.S. 39 (1968).

United States v. United States Coin & Currency, 401 U.S. 715 (1971).
Concurring: Harlan, Black, Douglas, Brennan, Marshall.
Dissenting: White, Stewart, Blackmun, Burger, C.J.

97. Act of Aug. 16, 1954, ch. 736, 68A Stat. 521, 26 U.S.C. § 4371(1).

A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

United States v. IBM Corp., 517 U.S. 843 (1996).
Justices concurring: Thomas, O'Connor, Scalia, Souter, Breyer,, and Rehnquist, C.J.
Justices dissenting: Kennedy, Ginsburg.

98. Act of July 18, 1956 (§ 106, Stat. 570).

Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of marijuana knew of its illegal importation into the United States held, in absence of showing that all mari-

juana in United States was of foreign origin and that domestic users could know that their marijuana was more likely than not of foreign origin, unconstitutional under the due process clause of the Fifth Amendment.

Leary v. United States, 395 U.S. 6 (1969).
Concurring specially: Black.

99. Act of Aug. 10, 1956 (70A Stat. 65, Uniform Code of Military Justice, Articles 80, 130, 134).

Servicemen may not be charged under the Act and tried in military courts because of the commission of non-service connected crimes committed off-post and off-duty which are subject to civilian court jurisdiction where the guarantees of the Bill of Rights are applicable.

O'Callahan v. Parker, 395 U.S. 258 (1969), overruled in *Solorio v. United States*, 483 U.S. 435 (1987).
Concurring: Douglas, Black, Brennan, Fortas, Marshall, Warren, C.J.
Dissenting: Harlan, Stewart, White.

100. Act of Aug. 10, 1956 (70A Stat. 35, § 772(f)).

Proviso of statute permitting the wearing of United States military apparel in theatrical productions only if the portrayal does not tend to discredit the armed forces imposes an unconstitutional restraint upon First Amendment freedoms and precludes a prosecution under 18 U.S.C. § 702 for unauthorized wearing of uniform in a street skit disrespectful of the military.

Schacht v. United States, 398 U.S. 58 (1970).

101. Act of Sept. 2, 1958 (§ 5601(b)(1), 72 Stat. 1399).

Provision of Internal Revenue Code creating a presumption that one's presence at the site of an unregistered still shall be sufficient for conviction under a statute punishing possession, custody, or control of an unregistered still unless defendant otherwise explained his presence at the site to the jury held unconstitutional because the presumption is not a legitimate, rational, or reasonable inference that defendant was engaged in one of the specialized functions proscribed by the statute.

United States v. Romano, 382 U.S. 136 (1965).

102. Act of Sept. 2, 1958 (Pub. L. 85-921, § 1, 72 Stat. 1771, 18 U.S.C. § 504(1)).

Exemptions from ban on photographic reproduction of currency "for philatelic, numismatic, educational, historical, or newsworthy purposes" violates the First Amendment because it discriminates on the basis of the content of a publication.

Regan v. Time, Inc., 468 U.S. 641 (1984).
Justices concurring: White, Brennan, Blackmun, Marshall, Powell, Rehnquist, O'Connor, Burger, C.J.

Justice dissenting: Stevens.

103. Act of Sept. 2, 1958 (§ 1(25)(B), 72 Stat. 1446), and Act of September 7, 1962 (§ 401, 76 Stat. 469).

Federal statutes providing that spouses of female members of the Armed Forces must be dependent in fact in order to qualify for certain dependent's benefits, whereas spouses of male members are statutorily deemed dependent and automatically qualified for allowances, whatever their actual status, held an invalid sex classification under the equal protection principles of the Fifth Amendment's due process clause.

Frontiero v. Richardson, 411 U.S. 677 (1973).
Concurring: Brennan, Douglas, White, Marshall.
Concurring specially: Powell, Blackmun, Burger, C.J., Stewart.
Dissenting: Rehnquist..

104. Act of Sept. 14, 1959 (§ 504, 73 Stat. 536).

Provision of Labor-Management Reporting and Disclosure Act of 1959 making it a crime for a member of the Communist Party to serve as an officer or, with the exception of clerical or custodial positions, as an employee of a labor union held to be a bill of attainder and unconstitutional.

United States v. Brown, 381 U.S. 437 (1965).
Concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg.
Dissenting: White, Clark, Harlan, Stewart.

105. Act of Oct. 11, 1962 (§ 305, 76 Stat. 840).

Provision of Postal Services and Federal Employees Salary Act of 1962 authorizing Post Office Department to detain material determined to be "communist political propaganda" and to forward it to the addressee only if he requested it after notification by the Department, the material to be destroyed otherwise, held to impose on the addressee an affirmative obligation which amounted to an abridgment of First Amendment rights.

Lamont v. Postmaster General, 381 U.S. 301 (1965).

106. Act of Oct. 15, 1962 (76 Stat. 914).

Provision of District of Columbia laws requiring that a person to be eligible to receive welfare assistance must have resided in the District for at least one year impermissibly classified persons on the basis of an assertion of the right to travel interstate and therefore held to violate the due process clause of the Fifth Amendment.

Shapiro v. Thompson, 394 U.S. 618 (1969).
Concurring: Brennan, Douglas, Stewart, White, Fortas, Marshall.
Dissenting: Warren, C.J., Black, Harlan.

107. Act of Dec. 16, 1963 (77 Stat. 378, 20 U.S.C. § 754).

Provision of Higher Education Facilities Act of 1963 which in effect removed restriction against religious use of facilities constructed with federal funds after 20 years held to violate the establishment clause of the First Amendment inasmuch as the property will still be of considerable value at the end of the period and removal of the restriction would constitute a substantial governmental contribution to religion.

Tilton v. Richardson, 403 U.S. 672 (1971).

108. Act of July 30, 1965 (§ 339, 79 Stat. 409).

Section of Social Security Act qualifying certain illegitimate children for disability insurance benefits by presuming dependence but disqualifying other illegitimate children, regardless of dependency, if the disabled wage earner parent did not contribute to the child's support before the onset of the disability or if the child did not live with the parent before the onset of disability, held to deny latter class of children equal protection as guaranteed by the due process clause of the Fifth Amendment.

Jiminez v. Weinberger, 417 U.S. 628 (1974).
Concurring: Burger, C.J., Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell.
Dissenting: Rehnquist.

109. Act of Sept. 3, 1966 (§ 102(b), 80 Stat. 831), and Act of Apr. 8, 1974 (§§ 6(a)(1) amending § 3(d) of Act, 6(a)(2) amending 3 (e)(2)(C), 6(a)(5) amending § 3(s)(5), and 6(a)(6) amending § 3(x)).

Those sections of the Fair Labor Standards Act extending wage and hour coverage to the employees of state and local governments held invalid because Congress lacks the authority under the commerce clause to regulate employee activities in areas of traditional governmental functions of the States.

National League of Cities v. Usery, 426 U.S. 833 (1976) (subsequently overruled).
Concurring: Rehnquist, Stewart, Blackmun, Powell, Burger, C.J.
Dissenting: Brennan, White, Marshall; Stevens.

110. Act of Nov. 7, 1967 (Pub. L. 90-129, § 201(8), 81 Stat. 368), as amended by Act of Aug. 13, 1981 (Pub. L. 97-35, § 1229, 95 Stat. 730, 47 U.S.C. § 399).

Communications Act provision banning noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing violates the First Amendment.

FCC v. League of Women Voters, 468 U.S. 364 (1984).
Justices concurring: Brennan, Marshall, Blackmun, Powell, O'Connor.

Justices dissenting: White, Rehnquist, Stevens, Burger, C.J.

111. Act of Jan. 2, 1968 (§ 163(a)(2), 81 Stat. 872).

District court decisions holding unconstitutional under Fifth Amendment's due process clause section of Social Security Act that reduced, perhaps to zero, benefits coming to illegitimate children upon death of parent in order to satisfy the maximum payment due the wife and legitimate children are summarily affirmed.

Richardson v. Davis, 409 U.S. 1069 (1972).

112. Act of Jan. 2, 1968 (§ 203, 81 Stat. 882).

Provision of Social Security Act extending benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not giving benefits when the mother becomes unemployed held to impermissibly classify on the basis of sex and violate the Fifth Amendment's due process clause.

Califano v. Westcott, 443 U.S. 76 (1979).

113. Act of June 19, 1968 (Pub. L. 90-351, § 701(a)), 82 Stat. 210, 18 U.S.C. § 3501.

A section of the Omnibus Crime Control and Safe Streets Act of 1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations prior to the Court's decision in *Miranda v. Arizona*, 384 U.S. 486 (1966), is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by *Miranda* are constitution-based rules. While the *Miranda* Court invited a legislative rule that would be "at least as effective" in protecting a suspect's right to remain silent, section 3501 is not an adequate substitute.

Dickerson v. United States, 530 U.S. 428 (2000).
Justices concurring: Rehnquist, C.J., Stevens, O'Connor, Kennedy, Souter, and Ginsburg.
Justices dissenting: Scalia, Thomas.

114. Act of June 19, 1968 (Pub. L. No. 90-351, § 802), 82 Stat. 213, 18 U.S.C. § 2511(c), as amended by the Act of Oct. 21, 1986 (Pub. L. No. 99-508, § 101(c)(1)(A)), 100 Stat. 1851.

A federal prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied to a talk show host and a community activist who had played no part in the illegal interception, and who had lawfully obtained tapes of the illegally intercepted cellular phone conversation. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was "a matter of public concern." Although the disclosure prohibition well serves the government's "im-

portant" interest in protecting private communication, in this case "privacy concerns give way when balanced against the interest in publishing matters of public importance."

Bartnicki v. Vopper, 532 U.S. 514 (2001).
Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Rehnquist, C.J., Scalia, Thomas.

115. Act of June 22, 1970 (ch. III, 84 Stat. 318).

Provision of Voting Rights Act Amendments of 1970 which set a minimum voting age qualification of 18 in state and local elections held to be unconstitutional because beyond the powers of Congress to legislate.

Oregon v. Mitchell, 400 U.S. 112 (1970).
Concurring: Harlan, Stewart, Blackmun, Burger, C.J.
Concurring specially: Black.
Dissenting: Douglas, Brennan, White, Marshall.

116. Act of Dec. 29, 1970 (§ 8(a), 84 Stat. 1598, 29 U.S.C. § 637(a)).

Provision of Occupational Safety and Health Act authorizing inspections of covered work places in industry without warrants held to violate Fourth Amendment.

Marshall v. Barlow's Inc., 436 U.S. 307 (1978).
Concurring: White, Stewart, Marshall, Powell, Burger, C.J.
Dissenting: Stevens, Blackmun, Rehnquist.

117. Act of Jan. 11, 1971, (§ 2, 84 Stat. 2048).

Provision of Food Stamp Act disqualifying from participation in program any household containing an individual unrelated by birth, marriage, or adoption to any other member of the household violates the due process clause of the Fifth Amendment.

Department of Agriculture v. Moreno, 413 U.S. 528 (1973).
Concurring: Brennan, Douglas, Stewart, White, Marshall, Blackmun, Powell.
Dissenting: Rehnquist, Burger, C.J.

118. Act of Jan. 11, 1971 (§ 4, 84 Stat. 2049).

Provision of Food Stamp Act disqualifying from participation in program any household containing a person 18 years or older who had been claimed as a dependent child for income tax purposes in the present or preceding tax year by a taxpayer not a member of the household violates the due process clause of the Fifth Amendment.

Department of Agriculture v. Murry, 413 U.S. 508 (1973).
Concurring: Douglas, Brennan, Stewart, White, Marshall.
Dissenting: Blackmun, Rehnquist, Powell, Burger, C.J.

119. Act of Dec. 10, 1971 (Pub. L. 92-178, § 801, 85 Stat. 570, 26 U.S.C § 9012(f)).

Provision of Presidential Election Campaign Fund Act limiting to $1,000 the amount that independent committees may expend to fur-

ther the election of a presidential candidate financing his campaign with public funds is an impermissible limitation of freedom of speech and association protected by the First Amendment.

FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985).
Justices concurring: Rehnquist, Brennan, Blackmun, Powell, O'Connor, Stevens, Burger, C.J.
Justices dissenting: White, Marshall.

120. Federal Election Campaign Act of Feb. 7, 1972 (86 Stat. 3), as amended by the Federal Campaign Act Amendments of 1974 (88 Stat. 1263), adding or amending 18 U.S.C. §§ 608(a), 608(e), and 2 U.S.C. § 437c.

Provisions of election law that forbid a candidate or the members of his immediate family from expending personal funds in excess of specified amounts, that limit to $1,000 the independent expenditures of any person relative to an identified candidate, and that forbid expenditures by candidates for federal office in excess of specified amounts violate the First Amendment speech guarantees; provisions of the law creating a commission to oversee enforcement of the Act are an invalid infringement of constitutional separation of powers in that they devolve responsibilities upon a commission four of whose six members are appointed by Congress and all six of whom are confirmed by the House of Representatives as well as by the Senate, not in compliance with the appointments clause.

Buckley v. Valeo, 424 U.S. 1 (1976).
Concurring: Brennan, Stewart, Blackmun, Powell, Rehnquist, Burger, C.J.
Dissenting (expenditure provisions only): White.
Dissenting (candidate's personal funds only): Marshall.

121. Act of Apr. 8, 1974, Pub. L. 93-259, §§ 6(a)(6), 6(d)(1), 29 U.S.C. §§ 203(x), 216(b).

Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.

Alden v. Maine, 527 U.S. 706 (1999).
Justices concurring: Kennedy, O'Connor, Scalia, Thomas, Rehnquist, C.J.
Justices dissenting: Souter, Stevens, Ginsburg, Breyer.

122. Act of Apr. 8, 1974 (Pub. L. No. 93-259, §§ 6(d)(1), 28(a)(2)), 88 Stat. 61, 74;29 U.S.C. §§ 216(b), 630(b).

The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause, and the ADEA is "so out of

proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).
Justices concurring: O'Connor, Scalia, Kennedy, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

123. Act of May 11, 1976 (Pub. L. 94-283, § 112(2)), 90 Stat. 489; 2 U.S.C. § 441a(d)(3).

The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures by a political party "in connection with the general election campaign of a [congressional] candidate," violates the First Amendment when applied to expenditures that a political party makes independently, without coordination with the candidate.

Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996).
Justices concurring: Breyer, O'Connor, Souter.
Justices concurring in part and dissenting in part: Kennedy, Scalia, Thomas,, and Rehnquist, C.J.
Justices dissenting: Stevens, Ginsburg.

124. Act of May 11, 1976, Pub. L. 92-225, § 316, 90 Stat. 490, 2 U.S.C. § 441b.

Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions to a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union.

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).
Justices concurring: Brennan, Marshall, Powell, Scalia.
Justice concurring specially: O'Connor.
Justices dissenting: Rehnquist, C.J., White, Blackmun, Stevens.

125. Act of Oct. 1, 1976 (title II, 90 Stat. 1446); Act of Oct. 12, 1979 (101(c), 93 Stat. 657)).

Provisions of appropriations laws rolling back automatic pay increases for federal officers and employees is unconstitutional as to Article III judges because, the increases having gone into effect, they violate the security of compensation clause of Article III, § 1.

United States v. Will, 449 U.S. 200 (1980).

126. Act of Oct. 19, 1976 (Pub. L. 94-553, § 101(c)), 17 U.S.C. § 504(c).

Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, "in a sum of not less than $500 or more than $20,000 as the court considers just," does not grant the right to a jury trial on the amount of statu-

tory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998).

127. Act of Nov. 6, 1978 (§ 241(a), 92 Stat. 2668, 28 U.S.C. § 1471)

Assignment to judges who do not have tenure and guarantee of compensation protections afforded Article III judges of jurisdiction over all proceedings arising under or in the bankruptcy act and over all cases relating to proceedings under the bankruptcy act is invalid, inasmuch as judges without Article III protection may not receive at least some of this jurisdiction.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
Concurring: Brennan, Marshall, Blackmun, Stevens.
Concurring specially: Rehnquist, O'Connor.
Dissenting: White, Powell, Burger, C.J.

128. Act of Nov. 9, 1978 (Pub. L. 95-621, § 202(c)(1), 92 Stat. 3372, 15 U.S.C. § 3342(c)(1).

Decision of Court of Appeals holding unconstitutional provision giving either House of Congress power to veto rules of Federal Energy Regulatory Commission on certain natural gas pricing matters is summarily affirmed on the authority of *INS v. Chadha*.

Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983).

129. Act of May 28, 1980 (Pub. L. 96-252, § 21(a)), 94 Stat. 393, 15 U.S.C. § 57a-1(a).

Decision of Court of Appeals holding unconstitutional provision of FTC Improvements Act giving Congress power by concurrent resolution to veto final rules of the FTC is summarily affirmed on the basis of *INS v. Chadha*.

United States Senate v. FTC, 463 U.S. 1216 (1983).

130. Act of May 30, 1980 (94 Stat. 399, 45 U.S.C. § 1001 et seq.) as amended by the Act of Oct. 14, 1980 (94 Stat. 1959).

Acts of Congress applying to bankruptcy reorganization of one railroad and guaranteeing employee benefits is repugnant to the requirement of Article I, § 8, cl. 4, that bankruptcy legislation be "uniform."

Railroad Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982).

131. Act of Jan. 12, 1983 (Pub. L. 97-459, § 207), 96 Stat. 2519, 25 U.S.C. § 2206.

Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates the Fifth Amendment's takings clause by completely abrogating rights of intestacy and devise.

Hodel v. Irving, 481 U.S. 704 (1987).
Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, Scalia, Rehnquist, C.J.
Justices concurring specially: Stevens, White..

132. Act of Apr. 20, 1983, 97 Stat. 69 (Pub. L. No. 98-21 § 101(b)(1) (amending 26 U.S.C. § 3121(b)(5)).

The 1983 extension of the Social Security tax to then-sitting judges violates the Compensation Clause of Article III, § 1. The Clause "does not prevent Congress from imposing a non-discriminatory tax laid generally upon judges and other citizens . . . , but it does prohibit taxation that singles out judges for specially unfavorable treatment." The 1983 Social Security law gave 96% of federal employees "total freedom" of choice about whether to participate in the system, and structured the system in such a way that "virtually all"" of the remaining 4% of employees – except the judges – could opt to retain existing coverage. By requiring then-sitting judges to join the Social Security System and pay Social Security taxes, the 1983 law discriminated against judges in violation of the Compensation Clause.

United States v. Hatter, 532 U.S. 557 (2001).
Justices concurring: Breyer, Kennedy, Souter, Ginsburg, Scalia, Thomas, Rehnquist, C.J..

133. Act of Oct. 30, 1984, (Pub. L. 98-608, § 1(4)), 98 Stat. 3173, 25 U.S.C. § 2206.

Section 207 of the Indian Land Consolidation Act, as amended in 1984, effects an unconstitutional taking of property without compensation by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in *Hodel v. Irving* (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cures the constitutional defect.

Babbitt v. Youpee, 519 U.S. 234 (1997).
Justices concurring: Ginsburg, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer,and Rehnquist, C.J.
Justices dissenting: Stevens.

134. Act of Jan. 15, 1985, (Pub. L. 99-240, § 5(d)(2)(C)), 99 Stat. 1842, 42 U.S.C. §2021e(d)(2)(C).

"Take-title" incentives contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage states to cooperate in the federal regulatory scheme, offend principles of federalism embodied in the Tenth Amendment. These incentives, which require that non-participating states take title to waste or become liable for generators' damages, cross the line distinguishing encouragement from coercion. Congress may not simply commandeer the legis-

lative and regulatory processes of the states, nor may it force a transfer from generators to state governments. A required choice between two unconstitutionally coercive regulatory techniques is also impermissible.

New York v. United States, 505 U.S. 144 (1992).
Justices concurring: O'Connor, Scalia, Kennedy, Souter, Thomas, Rehnquist, C.J.
Justices dissenting: White, Blackmun, Stevens.

135. Act of Dec. 12, 1985 (Pub. L. 99-177, § 251), 99 Stat. 1063, 2 U.S.C. § 901.

That portion of the Balanced Budget and Emergency Deficit Control Act which authorizes the Comptroller General to determine the amount of spending reductions which must be accomplished each year to reach congressional targets and which authorizes him to report a figure to the President which the President must implement violates the constitutional separation of powers inasmuch as the Comptroller General is subject to congressional control (removal) and cannot be given a role in the execution of the laws.

Bowsher v. Synar, 478 U.S. 714 (1986).
Justices concurring: Burger, C.J., Brennan, Powell, Rehnquist, O'Connor.
Justices concurring specially: Stevens, Marshall.
Justices dissenting: White, Blackmun.

136. Act of Oct. 30, 1986 (Pub. L. 99-591, title VI, § 6007(f)), 100 Stat. 3341, 49 U.S.C. App.§ 2456(f).

The Metropolitan Washington Airports Act of 1986, which transferred operating control of two Washington, D.C., area airports from the Federal Government to a regional airports authority, violates separation of powers principles by conditioning that transfer on the establishment of a Board of Review, composed of Members of Congress and having veto authority over actions of the airports authority's board of directors.

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991)
Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter.
Justices dissenting: White, Marshall, Rehnquist, C.J.

137. Act of Nov. 17, 1986 (Pub. L. 99-662, title IV, § 1402(a)), 26 U.S.C. §§ 4461, 4462.

The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125% of cargo value on commercial cargo shipped through the Nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used

by exporters, and the tax does not, therefore, represent compensation for services rendered.

United States v. United States Shoe Corp., 523 U.S. 360 (1998).

138. Act of Apr. 28, 1988 (Pub. L. 100-297 § 6101), 102 Stat. 424, 47 U.S.C. § 223(b)(1).

Amendment to Communications Act of 1934 imposing an outright ban on "indecent" but not obscene messages violates the First Amendment, since it has not been shown to be narrowly tailored to further the governmental interest in protecting minors from hearing such messages.

Sable Communications of California v. FCC, 492 U.S. 115 (1989).

139. Act of Oct. 17, 1988 (Pub. L. 100-497, § 11(d)(7)), 102 Stat. 2472, 25 U.S.C. § 2710(d)(7).

A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States' Eleventh Amendment immunity from suit in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), is overruled.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

140. Act of Oct. 28, 1989 (Pub. L. 101-131), 103 Stat. 777, 18 U.S.C. § 700.

The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violates the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.

United States v. Eichman, 496 U.S. 310 (1990).
Justices concurring: Brennan, Marshall, Blackmun, Scalia, Kennedy.
Justices dissenting: Stevens, White, O'Connor, Rehnquist, C.J.

141. Act of Nov. 30, 1989 (Pub. L. 101-194, § 601), 103 Stat. 1760, 5 U.S.C. app. § 501.

Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit Members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS-16. The ban is limited to expressive activity and does not include other outside income, and the "speculative benefits" of the ban do not justify its "crudely crafted burden" on expression.

United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justice concurring in part and dissenting in part: O'Connor.
Justices dissenting: Rehnquist, C.J., Scalia, Thomas.

142. Act of July 26, 1990 (Pub. L. No. 101-336, Title I), 104 Stat. 330, 42 U.S.C. §§ 12111-12117.

Title I of the Americans with Disabilities Act of 1990 (ADA), exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages for the state's failure to make reasonable accommodations for qualified individuals with disabilities. Rational basis review applies, and consequently states "are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." The legislative record of the ADA fails to show that Congress identified a pattern of irrational state employment discrimination against the disabled. Moreover, even if a pattern of discrimination by states had been found, the ADA's remedies would run afoul of the "congruence and proportionality" limitation on Congress's exercise of enforcement power.

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Breyer, Stevens, Souter, Ginsburg.

143. Act of Nov. 28, 1990 (Pub. L. No. 101-624, Title XIX, Subtitle B), 104 Stat. 3854, 7 U.S.C. §§ 6101 et seq.

The Mushroom Promotion, Research, and Consumer Information Act violates the First Amendment by imposing mandatory assessments on mushroom handlers for the purpose of funding generic advertising to promote mushroom sales. The mushroom program differs "in a most fundamental respect" from the compelled assessment on fruit growers upheld in *Glickman v. Wileman Brothers & Elliott* (1997). There the mandated assessments were "ancillary to a more comprehensive program restricting marketing autonomy," while here there is "no broader regulatory system in place." The mushroom program contains no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing else that forces mushroom producers to associate as a group to make cooperative decisions. But for the assessment for advertising, the mushroom growing business is unregulated.

United States v. United Foods, Inc., 533 U.S. 405 (2001).
Justices concurring: Kennedy, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J..
Justices dissenting: Breyer, Ginsburg, O'Connor..

144. Act of Nov. 29, 1990 (Pub. L. 101-647, § 1702), 104 Stat. 4844, 18 U.S.C. § 922q.

The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." Possession of a gun at or near a school "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."

United States v. Lopez, 514 U.S. 549 (1995).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Stevens, Souter, Breyer, Ginsburg.

145. Act of Dec. 19, 1991 (Pub. L. 102-242 § 476), 105 Stat. 2387, 15 U.S.C. § 78aa-1.

Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the power to render dispositive judgments.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).
Justices concurring: Scalia, O'Connor, Kennedy, Souter, Thomas, Rehnquist, C.J.
Justice concurring specially: Breyer..
Justices dissenting: Stevens, Ginsburg.

146. Act of Oct. 5, 1992 (Pub. L. 102-385, §§ 10(b) and 10(c)), 106 Stat. 1487, 1503; 47 U.S.C. § 532(j) and § 531 note, respectively.

Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels, also violates the First Amendment.

Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727 (1996).
Justices concurring: Breyer, Stevens, O'Connor (§ 10(b) only), Kennedy, Souter, Ginsburg.
Justices dissenting: Thomas, Scalia, O'Connor (§ 10(c) only), Rehnquist, C.J.

147. Act of Oct. 24, 1992, Title XIX, 106 Stat. 3037 (Pub. L. 102-486), 26 U.S.C. §§ 9701-9722.

The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to

the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).
Justices concurring: O'Connor, Scalia, Thomas, Rehnquist, C.J.
Justices concurring specially: Kennedy.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

148. Act of Oct. 27, 1992, Pub. L. 102-542, 15 U.S.C. § 1122.

The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) "under the eleventh amendment . . . or under any other doctrine of sovereign immunity," did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Article I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a "property right" protected by the Due Process Clause.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).
Justices concurring: Scalia, O'Connor, Kennedy, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

149. Act of Oct. 28, 1992, 106 Stat. 4230, Pub. L. 102-560, 29 U.S.C. § 296.

The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringemenet suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are "out of proportion to a supposed remedial or preventive object."

Florida Prepaid Postsecondary Edu. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

150. Act of Nov. 16, 1993 (Pub. L. 103-141), 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb-4.

The Religious Freedom Restoration Act, which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion,

exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under Section 5 to "enforce" the Fourteenth Amendment by "appropriate legislation" does not extend to defining the substance of the Amendment's restrictions. This RFRA appears to do. RFRA "is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

City of Boerne v. Flores, 521 U.S. 507 (1997).
Justices concurring: Kennedy, Stevens, Thomas, Ginsburg, Rehnquist, C.J..
Justices dissenting: O'Connor, Breyer, Souter.

151. Act of Nov. 30, 1993 (Pub. L. 103-159), 107 Stat. 1536.

Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between Federal and State governments. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the State's officers directly."

Printz v. United States, 521 U.S. 898 (1997).
Justices concurring: Scalia, O'Connor, Kennedy, Thomas, Rehnquist, C.J..
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

152. Act of Sept. 13, 1994 (Pub. L. 103-322, § 40302), 108 Stat. 1941, 42 U.S.C. § 13981.

A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate "noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

United States v. Morrison, 529 U.S. 598 (2000).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Souter, Breyer, Stevens, Ginsburg.

153. Act of Feb. 8, 1996, 110 Stat. 56, 133-34 (Pub. L. 104-104, title V, § 502), 47 U.S.C. §§ 223(a), 223(d).

Two provisions of the Communications Decency Act of 1996 -- one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive

messages in a manner that is available to anyone under 18 years of age -- violate the First Amendment.

Reno v. ACLU, 521 U.S. 844 (1997).
Justices concurring: Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.
Justices concurring in part and dissenting in part: O'Connor, Rehnquist, C.J..

154. Act of Feb. 8, 1996 (Pub. L. 104-104, § 505), 110 Stat. 136, 47 U.S.C. § 561.

Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, since the Government did not establish that the less restrictive alternative found in section 504 of the Act -- that of scrambling a channel at a subscriber's request -- would be ineffective.

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).
Justices concurring: Kennedy, Stevens, Souter, Thomas, Ginsburg.
Justices dissenting: Scalia, Breyer, O'Connor, Scalia, Rehnquist, C.J..

155. Act of Apr. 9, 1996, 110 Stat. 1200 (Pub. L. 104-130), 2 U.S.C. §§ 691 et seq.

The Line Item Veto Act, which gives the President the authority to "cancel in whole" three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President "the unilateral power to change the text of duly enacted statutes." This Line Item Veto Act authority differs in important respects from the President's constitutional authority to "return" (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

Clinton v. City of New York, 524 U.S. 417 (1998).
Justices concurring: Stevens, Kennedy, Souter, Thomas, Ginsburg, Rehnquist, C.J..
Justices dissenting: Scalia, O'Connor, Breyer.

156. Act of Apr. 26, 1996 (Pub. L. No. 104-134 § 504(a)(16)), 110 Stat. 1321-55.

A restriction in the appropriations act for the Legal Services Corporation that prohibits funding for any organization that participates in litigation that challenges a federal or state welfare law constitutes viewpoint discrimination in violation of the First Amendment. More-

over, the restrictions on LSC advocacy "distort [the] usual functioning" of the judiciary, and are "inconsistent with accepted separation-of-powers principles." "An informed, independent judiciary presumes an informed, independent bar," yet the restriction "prohibits speech and expression on which courts must depend for the proper exercise of judicial power."

Legal Services Corp. v. Valazquez, 531 U.S. 533 (2001).
Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.
Justices dissenting: Scalia, O'Connor, Thomas, Rehnquist, C.J..

157. Act of Sep. 30, 1996 (Pub. L. No. 104-208, § 121), 110 Stat. 3009-26, 18 U.S.C. §§ 2252, 2256.

Two sections of the Child Pornography Prevention Act of 1996 that extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but that were produced without using any real children violate the First Amendment. These provisions cover any visual image that "appears to be" of a minor engaging in sexually explicit conduct, and any image promoted or presented in a way that "conveys the impression" that it depicts a minor engaging in sexually explicit conduct. The rationale for excepting child pornography from First Amendment coverage is to protect children who are abused and exploited in the production process, yet the Act's prohibitions extend to "virtual" pornography that does not involve children in the production process.

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer..
Justice concurring specially: Thomas..
Justices dissenting: Chief Justice Rehnquist, and Scalia..

158. Act of Nov. 21, 1997 (Pub. L. 105-115, § 127), 111 Stat. 2328, 21 U.S.C. § 353a.

Section 127 of the Food and Drug Administration Modernization Act of 1997, which adds section 503A of the Federal Food, Drug, and Cosmetic Act to exempt "compounded drugs" from the regular FDA approval process if providers comply with several restrictions, including that they refrain from advertising or promoting the compounded drugs, violates the First Amendment. The advertising restriction does not meet the *Central Hudson* test for acceptable governmental regulation of commercial speech. The government failed to demonstrate that the advertising restriction is "not more extensive than is necessary" to serve its interest in preventing the drug compounding exemption from becoming a loophole by which large-scale drug manufacturing can avoid the FDA drug approval process. There are several non-speech means by which the government might achieve its objective.

Thompson v. Western States Medical Center, 535 U.S. 357 (2002).

Justices concurring: O'Connor, Scalia, Kennedy, Souter, Breyer..
Justices dissenting: Breyer, Stevens, Ginsburg, and Chief Justice Rehnquist..

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW (1789–2002)

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

Three separate lists of Supreme Court decisions appear below: part I lists cases holding state constitutional or statutory provisions unconstitutional, part II lists cases holding local laws unconstitutional, and part III lists cases holding that state or local laws are preempted by federal law. Each case is briefly summarized, and the votes of Justices are indicated unless the Court's decision was unanimous. Previous editions contained only two lists, one for cases holding state laws unconstitutional or preempted by federal law, and one for unconstitutional or preempted local laws. The 2002 edition adds the third category because of the different nature of preemption cases. State or local laws held to be preempted by federal law are void not due to repugnancy with any provision of the Constitution, but rather due to conflict with a federal statute or treaty, and through operation of the Supremacy Clause. Preemption cases formerly listed in one of the first two categories have been moved to the third. A few cases with multiple holdings are listed in more than one category.

I. STATE LAWS HELD UNCONSTITUTIONAL

1. *United States v. Peters*, 9 U.S. (5 Cr.) 115 (1809)

A Pennsylvania statute prohibiting the execution of any process issued to enforce a certain sentence of a federal court, on the ground that the federal court lacked jurisdiction in the cause, could not oust the federal court of jurisdiction. A state statute purporting to annul the judgment of a court of the United States and to destroy rights acquired thereunder is without legal foundation.

2. *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810)

A Georgia statute annulling conveyance of public lands authorized by a prior enactment was violative of the obligation of contracts clause (Art. I, § 10) of the Constitution.

Justices concurring: Marshall, C.J., Washington, Livingston, Todd.
Justice dissenting: Johnson (in part).

3. *New Jersey v. Wilson*, 11 U.S. (7 Cr.) 164 (1812).

A New Jersey law purporting to repeal an exemption from taxation contained in a prior enactment conveying certain lands was violative of the obligation of contracts clause (Art. I, § 10).

4. *Terrett v. Taylor*, 13 U.S. (9 Cr.) 43 (1815).

Although subsequently cited as a contract clause case (*Piqua Branch Bank v. Knoop*, 57 U.S. (16 How.) 369, 389 (1853)), the Court

in the instant decision, without referring to the obligation of contracts clause (Art. I, § 10), voided, as contrary to the principles of natural justice, two Virginia acts which purported to divest the Episcopal Church of title to property "acquired under the faith of previous laws."

5. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

Retroactive operation of a New York insolvency law to discharge the obligation of a debtor on a promissory note negotiated prior to its adoption violated the obligation of contracts clause (Art. I, § 10).

6. *McMillan v. McNeil*, 17 U.S. (4 Wheat.) 209 (1819).

A Louisiana insolvency law had no extraterritorial operation, and although adopted in 1808, its invocation to relieve a debtor of an obligation contracted by him in 1811, while a resident of South Carolina, offended the obligation of contracts clause (Art. I, § 10).

7. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Under the principle of national supremacy (Art. VI) whereunder instrumentalities of the Federal Government are immune from state taxation, a Maryland law imposing a tax on notes issued by a branch of the Bank of United States was held unconstitutional.

8. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

A New Hampshire law which altered a charter granted to a private eleemosynary corporation by the British Crown prior to the Revolution was deemed violative of the obligation of contracts clause (Art. I, § 10).

Justices concurring: Marshall, C.J., Washington, Johnson, Livingston, Story. Justice dissenting: Duvall.

9. *Farmers' and Mechanics' Bank v. Smith*, 19 U.S. (6 Wheat.) 131 (1821).

A Pennsylvania insolvency law, insofar as it purported to discharge a debtor from obligations contracted prior to its passage, was violative of the obligation of contracts clause (Art. I, § 10).

10. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823).

Inasmuch as the compact between Virginia and Kentucky negotiated on the occasion of the separation of the latter from the former stipulated that rights in lands within the ceded area should remain valid and secure under the laws of Kentucky, and should be determined by Virginia law as of the time of separation, a subsequent Kentucky law which diminished the rights of a lawful owner by reducing the scope of his remedies against an adverse possessor violated the obligation of contracts clause (Art. I, § 10)

Justice concurring: Johnson (separately).

11. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

An Ohio statute levying a tax on the Bank of the United States, a federal instrumentality, was unenforceable (Art VI).

Justices concurring: Marshall, C.J., Washington, Todd, Duvall, Story, Thompson.

Justice dissenting: Johnson.

12. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

Although a New York insolvency law may be applied to discharge a debt contracted subsequently to the passage of such law, the statute could not be accorded extraterritorial enforcement to the extent of discharging a claim sought to be collected by a citizen of another State either in a federal court or in the courts of other States.

Justices concurring: Johnson, Marshall, C.J., Duvall, Story.

Justices dissenting: Washington, Thompson, Trimble.

13. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

A Maryland statute which required an importer to obtain a license before reselling in the original package articles imported from abroad was in conflict with the federal power to regulate foreign commerce (Art. I, § 8, cl. 3) and with the constitutional provision (Art. I, § 10, cl. 2) prohibiting States from levying import duties.

Justices concurring: Marshall, C.J., Washington, Johnson, Duvall, Story, Trimble.

Justice dissenting: Thompson.

14. *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830).

A Missouri act, under the authority of which certificates in denominations of 50 to $10 were issued, payable in discharge of taxes or debts owned to the State and of salaries due public officers violated the constitutional prohibition (Art. I, § 10, cl. 10) against emission of "bills of credit" by States.

Justices concurring: Marshall, C.J., Duvall, Story, Baldwin.

Justices dissenting: Johnson, Thompson, McLean.

15. *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 635 (1832).

Consistently with the principle of *Ogden v. Saunders*, a Maryland insolvency law could not be invoked to effect discharge of an obligation contracted in Louisiana subsequently to its passage.

16. *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842).
A Pennsylvania law which diminished the compensation of a federal officer by subjecting him to county taxes imposed an invalid burden on a federal instrumentality (Art. VI).

17. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

A Pennsylvania statute (1826) which penalized an owner's recovery of a runaway slave was violative of Art. IV, § 2, cl. 3, as well as federal implementing legislation.

Justices concurring: Story, Catron, McKinley, Taney, C.J. (separately), Thompson (separately), Baldwin (separately), Wayne (separately), Daniel (separately), McLean (separately).

18. *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843).

Illinois mortgage moratorium law which, when applied to a mortgage negotiated prior to its passage, reduced the remedies of the mortgage lender by conferring a new right of redemption upon a defaulting borrower, impaired an obligation of contract contrary to Art. I, § 10, of the Constitution.

Justices concurring: Taney, C.J., Baldwin, Wayne, Catron, Daniel.
Justice dissenting: McLean.

19. *McCracken v. Hayward*, 43 U.S. (2 How.) 608 (1844).

Illinois mortgage moratorium law, which, when applied to a mortgage executed prior to its passage, diminished remedies of the mortgage lender by prohibiting consummation of a foreclosure unless the foreclosure price equaled two-thirds of the value of the mortgaged property, impaired the lender's obligation of contract contrary to Art. I, § 10, of the Constitution.

20. *Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133 (1845).

As to stockholders of Maryland state banks afforded an exemption under prior act of 1821, Maryland statute of 1841 taxing these stockholders impaired the obligation of contract.

21. *Planters' Bank v. Sharp*, 47 U.S. (6 How.) 301 (1848).

Mississippi law which nullified the power of a bank under a previously issued charter to discount bills of exchange and promissory notes and to institute actions for collection of the same was void by reason of imparing an obligation of contract (Art. I, § 10).

Justices concurring: McLean, Wayne, Catron, Nelson, Woodbury, Grier.
Justices dissenting: Taney, C.J., Daniel.

22. *Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

Collection by New York and Massachusetts of per capita taxes on alien and domestic passengers arriving in the ports of these States was violative of the federal power to regulate foreign and interstate commerce (Art. I, § 8, cl. 3).

Justices concurring: McLean (separately), Wayne (separately), Catron (separately), McKinley (separately), Grier (separately).
Justices dissenting: Taney, C.J. (separately), Daniel (separately), Woodbury (separately), Nelson.

23. *Woodruff v. Trapnall*, 51 U.S. (10 How.) 190 (1851).

A judgment debtor of the State of Arkansas tendered, in satisfaction of the judgment, banknotes in circulation at the time of the repeal by the State of that section of the said bank's charter providing that such notes should be received in discharge of public debts. By reason of the inhibition of the contract clause of the Constitution, the legislative repeal could neither affect such notes nor abrogate the pledge of the State to receive them in payment of debts.

Justices concurring: Taney, C.J., McLean, Wayne, McKinley, Woodbury.
Justices dissenting: Catron, Daniel, Nelson, Grier.

24. *Achison v. Huddleson*, 53 U.S. (12 How.) 293 (1852).

Inasmuch as by the terms of a Maryland statute, assented to by Congress, no toll was to be levied by that State on passenger coaches carrying mails over the Cumberland Road, later Maryland law imposing tolls on passengers in such coaches was void by reason of conflict with an earlier compact between Maryland and the Federal Government and also by virtue of imposing a burden on federal carriage of the mails (Art. VI).

25. *Trustees for Vincennes University v. Indiana*, 55 U.S. (14 How.) 268 (1853).

Inasmuch as the incorporation by the territorial legislature of the University in 1806 operated to vest in the latter certain federal lands reserved for educational purposes, subsequent enactment by Indiana ordering the sale of such lands and use of the proceeds for other purposes was invalid because of impairment of the contractual rights of the University.

Justices concurring: McLean, Wayne, Nelson, Grier, Curtis.
Justices dissenting: Taney, C.J., Catron, Daniel.

26. *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1854).

Retroactive Arkansas laws which vested all property of the state bank in Arkansas and thereby prevented the bank from honoring its outstanding bills payable on demand to the holders thereof impaired the bank's contractual rights and were void.

Justices concurring: Taney, C.J., McLean, Wayne, Grier, Curtis, Campbell.
Justices dissenting: Catron, Daniel, Nelson.

27. *State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1854).

Inasmuch as state banks, on acceptance of a charter under the Ohio banking law of 1845, were directed, in lieu of all taxes, to pay six percent of annual dividends to the States, a later statute which exposed these banks to higher taxes effected an invalid impairment of the obligation of contract.

Justices concurring: Taney, C.J., McLean, Wayne, Nelson, Grier, Curtis.

Justices dissenting: Catron, Daniel, Campbell.

28. *Hays v. The Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596 (1855).
California lacked jurisdiction to impose property taxes on vessels owned by a New York company and registered in New York as their home port which engaged in the coastwise trade entailing calls at California ports which were too brief to establish a tax situs.

Justices concurring: Taney, C.J., McLean, Wayne, Catron, Nelson, Grier, Curtis, Campbell.
Justice dissenting: Daniel.

29. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856).
Levy under an 1851 Ohio law of a bank tax at a higher rate than that specified in the bank's charter in 1845 was invalid by reason of impairment of the obligation of contract.

Justices concurring: Taney, C.J., McLean, Wayne, Nelson, Grier, Curtis.
Justices dissenting: Catron, Daniel, Campbell.

30. *Almy v. California*, 65 U.S. (24 How.) 169 (1861).
A California stamp tax imposed on bills of lading for gold or silver transported from California to any place outside the State was void as a tax on exports forbidden by Art. I, § 10, cl. 2 of the Constitution.

31. *Howard v. Bugbee*, 65 U.S. (24 How.) 461 (1861).
An Alabama statute authorizing redemption of mortgaged property in two years after sale under a foreclosure decree, by bona fide creditors of the mortgagor could not be applied to sales under mortgages executed prior to the enactment without invalid impairment of the obligation of contracts (Art. I, § 10).

32. *Bank of Commerce v. New York City*, 67 U.S. (2 Black) 620 (1863).
Securities of the United States being exempt from state taxation, inclusion of the value thereof in the capital of a bank subjected to taxation by the terms of a New York law rendered the latter void.

33. *Bank Tax Case*, 69 U.S. (2 Wall.) 200 (1865).
An 1863 New York law, enacted after the *Bank of Commerce* decision, is similarly invalid as in effect a tax on the securities of the United States.

34. *Hawthorne v. Calef*, 69 U.S. (2 Wall.) 10 (1865).
A Maine statute terminating the liability of corporate stock for the debts of the corporation impaired the obligation of contracts as respects claims of creditors outstanding at the time of such termination.

35. *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51 (1866).
An obligation of contract was impaired when the New York legislature, after having issued a charter to a bridge company containing

assurances that erection of other bridges within two miles of said bridge would not be authorized, subsequently chartered a second company to construct a bridge within a few rods of the first.

36. *McGee v. Mathis*, 71 U.S. (4 Wall.) 143 (1867).

Arkansas statute of 1855 repealing an 1851 grant of tax exemption applicable to swamp lands, paid for either before or after repeal with scrip issued before the repeal, impaired a contract of the State with holders of such scrip (Art. I, § 10).

37. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

Missouri constitutional provisions which required clergymen, as a prerequisite to the practice of their profession, to take an oath that they had never been guilty of hostility to the United States, or of certain other acts which were lawful when committed, was void as a bill of attainder and as an ex post facto law.

Justices concurring: Wayne, Grier, Nelson, Clifford, Field.
Justices dissenting: Swayne, Davis, Miller.

38. *Von Hoffman v. Quincy*, 71 U.S. (4 Wall.) 535 (1867).

Illinois law limiting taxing powers granted to a municipality under a prior law authorizing it to issue bonds and amortize the same by levy of taxes impaired the obligation of contract (Art. I, §10).

39. *Christmas v. Russell*, 72 U.S. (5 Wall.) 290 (1867).

A Mississippi statute which prohibited enforcement of a judgment of a sister State against a resident of Mississippi whenever barred by the Mississippi statute of limitations was violative of the full faith and credit clause of Art. IV.

40. *Steamship Company v. Portwardens*, 73 U.S. (6 Wall.) 31 (1867).

A Louisiana statute which provided that port wardens might collect, in addition to other fees, a tax of five dollars from every ship entering the port of New Orleans, whether any service was performed or not, was in conflict with the commerce clause of the Constitution (Art. I, § 8, cl. 3).

41. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868).

A Nevada tax collected from every person leaving the State by rail or stage coach abridged the privileges of United States citizens to move freely across state lines in fulfillment of their relations with the National Government.

42. *Northern Central Ry. v. Jackson*, 74 U.S. (7 Wall.) 262 (1869).

Pennsylvania was without jurisdiction to enforce its law taxing interest on railway bonds secured by a mortgage applicable to railway property part of which was located in another State.

Justices concurring: Chase, C.J., Nelson, Davis, Field, Miller, Grier.

Justices dissenting: Clifford, Swayne.

43. *Furman v. Nichol*, 75 U.S. (8 Wall.) 44 (1869).

Tennessee statute repealing prior law making notes of the Banks of Tennessee receivable in payment of taxes impaired the obligation of contract as to the notes already in circulation (Art. I, § 10).

44. *Home of the Friendless v. Rouse*, 75 U.S. (8 Wall.) 430 (1869); *The Washington University v. Rouse*, 75 U.S. (8 Wall.) 439 (1869).

Missouri statute taxing corporations afforded tax exemption by their charter impaired the obligation of contract (Art. I, § 10).

Justices concurring: Nelson, Clifford, Grier, Swayne, Davis.
Justices dissenting: Chase, C.J., Miller, Field.

45. *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1871).

Alabama taxes levied on vessels owned by its citizens and employed in intrastate commerce "at so much per ton of the registered tonnage" were violative of the constitutional prohibition against the levy of tonnage duties by States.

46. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871).

Maryland law which exacted a traders' license from nonresidents at a higher rate than was collected from residents was violative of the privileges and immunities clause of Art. IV, § 2.

47. *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1872).

State legislation cannot interfere with the disposition of the public domain by Congress, and therefore a Missouri statute of limitations, which was inapplicable to the United States, could not be applied so as to accord title to an adverse possessor as against a grantee from the United States, notwithstanding that the adverse possession preceded the federal conveyance.

Justices concurring: Field, Nelson, Swayne, Clifford, Miller, Bradley, Chase, C.J..
Justices dissenting: Davis, Strong.

48. *Wilmington R.R. v. Reid*, 80 U.S. (13 Wall.) 264 (1872).

North Carolina statute which levied a tax on the franchise and property of a railroad which had been accorded tax exemption by the terms of its charter impaired the obligation of contract.

49. *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872).

Obligations of contracts clause (Art. I, § 10) precluded reliance on a Georgia constitutional provision of 1868, prohibiting enforcement of any contract, the consideration for which was a slave, to defeat enforcement of a note based on such consideration and negotiated prior to adoption of said provision.

Justices concurring: Swayne, Nelson, Davis, Strong, Clifford, Miller, Field, Bradley.

Justice dissenting: Chase, C.J..

50. *Accord: Osborne v. Nicholson*, 80 U.S. (13 Wall.) 654 (1872), invalidating a similar Arkansas constitutional provision adopted in 1868.

Justices concurring: Swayne, Nelson, Davis, Strong, Clifford, Miller, Field, Bradley.
Justice dissenting **Chase**

51. *Delmas v. Insurance Company*, 81 U.S. (14 Wall.) 661 (1872).

A Louisiana constitutional provision rendering unenforceable contracts, the consideration for which was Confederate money, was inapplicable, by reason of the obligation of contracts clause of the Federal Constitution (Art. I, § 10) to contracts consummated before adoption of the former provision.

52. *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873).

A Pennsylvania law which imposed a tax on freight transported interstate, into and out of Pennsylvania, was an invalid regulation of interstate commerce.

Justices concurring: Story, Chase, C.J., Clifford, Miller, Field, Bradley, Hunt.
Justices dissenting: Swayne, Davis.

53. *State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300 (1873).

Pennsylvania law, so far as it directed domestic corporations to withhold on behalf of the State a portion of interest due on bonds owned by nonresidents, impaired the obligation of contract and denied due process by taxing property beyond its jurisdiction.

Justices concurring: Field, Chase, C.J., Bradley, Swayne, Strong.
Justices dissenting: Davis, Clifford, Miller, Hunt.

54. *Gunn v. Barry*, 82 U.S. (15 Wall.) 610 (1873).

Georgia constitutional provision increasing amount of homestead exemption impaired the obligation of contract, insofar as it applied to a judgment obtained under a less liberal exemption provision.

55. *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1873).

A West Virginia Act of 1865, depriving defendants of right to rehearing on a judgment obtained under an earlier law unless they made oath that they had not committed certain offenses, constituted an invalid bill of attainder and ex post facto law.

Justices concurring: Field, Chase, C.J., Clifford, Miller, Swayne, Davis, Strong, Hunt.
Justice dissenting: Bradley.

56. *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244 (1873).

South Carolina taxing laws, as applied to a railroad whose charter exempted it from taxation, impaired the obligation of contract.

57. *Walker v. Whitehead*, 83 U.S. (16 Wall.) 314 (1873).

Georgia law restricting remedies for obtaining a judgment, so far as it affected prior contracts, impaired the obligation of contract.

58. *Barings v. Dabney*, 86 U.S. (19 Wall.) 1 (1873).

South Carolina act appropriating for payment of state debts the assets of an insolvent bank, in which the State owned all the stock, disadvantaged private creditors of the bank and thereby impaired the obligation of contract.

59. *Peete v. Morgan*, 86 U.S. (19 Wall.) 581 (1874).

Texas act of 1870 imposing a tonnage tax on foreign vessels to defray quarantine expenses held violative of Art I, § 10, prohibiting levy without consent of Congress.

60. *Pacific R.R. v. Maguire*, 87 U.S. (20 Wall.) 36 (1874).

Missouri law which levied a tax on railroad prior to expiration of a grant of exemption impaired obligation of contract.

Justices concurring: Waite, C.J., Field, Bradley, Swayne, Davis, Hunt.
Justices dissenting: Clifford, Miller.

61. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874).

Wisconsin act admitting foreign insurance companies to transact business within the State, upon their agreement not to remove suits to federal courts, exacted an unconstitutional condition.

Justices concurring: Clifford, Miller, Field, Bradley, Swayne, Strong, Hunt.
Justices dissenting: Waite, C.J., Davis.

62. *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1875).

Kansas act of 1872, authorizing municipalities to issue bonds repayable out of tax revenues in support of private enterprise, amounted to collection of money in aid of a private, rather than public purpose, and was violative of due process.

Justices concurring: Strong, Swayne, Davis, Waite, C.J., Miller, Field, Bradley.
Justice dissenting: Clifford.

63. *Wilmington & Weldon R.R. v. King*, 91 U.S. 3 (1875).

North Carolina statute, insofar as it authorized a jury in suits on contracts--negotiated previously during the Civil War--to place their own estimates upon the value of the contract instead of taking the value stipulated by the parties, impaired the obligation of such contracts.

Justices concurring: Waite, C.J., Clifford, Miller, Field, Swayne, Davis, Strong, Hunt.
Justice dissenting: Bradley.

64. *Welton v. Missouri*, 91 U.S. 275 (1876).
Missouri act which required payment of a license fee by peddlers of merchandise produced outside the State, but exempted peddlers of State-produced merchandise, imposed an unconstitutional burden on interstate commerce.

65. *Morrill v. Wisconsin*, 154 U.S. 626 (1877).
Wisconsin statute void on basis of *Welton v. Missouri*.

66. *Henderson v. Mayor of New York*, 92 U.S. 259 (1876).
New York act of 1849, which required owner of ocean-going passenger vessel to post bond of $300 for each passenger as surety against their becoming public charges, or, in lieu thereof, to pay a tax of $1.50 for each, contravened exclusive federal power to regulate foreign commerce.

67. *Chy Lung v. Freeman*, 92 U.S. 275 (1876).
California law, which required master of vessel to post $500 bond for each alien "lewd and debauched female" passenger landed, contravened the federal power to regulate foreign commerce.

68. *Inman Steamship Co. v. Tinker*, 94 U.S. 238 (1877).
New York act of 1865, providing for collection from docking vessels of a fee measured by tonnage, imposed tonnage duty in violation of Art. I, § 10.

69. *Foster v. Masters of New Orleans*, 94 U.S. 246 (1877).
Louisiana statute requiring survey of hatches of every sea-going vessel arriving at New Orleans, contravened the federal power to regulate foreign and interstate commerce.

70. *New Jersey v. Yard*, 95 U.S. 104 (1877).
Statute increasing tax above rate stipulated in State's contract with railroad corporations impaired the obligation of contract.

71. *Railroad Co.v. Husen*, 95 U.S. 465 (1878).
Missouri act prohibiting the bringing of cattle into the State between March and November contravened the power of Congress over interstate commerce.

72. *Hall v. DeCuir*, 95 U.S. 485 (1878).
Louisiana Reconstruction Act, prohibiting interstate common carriers of passengers from making any discrimination on the basis of race or color, held invalid as a regulation of interstate commerce.

73. *Farrington v. Tennessee*, 95 U.S. 679 (1878).
Tennessee law increasing the tax on a bank above the rate specified in its charter, held to impair the obligation of that contract.

Justices concurring: Swayne, Miller, Hunt, Bradley, Harlan, Waite, C.J..

Justices dissenting: Strong, Clifford, Field.

74. *Edwards v. Kearzey*, 96 U.S. 595 (1878).

North Carolina constitutional provision increasing amount of debtor's property exempt from sale under execution of a judgment impaired the obligation of contracts negotiated prior to its adoption.

Justices concurring: Waite, C.J., Swayne, Bradley, Strong, Miller.
Justices concurring specially: Field, Hunt.
Justice dissenting: Harlan.

75. *Keith v. Clark*, 97 U.S. 454 (1878).

Provision of the Tennessee Constitution of 1865, forbidding the receipt for taxes of the bills of the Bank of Tennessee and declaring the issues of the bank during the insurrectionary period void, held to impair the obligation of contract.

Justices concurring: Miller, Clifford, Strong, Hunt, Swayne, Field.
Justices dissenting: Waite, C.J., Bradley, Harlan.

76. *Cook v. Pennsylvania*, 97 U.S. 566 (1878).

Pennsylvania act taxing auction sales, when applied to sales of imported goods in the original packages, was void as a duty on imports and a regulation of foreign commerce.

77. *Northwestern University v. Illinois ex rel. Miller*, 99 U.S. 309 (1878).

Revenue law of Illinois, so far as it modified tax exemptions granted to Northwestern University by an earlier statute, impaired the obligation of contract.

78. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

West Virginia law barring Negroes from jury service violated the equal protection clause of the Fourteenth Amendment.

Justices concurring: Strong, Miller, Hunt, Swayne, Bradley, Harlan, Waite, C.J..
Justices dissenting: Field, Clifford.

79. *Guy v. City of Baltimore*, 100 U.S. 434 (1880).

Maryland statute and Baltimore ordinance, levying tax solely on products of other States, held to impose an invalid burden upon foreign and interstate commerce.

Justices concurring: Harlan, Hunt, Clifford, Strong, Miller, Swayne, Field, Bradley.
Justice dissenting: Waite, C.J..

80. *Tiernan v. Rinker*, 102 U.S. 123 (1880).

Texas statute, insofar as it levied occupational tax only upon sale of out-of-state beer and wine, was violative of the federal power to regulate foreign and interstate commerce.

81. *Hartman v. Greenhow*, 102 U.S. 672 (1880).

Virginia act, adopted subsequently to law providing for issuance of bonds and acceptance of interest coupons thereon in full payment of taxes, which levied a new property tax collectible by way of deduction from such interest coupons, impaired the obligation of contract.

Justices concurring: Field, Clifford, Harlan, Strong, Hunt, Swayne, Bradley, Waite, C.J..
Justice dissenting: Miller.

82. *Hall v. Wisconsin*, 103 U.S. 5 (1880).

Wisconsin act which repealed prior statute authorizing payment of fixed sum for performance of a contract to complete a geological survey, impaired the obligation of contract, notwithstanding that the second act was enacted prior to total fulfillment of the contract.

83. *Webber v. Virginia*, 103 U.S. 344 (1881).

Virginia license acts, requiring a license for sale of goods made outside the State but not within the State, held in conflict with the commerce clause.

84. *United States ex rel. Wolff v. City of New Orleans*, 103 U.S. 358 (1881).

Louisiana act withdrawing from New Orleans the power to levy taxes adequate to amortize previously issued bonds impaired the obligation of contract.

Accord: Louisiana v. Pilsbury, 105 U.S. 278 (1881).

85. *Asylum v. City of New Orleans*, 105 U.S. 362 (1881).

The general taxing laws for New Orleans when applied to the property of an asylum, whose charter exempted it from taxation, impaired the obligation of contract.

Justices concurring: Bradley, Waite, C.J., Woods, Gray, Harlan, Matthews, Blatchford.
Justices dissenting: Miller, Field.

86. *Western Union Telegraph Co. v. Texas*, 105 U.S. 460 (1882).

Texas tax collected on private telegraph messages sent out of the State imposed an invalid burden on foreign and interstate commerce; and insofar as it was imposed on official messages sent by federal officers amounted to an unconstitutional burden on a federal instrumentality.

87. *Ralls County Court v. United States*, 105 U.S. 733 (1881).

Missouri law which deprived a county of the taxing power requisite to meet interest payments on previously issued bonds impaired the obligation of contract.

88. *City of Parkersburg v. Brown*, 106 U.S. 487 (1882).

West Virginia law authorizing a city to issue its bonds in aid of manufacturers was void by reason of sanctioning an expenditure of

public funds for a private purpose contrary to the requirements of due process.

89. *New York v. Compagnie Gen. Transatlantique*, 107 U.S. 59 (1882).

New York law imposing a tax on every alien arriving from a foreign country, and holding the vessel liable for payment of the tax was an invalid regulation of foreign commerce.

90. *Kring v. Missouri*, 107 U.S. 221 (1883).

A Missouri law which abolished a rule existing at the time the crime was committed, whereunder subsequent prosecution for first degree murder was precluded after conviction for second degree murder has been set aside on appeal, was void as an ex post facto law.

Justices concurring: Miller, Harlan, Field, Blatchford, Woods.
Justices dissenting: Matthews, Bradley, Gray, Waite, C.J..

91. *Nelson v. St. Martin's Parish*, 111 U.S. 716 (1884).

Louisiana act repealing taxing authority of a municipality to pay judgments hitherto rendered against it impaired the obligation of contract.

92. *Cole v. La Grange*, 113 U.S. 1 (1885).

Missouri act authorizing city to issue bonds in aid of manufacturing corporations was void by reason of sanctioning defrayment of public moneys for other than public purpose and depriving taxpayers of property without due process.

93. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885).

Pennsylvania taxing laws, when applied to the capital stock of a New Jersey ferry corporation carrying on no business in the State except the landing and receiving of passengers and freight, was void as a tax on interstate commerce.

94. *Virginia Coupon Cases*, 114 U.S. 269 (1885).

Virginia act which terminated privilege accorded bondholders under prior law of tendering coupons from said bonds in payment of taxes impaired the obligation of contract (Art. I, § 10).

Justices concurring: Matthews, Field, Harlan, Woods, Blatchford.
Justices dissenting: Bradley, Miller, Gray, Waite, C.J..

95. *Effinger v. Kenney*, 115 U.S. 566 (1885).

Virginia Act of 1867, which provided that in suits to enforce contracts for the sale of property negotiated during the Civil War and payable in Confederate notes, the measure of recovery was to be the value of the land at the time of sale rather than the value of such notes at that time, impaired the obligation of contracts (Art. I, § 10).

96. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U.S. 683 (1885).

Kentucky act of 1872 chartering and authorizing a corporation to supply gas in Louisville, Kentucky, impaired the obligation of contract resulting from the grant of an exclusive privilege to an older company in 1869.

97. *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885).

When a public officer has completed services (1871-1874), for which the compensation was fixed by law, an implied obligation to pay him at such rate arises, and such contract was impaired by a Louisiana constitutional provision of 1880 which reduced the taxing power of a parish to such extent as to deprive the officer of any effective means of collecting the sum due him.

98. *City of Mobile v. Watson*, 116 U.S. 289 (1886).

Alabama law which deprived Mobile and its successor of the power to levy taxes sufficient to amortize previously issued bonds impaired the obligation of contracts.

99. *Walling v. Michigan*, 116 U.S. 446 (1886).

Michigan law taxing nonresidents soliciting sale of foreign liquors to be shipped into the State imposed an invalid restraint on interstate commerce.

100. *Royall v. Virginia*, 116 U.S. 572 (1886).

When a Virginia law provided that coupons on state bonds were acceptable in payment of state fees, subsequent law requiring legal tender in payment of a professional license fee impaired the obligation of contract between the coupon holder and the State and also voided invocation of another law imposing penalty for practice without a license (refused for want of payment in legal tender).

101. *Pickard v. Pullman Southern Car Co.*, 117 U.S. 34 (1886).

Tennessee privilege tax on railway sleeping cars was void insofar as it applied to cars moving in interstate commerce.

102. *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886).

A State cannot validly sell for taxes lands which the United States owned at the time the taxes were levied, but in which it ceased to have an interest at the time of sale (Art. VI).

103. *Wabash, St. L. & P. Ry. v. Illinois*, 118 U.S. 557 (1886).

Illinois law, prohibiting long-short haul rate discrimination, when applied to interstate transportation, encroached upon the federal commerce power.

Justices concurring: Miller, Field, Harlan, Woods, Matthews, Blatchford.
Justices dissenting: Bradley, Gray, Waite, C.J..

104. *Robbins v. Shelby Taxing District*, 120 U.S. 489 (1887).

Tennessee law taxing drummers not operating from a domestic licensed place of business, insofar as it applied to drummers soliciting sales of goods on behalf of out-of-state business firms, was an invalid regulation of interstate commerce.

Justices concurring: Bradley, Miller, Harlan, Woods, Matthews, Blatchford.
Justices dissenting: Waite, C.J., Gray, Field.

105. *Corson v. Maryland*, 120 U.S. 502 (1887).

Maryland law licensing salesmen, insofar as it was applied to a New York resident soliciting orders on behalf of a New York firm, was an invalid regulation of interstate commerce.

106. *Barron v. Burnside*, 121 U.S. 186 (1887).

Iowa law, conditioning admission of a foreign corporation to do local business on surrender of right to invoke the diversity of citizenship jurisdiction of federal courts, exacted an invalid forfeiture of a constitutional right.

107. *Fargo v. Michigan*, 121 U.S. 230 (1887).

Michigan act, insofar as it taxed the gross receipts of companies and corporations engaged in interstate commerce, was held to be in conflict with the commerce powers of Congress.

108. *Seibert v. Lewis*, 122 U.S. 284 (1887).

Missouri law requiring certain petitions, not exacted when county bonds were issued, before taxes could be levied to amortize said bonds, impaired the obligation of contracts.

109. *Philadelphia Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887).

Pennsylvania gross receipts tax on public utilities, insofar as it was applied to the gross receipts of a domestic corporation derived from transportation of persons and property on the high seas, was in conflict with the exclusive federal power to regulate foreign and interstate commerce.

110. *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347 (1887).

Indiana statute concerning the delivery of telegrams, so far as applied to deliveries sent from Indiana to other States, was an invalid regulation of commerce.

111. *Bowman v. Chicago & Nw. Ry.*, 125 U.S. 465 (1888).

Iowa liquor statute requiring interstate carriers to procure a certificate from the auditor of the county of destination before bringing liquor into the State, was violative of the commerce clause.

Justices concurring: Matthews, Field (separately), Miller, Bradley, Blatchford.
Justices dissenting: Harlan, Gray, Waite, C.J..

112. *California v. Pacific R.R.*, 127 U.S. 1 (1888).

A California tax levied on the franchise of interstate railway corporations chartered by Congress pursuant to its commerce power is void, Congress not having consented.

113. *Ratterman v. Western Union Tel. Co.*, 127 U.S. 411 (1888).

An Ohio law which levied a tax on the receipts of a telegraph company was invalid to the extent that part of such receipts levied on were derived from interstate commerce.

114. *Asher v. Texas*, 128 U.S. 129 (1888).

A Texas law which imposed a license tax on drummers violates the commerce clause as enforced against one who solicited orders for the purchase of merchandise from out-of-state sellers.

115. *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

Clause of the District act requiring commercial agents selling by sample to pay a license tax, held a regulation of interstate commerce when applied to agents soliciting purchases on behalf of principals outside of the District of Columbia.

Justices concurring: Fuller, C.J., Field, Bradley, Harlan, Matthews, Gray, Blatchford, Lamar.
Justice dissenting: Miller.

116. *Western Union Tel. Co. v. Alabama*, 132 U.S. 472 (1889).

Alabama tax law, as applied to revenue of telegraph company made by sending messages outside the State, was held to be an invalid regulation of commerce.

117. *Medley, Petitioner*, 134 U.S. 160 (1890).

Colorado law, when applied to a person convicted of a murder committed prior to the enactment and which increased the penalty to be imposed, was void as an ex post facto law.

Justices concurring: Miller, Field, Harlan, Gray, Blatchford, Lamar, Fuller, C.J..
Justices dissenting: Brewer, Bradley.

118. *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890).

State rate regulatory law which empowered a commission to establish rate schedules that were final and not subject to judicial review as to their reasonableness was violative of the due process and equal protection clauses of the Fourteenth Amendment.

Justices concurring: Blatchford, Miller, Field, Harlan, Brewer, Fuller, C.J..
Justices dissenting: Bradley, Gray, Lamar.

119. *Leisy v. Hardin*, 135 U.S. 100 (1890).

Iowa prohibition law, enforced as to an interstate shipment of liquor in the original packages or kegs, was violative of the federal power to regulate interstate commerce.

Justices concurring: Fuller, C.J., Miller, Field, Bradley, Blatchford, Lamar.
Justices dissenting: Gray, Harlan, Brewer.

120. *Lyng v. Michigan*, 135 U.S. 161 (1890).

Michigan statute taxing sale of imported liquor in original package, held invalid regulation of interstate commerce.

Justices concurring: Fuller, C.J., Miller, Field, Bradley, Blatchford, Lamar.
Justices dissenting: Gray, Harlan, Brewer.

121. *McGahey v. Virginia*, 135 U.S. 662 (1890).

Virginia acts which stipulated that if the genuineness of coupons tendered in payment of taxes was in issue, the bond from which the coupon was cut must be produced, which precluded use of expert testimony to establish the genuineness of the coupons, and which, in suits for payment of taxes, imposed on the defendant tendering coupons as payment the burden of establishing the validity of said coupons, were deemed to abridge the remedies available to the bondholders so materially as to impair the obligation of contract.

122. *Norfolk & Western R.R. v. Pennsylvania*, 136 U.S. 114 (1890).

Pennsylvania act, imposing a license tax on foreign corporation common carriers doing business in the State, was held to be invalid as a tax on interstate commerce.

Justices concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford.
Justices dissenting: Fuller, C.J., Gray, Brewer.

123. *Minnesota v. Barber*, 136 U.S. 313 (1890).

Minnesota statute, which made it illegal to offer for sale any meat other than that taken from animals passed by state inspectors, held to discriminate against meat producers from other States and to place an undue burden upon interstate commerce.

124. *Brimmer v. Rebman*, 138 U.S. 78 (1891).

Virginia statute prohibiting sale of meat killed 100 miles or more from place of sale, unless it was first inspected in Virginia, held void as interference with interstate commerce and imposing a discriminatory tax.

125. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891).

Oregon act of 1887 which voided all certificates for the sale of public land unless 20% of the purchase price had been paid prior to 1879 altered the terms of purchase provided under preexisting law and therefore impaired the obligations of the contract.

126. *Crutcher v. Kentucky*, 141 U.S. 47 (1891).

Kentucky law, which required license from foreign express corporation agents before doing business in the State, was held invalid under the commerce clause.

Justices concurring: Bradley, Field, Harlan, Blatchford, Lamar, Brewer.
Justices dissenting: Fuller, C.J., Gray.

127. *Voight v. Wright*, 141 U.S. 62 (1891).

Virginia statute which required state inspection of all but domestic flour held invalid under commerce clause.

128. *Mobile & Ohio R.R. v. Tennessee*, 153 U.S. 486 (1894).

Tennessee statutes which levied taxes on a railroad company enjoying tax exemption under an earlier charter impaired the obligation of contract.

Justices concurring: Jackson, Field, Harlan, Brown, White.
Justices dissenting: Fuller, C.J., Gray, Brewer, Shiras.

129. *New York, L. E. & W. R.R. v. Pennsylvania*, 153 U.S. 628 (1894).

Pennsylvania act of 1885 which required a New York corporation, when paying interest in New York City on its outstanding securities, to withhold a Pennsylvania tax levied on resident owners of such securities was violative of due process by reason of its application to property beyond the jurisdiction of Pennsylvania. The act also impaired the obligation of contracts by increasing the conditions originally exacted of the railroad in return for permission to construct and operate over trackage in Pennsylvania.

130. *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204 (1894).

Kentucky act regulating toll rates on bridge across the Ohio River held unconstitutional regulation of interstate commerce.

Justices concurring: Brown, Harlan, Brewer, Shiras, Jackson.
Justices dissenting: Fuller, C.J., Field, Gray, White.

131. *Bank of Commerce v. Tennessee*, 161 U.S. 134 (1896).

Tennessee revenue laws which imposed a tax on stock beyond that stipulated under the provision of a state charter held to impair the obligation of contracts.

132. *Barnitz v. Beverly*, 163 U.S. 118 (1896).

Kansas law granting to mortgagor a right, not existent when the mortgage was negotiated, namely, a right to redeem foreclosed property, impaired the obligation of contracts.

133. *Illinois Central R.R. v. Illinois*, 163 U.S. 142 (1896).

Illinois statute that required a railroad to run its New Orleans train into Cairo and back to mail line, although there was already adequate service to Cairo, was held to be an unconstitutional obstruction of interstate commerce and of passage of United States mails.

134. *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896).

A Nebraska statute that compelled a railroad to permit a third party to erect a grain elevator on its right of way deprived of property violated due process.

135. *Scott v. Donald*, 165 U.S. 58 (1897).

South Carolina act regulating sale of alcoholic beverages exclusively at state dispensaries, when enforced against a resident importing out-of-state liquor, constituted an invalid discriminatory regulation of interstate commerce.

Justices concurring: Shiras, Field, Harlan, Gray, White, Peckham, Fuller.
Justice dissenting: Brown.

136. *Gulf, C. & S. F. Ry. v. Ellis*, 165 U.S. 150 (1897).

Texas law which required railroads to pay court costs and attorneys' fees to litigants successfully prosecuting claims against them deprived the railroads of due process and equal protection of the law.

Justices concurring: Brewer, Field, Harlan, Brown, Shiras, Peckham.
Justices dissenting: Gray, White, Fuller, C.J..

137. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

Louisiana law imposing penalty for soliciting contract of insurance on behalf of insurers which have not complied with Louisiana law effected a denial of liberty of contract contrary to due process when applied to an insurance contract negotiated in New York with a New York company and with premiums and losses to be paid in New York.

138. *Smyth v. Ames*, 169 U.S. 466 (1898).

Nebraska statute setting intrastate freight rates held to impose rates so low as to be unreasonable and to amount to a deprivation of property without due process of law.

139. *Houston & Texas Central Ry. v. Texas*, 170 U.S. 243 (1898).

Texas constitutional provision, as enforced to recover certain sections of land held by a railroad company under a previous legislative grant, judged an impairment of obligation of contract.

140. *Thompson v. Utah*, 170 U.S. 343 (1898).

Provision in Utah constitution, providing for the trial of non-capital criminal cases in courts of general jurisdiction by a jury of eight persons, held an ex post facto law applied to felonies committed before the territory became a State.

Justices concurring: Harlan, Gray, Brown, Shiras, White, McKenna, Fuller, C.J..
Justices dissenting: Brewer, Peckham.

141. *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898).

Pennsylvania law which prohibited the manufacture and sale of oleomargarine was invalid to the extent that it prohibited interstate importation and resale of oleomargarine in original packages.

Justices concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna.
Justices dissenting: Gray, Harlan.

142. *Collins v. New Hampshire*, 171 U.S. 30 (1898).

New Hampshire law which prohibited the sale of oleomargarine unless it was pink in color, was invalid as an arbitrary means of rendering the product unmarketable and also could not be enforced to prevent the interstate transportation and resale of oleomargarine produced in another State and not colored pink.

Justices concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna.
Justices dissenting: Harlan, Gray.

143. *Blake v. McClung*, 172 U.S. 239 (1898).

Tennessee acts which granted Tennessee creditors priority over non-resident creditors having claims against foreign corporations admitted to do local business infringed the privileges and immunities clause of Art. IV, § 2.

Justices concurring: Harlan, Gray, Brown, Shiras, White, McKenna, Peckham.
Justices dissenting: Brewer, Fuller, C.J..

144. *Norwood v. Baker*, 172 U.S. 269 (1898).

The exaction, as authorized by Ohio law, from the owner of property, via special assessment, of the cost of a public improvement in substantial excess of the benefits accruing to him amounted to a taking of property for public use without compensation and was violative of due process.

Justices concurring: Harlan, Brown, White, Peckham, McKenna, Fuller, C.J..
Justices dissenting: Brewer, Gray, Shiras.

145. *Dewey v. City of Des Moines*, 173 U.S. 193 (1899).

Iowa statute deprived a nonresident owner of property in Iowa of due process by subjecting him to personal liability to pay a special assessment when the State did not acquire personal jurisdiction via service of process.

146. *Lake Shore & Mich. So. Ry. v. Smith*, 173 U.S. 684 (1899).

Michigan act which required railroads to sell 1,000-mile tickets at a fixed price in favor of the purchaser, his wife, and children, with provisions for forfeiture if presented by any other person in payment

of fare, and for expiration within two years, subject to redemption of unused portion and collection of 3 cents per mile already traveled, effected a taking of property without due process and a denial of equal protection.

Justices concurring: Peckham, Harlan, Brewer, Brown, Shiras, White.
Justices dissenting: Fuller, C.J., Gray, McKenna.

147. *Houston & Texas Central R.R. v. Texas*, 177 U.S. 66 (1900).

Subsequent repeal of a Texas statute which permitted treasury warrants to be given to the State for payment of interest on bonds issued by a railroad and held by the State, with accompanying endeavor to hold the railroad liable for back interest paid on the warrants, was invalid by reason of impairment of the obligation of contract.

148. *Cleveland, C. C. & St. L. Ry. v. Illinois*, 177 U.S. 514 (1900).

Illinois law which required all regular passenger trains to stop at county seats for receipt and discharge of passengers imposed an invalid burden on interstate commerce when applied to an express train serving only through passengers between New York and St. Louis.

149. *Stearns v. Minnesota*, 179 U.S. 223 (1900).

Minnesota statute repealing all former tax exemption laws and providing for the taxation of lands granted to railroads held to impair the obligation of contracts.

Accord: Duluth & I. R.R. v. St. Louis County, 179 U.S. 302 (1900).

150. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901).

Kansas statute, regulating public stock yards, violates the equal protection clause of the Fourteenth Amendment in that it applied only to one stockyard company in the State.

151. *Louisville & Nashville R.R. v. Eubank*, 184 U.S. 27 (1902).

Section of Kentucky constitution on long and short haul railroad rates held invalid where interstate shipments were involved.

Justices concurring: Peckham, Harlan, Brown, Shiras, White, McKenna, Fuller, C.J..
Justices dissenting: Brewer, Gray.

152. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

Act of Illinois, which regulated monopolies but exempted agricultural products and livestock in the hands of the producer from the operation of the law, held to deny the equal protection of the laws.

Justices concurring: Harlan, Brewer, Brown, Shiras, White, Peckham, Fuller, C.J..
Justice dissenting: McKenna.

153. *Stockard v. Morgan*, 185 U.S. 27 (1902).

Tennessee license tax on agent soliciting and selling by sample for company in another State held invalid regulation of commerce.

154. *Louisville & J. Ferry Co.* v. Kentucky, 188 U.S. 385 (1903).

An Indiana franchise granted to a Kentucky corporation for operating a ferry from the Indiana to the Kentucky shore had its tax situs in Indiana; and, accordingly, Kentucky lacked jurisdiction with the result that its law which authorized a levy thereon effected a deprivation of property without due process of law.

Justices concurring: Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes.

Justices dissenting: Shiras, Fuller, C.J..

155. *The Roanoke*, 189 U.S. 185 (1903).

Washington law which accorded contractor or subcontractor a lien on a foreign vessel for work done and which made no provision for protection of owner in event contractor was fully paid before notice of subcontractor's lien was received deprived the owner of normal defenses and constituted an invalid interference with admiralty jurisdiction exclusively vested in federal courts by Art. III.

156. *The Robert W. Parsons*, 191 U.S. 17 (1903).

New York statutes giving a lien for repairs upon vessels and providing for the enforcement of such liens by proceedings *in rem*, held void as in conflict with the exclusive admiralty and maritime jurisdiction of the federal courts.

Justices concurring: Brown, White, McKenna, Holmes, Day.

Justices dissenting: Brewer, Peckham, Harlan, Fuller, C.J..

157. *Allen v. Pullman Company*, 191 U.S. 171 (1903).

Tennessee tax of $500 per year per pullman car, when applied to cars moving in interstate as well as intrastate commerce, imposed an invalid burden on interstate commerce.

158. *Bradley v. Lightcap*, 195 U.S. 1 (1904).

Illinois law, passed after a mortgage was executed, which provided that if a mortgagee did not obtain a deed within five years after the period of redemption had lapsed, he lost the estate (whereas under the law existing when the mortgage was executed, failure by the mortgagee to take out a deed had no effect on the title of the mortgagee against the mortgagor) was held void as impairing the obligation of contract and depriving the mortgagee of property rights without due process.

159. *Central of Georgia Ry. v. Murphey*, 196 U.S. 194 (1905).

Sections of Georgia code, imposing the duty on common carriers of reporting on the shipment of freight to the shipper, held void when applied to interstate shipments.

160. *Lochner v. New York*, 198 U.S. 45 (1905).

New York law establishing 10-hour day in bakeries was violative of due process by reason of interfering with the employees' freedom to contract in relation to their labor.

Justices concurring: Peckham, Brewer, Brown, McKenna, Fuller.
Justices dissenting: Harlan, White, Day, Holmes (separately).

161. *Union Transit Co. v. Kentucky*, 199 U.S. 194 (1905).

Inasmuch as tangible personal property acquires a tax situs in the State where it is permanently located, attempt by Kentucky, in which the owner was domiciled, to tax railway cars located in Indiana, was void and amounted to a deprivation of property without due process.

Justices concurring: Brown, Harlan, Brewer, Peckham, McKenna, Day.
Justices dissenting: Holmes, White, Fuller, C.J..

162. *Houston & Texas Central R.R. v. Mayes*, 201 U.S. 321 (1906).

Texas statute exacting of an interstate railroad an absolute requirement that it furnish a certain number of cars on a given day to transport merchandise to another State imposed an invalid, unreasonable burden on interstate commerce.

Justices concurring: Brewer, Brown, Peckham, Holmes, Day.
Justices dissenting: Harlan, McKenna, Fuller, C.J..

163. *Powers v. Detroit & Grand Haven Ry.*, 201 U.S. 543 (1906).

When a railroad is reorganized under a special act but no new corporation is chartered, tax concession granted by such act amounted to a contract which could not be impaired by subsequent Michigan enactment which purported to alter the rate of the tax.

Justices concurring: Brewer, Harlan, Brown, Peckham, McKenna, Holmes, Day, Fuller, C.J..
Justice dissenting: White.

164. *Mayor of Vicksburg v. Vicksburg Waterworks Co.*, 202 U.S. 453 (1906).

A water company owning an exclusive franchise to supply a city with water was entitled to an injunction restraining impairment of such contract by attempted erection by city of its own water system pursuant to Mississippi statutory authorization.

Justices concurring: Day, Brewer, Brown, White, Peckham, McKenna, Holmes, Fuller, C.J..
Justice dissenting: Harlan.

165. *American Smelting Co. v. Colorado*, 204 U.S. 103 (1907).

A Colorado statute stipulating that foreign corporations, as a condition for admission to do business, pay a fee based on their capital stock whereupon they would be subjected to all the liabilities and restrictions imposed upon domestic corporations amounted to a contract, the obligation of which was invalidly impaired by a later statute which imposed higher annual license fees on foreign corporations admitted under the preceding terms than were levied on domestic corporations, whose corporate existence had not expired.

Justices concurring: Peckham, Brewer, White, McKenna, Day.
Justices dissenting: Harlan, Holmes, Moody, Fuller, C.J..

166. *Adams Express Co. v. Kentucky*, 206 U.S. 129 (1907).

Kentucky law proscribing C.O.D. shipments of liquor, providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale, and making the carrier jointly liable with the vendor was, as applied to interstate shipments, an invalid regulation of interstate commerce.

Justices concurring: Brewer, Holmes, Peckham, Moody, White, Day, McKenna, Fuller, C.J..
Justice dissenting: Harlan.

Accord: American Express Co. v. Kentucky, 206 U.S. 139 (1907).

167. *Central of Georgia Ry. v. Wright*, 207 U.S. 127 (1907).

Georgia statutory assessment procedure which afforded taxpayer no opportunity to be heard as to valuation of property not returned by him under honest belief that it was not taxable and which permitted him to challenge the assessment only for fraud and corruption was violative of the due process requirements of the Fourteenth Amendment.

168. *Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908).

Tennessee tax law which exempted domestic crops and manufactured products while extending the levy to like products of out-of-state origin imposed an invalid burden on interstate commerce.

169. *Ex parte Young*, 209 U.S. 123 (1908).

Minnesota railroad rate statute which imposed such excessive penalties that parties affected were deterred from testing its validity in the courts denied a railroad the equal protection of the laws.

170. *Galveston, H. & S.A. Ry. v. Texas*, 210 U.S. 217 (1908).

Texas gross receipts tax insofar as it was levied on railroad receipts which included income derived from interstate commerce was invalid by reason of imposing a burden on interstate commerce.

Justices concurring: Holmes, Brewer, Peckham, Day, Moody.
Justices dissenting: Harlan, White, McKenna, Fuller, C.J..

171. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909).

New York law which required a public utility to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained under the rates fixed unconstitutionally deprived the utility of its property without due process.

172. *Louisville & Nashville R.R. v. Stock Yards Co.*, 212 U.S. 132 (1909).

Kentucky constitutional provision which required a carrier to deliver its cars to connecting carriers without providing adequate protection for their return or compensation for their use effected an invalid taking of property without due process of law.

Justices concurring: Holmes, Brewer, White, Peckham, Day, Fuller, C.J..
Justices dissenting: McKenna, Harlan, Moody.

173. *Nielson v. Oregon*, 212 U.S. 315 (1909).

For want of jurisdiction, Oregon could not validly prosecute as a violator of its law prohibiting the use of purse nets one who, pursuant to a license from Washington, used such a net on the Washington side of the Columbia River.

174. *Adams Express Co. v. Kentucky*, 214 U.S. 218 (1909).

Kentucky law proscribing the sale of liquor to an inebriate, as applied to a carrier delivering liquor to such person from another State, was void by reason of conflict with the commerce clause.

Justices concurring: Brewer, Holmes, Peckham, Moody, White, Day, McKenna, Fuller, C.J..
Justice dissenting: Harlan.

175. *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170 (1909).

Louisiana act of 1870 providing for registration and collection of judgments against New Orleans, so far as it delayed payment, or collection of taxes for payment, of contract claims existing before its passage, effected an invalid impairment of the obligation of such contracts.

176. *North Dakota ex rel. Flaherty v. Hanson*, 215 U.S. 515 (1910).

North Dakota statute which required the recipient of a federal retail liquor license, solely because of payment therefor and without reference to the doing of any act within North Dakota, to publish official notices of the terms of such license and of the place where it is posted, to display on his premises an affidavit confirming such publication, and to file an authenticated copy of such federal license together with a $10 fee, was void for imposing a burden on the federal taxing power.

Justices concurring: White, Harlan, Brewer, Day.
Justices dissenting: Fuller, C.J., McKenna, Holmes.

177. *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910).

Kansas statute imposing a charter fee, computed as a percentage of authorized capital stock, on corporations for the privilege of doing business in Kansas could not validly be collected from a foreign corporation engaged in interstate commerce, and also was violative of due process insofar as it was imposed on property, part of which was located beyond the limits of that State.

Justices concurring: Harlan, Brewer, White (separately), Day, Moody.
Justices dissenting: Holmes, McKenna, Peckham, Fuller, C.J..

178. *Ludwig v. Western Union Tel. Co.*, 216 U.S. 146 (1910).

Arkansas law which required a foreign corporation engaged in interstate commerce to pay, as a license fee for doing an intrastate business, a given amount of its entire capital stock, whether employed in Arkansas or elsewhere, was void by reason of imposing a burden on interstate commerce and embracing property outside the jurisdiction of the State.

Justices concurring: Harlan, Moody, Lurton, White, Day, Brewer.
Justices dissenting: Fuller, C.J., McKenna, Holmes.

179. *Southern Ry. v. Greene*, 216 U.S. 400 (1910).

Alabama law which imposed on foreign corporations already admitted to do business an additional franchise or privilege tax not levied on domestic corporations exposed the foreign corporations to denial of equal protection of the laws.

Justices concurring: Day, Harlan, Brewer, White.
Justices dissenting: Fuller, C.J., McKenna, Holmes.

180. *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910).

Kansas, which by law exacted of foreign corporations engaged in interstate commerce the following conditions for admission and retention of the right to do business in that State, namely, procurement of a license, submission of an annual financial statement, and which prohibited them from filing actions in Kansas courts unless such conditions were met, imposed an unconstitutional burden on interstate commerce.

Justices concurring: Harlan, White, Holmes, Day, Lurton.
Justices dissenting: Fuller, C.J., McKenna.

181. *St. Louis S.W. Ry. v. Arkansas*, 217 U.S. 136 (1910).

Arkansas law, and commission order issued under the authority thereof, which required an interstate carrier, upon application of a local shipper, to deliver promptly the number of freight cars requested for loading purposes and which, without regard to the effect of such demand on its interstate traffic, exposed it to severe penalties for noncompliance, imposed an invalid, unreasonable burden on interstate

commerce. The rules of the American Railway Association as to availability of a member carrier's cars for interstate shipments being a matter of federal regulation, it was beyond the power of a state court to pass on their sufficiency.

Justices concurring: White, Harlan, McKenna, Holmes, Day, Lurton.
Justices dissenting: Fuller, C.J..

182. *Missouri Pacific Ry. v. Nebraska*, 217 U.S. 196 (1910).

Nebraska law compelling railroad, at its own expense, and upon request of grain elevator operators, to install switches connecting such elevators with its right of way deprived the carrier of property without due process of law.

Justices concurring: Holmes, White, Day, Lurton, Fuller, C.J..
Justices dissenting: Harlan, McKenna.

183. *Dozier v. Alabama*, 218 U.S. 124 (1910).

Alabama law which imposed license tax on agents not having a permanent place of business in that State and soliciting orders for the purchase and delivery of pictures and frames manufactured in, and delivered from, another State, with the title remaining in the vendor until the agent collected the purchase price, imposed an invalid burden on interstate commercial transactions.

184. *Herndon v. Chicago, R.I. & P. Ry.*, 218 U.S. 135 (1910).

When a railroad already has provided adequate accommodations at any point, a Missouri regulation which required interstate trains to stop at such point imposed an invalid, unreasonable burden on interstate commerce. Also, a Missouri law which forfeited the right of an admitted foreign carrier to do a local business upon its instituting a right of action in a federal court extracted an unconstitutional condition.

185. *Bailey v. Alabama*, 219 U.S. 219 (1911).

Alabama law which made a refusal to perform labor contracted for, without return of money or property advanced under the contract, *prima facie* evidence of fraud and which was enforced under local rules of evidence which precluded one accused thereof from testifying as to uncommunicated motives was an invalid peonage law proscribed by the Thirteenth Amendment.

Justices concurring: Hughes, Lamar, Harlan, Day, Van Devanter, McKenna, White, C.J..
Justices dissenting: Holmes, Lurton.

186. *Oklahoma v. Kansas Nat. Gas. Co.*, 221 U.S. 229 (1911).

Oklahoma law which withheld from foreign corporations engaged in interstate commerce a privilege afforded domestic corporations engaged in local commerce, namely, of building pipe lines across its

highways and transporting to points outside its boundaries natural gas extracted and reduced to possession therein, was invalid as a restraint on interstate commerce and as a deprivation of property without due process of law.

Justices concurring: McKenna, Harlan, Day, Van Devanter, Lamar, White, C.J..
Justices dissenting: Holmes, Lurton, Hughes.

187. *Berryman v. Whitman College*, 222 U.S. 334 (1912).

A Washington statute of 1905, as interpreted to authorize taxation of Whitman College, impaired the obligation of contract by nullifying the College's exemption from taxation conferred by its charter.

188. *Louisville & Nashville R.R. v. Cook Brewing Co.*, 223 U.S. 70 (1912).

Kentucky statute prohibiting common carriers from transporting intoxicating liquors to "dry" points in Kentucky was constitutionally inapplicable to interstate shipments of such liquor to consignees in Kentucky.

189. *Atchison T. & S. F. Ry. v. O'Connor*, 223 U.S. 280 (1912).

Colorado law levying tax of 2 cents on each $1,000 of a corporation's capital stock could not constitutionally be collected from a Kansas corporation engaged in interstate commerce, the greater part of whose property and business were located and conducted outside Colorado.

190. *Oklahoma v. Wells, Fargo & Co.*, 223 U.S. 298 (1912).

Oklahoma law which purported to be an *ad valorem* tax on the property of corporations, levied in the form of a three per cent gross receipts tax, and computed, in the case of express companies doing an interstate business, as a percentage of gross receipts from all sources, interstate as well as intrastate, which is equal to the proportion which its business in Oklahoma bears to its total business was void as applied to such express companies. The tax burdened interstate commerce and was levied, contrary to due process, on property in the form of income from investments and bonds located outside the State.

191. *Haskell v. Kansas Natural Gas Co.*, 224 U.S. 217 (1912).

Oklahoma conservation law, insofar as it withheld from foreign corporations the right to lay pipe lines across highways for purposes of transporting natural gas in interstate commerce, imposed an invalid burden on interstate commerce.

192. *St. Louis, I. M. & S. Ry. v. Wynne*, 224 U.S. 354 (1912).

Arkansas law compelling railroads to pay claimants within 30 days after notice of injury to livestock caused by their trains, and, upon default thereof, authorizing claimants to recover double the damages awarded by a jury plus an attorney's fee, notwithstanding

that the amount sued for was less than the amount originally claimed, in effect penalized the railroads for their refusal to pay excessive claims, and accordingly effected an arbitrary deprivation of property without due process of law.

193. *Bucks Stove Co. v. Vickers*, 226 U.S. 205 (1912).

Kansas law which exacted certain requirements, such as obtaining permission of the State Charter Board, paying filing and license fees, and submitting annual statements listing all stockholders, as a condition prerequisite to doing business in Kansas and suing in its courts could not constitutionally be applied to foreign corporations engaged in interstate commerce. A State cannot exact a franchise for the privilege of engaging in such commerce.

194. *Crenshaw v. Arkansas*, 227 U.S. 389 (1913).

Arkansas statute, exacting license and fee from peddlers of lightning rods and other articles, as applied to representatives of a Missouri corporation soliciting orders for the sale and subsequent delivery of stoves by said corporation, imposed an invalid burden on interstate commerce.

Accord: Rogers v. Arkansas, 227 U.S. 401 (1913).

195. *Accord: Stewart v. Michigan*, 232 U.S. 665 (1914), voiding application of a similar Michigan law.

196. *Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

Washington statute of 1907 repealing a prior act of 1893 with the result that rights to consequential damages for a change of street grade that had already accrued under the earlier act were destroyed amounted to an invalid deprivation of property without due process of law.

197. *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340 (1913).

Kansas statute which did not permit a carrier to have the sufficiency of rates established thereunder determined by judicial review and which exposed the carrier, when sued for charging rates in excess thereof, to a liability for liquidated damages in the sum of $500, which was unrelated to actual damages, effected an unconstitutional deprivation of property without due process of law.

198. *Chicago, M. & St. P. Ry. v. Polt*, 232 U.S. 165 (1914).

South Dakota law which made railroads liable for double damages in case of failure to pay a claim, within 60 days after notice, or to offer to pay a sum equal to what a jury found the claimant entitled to was arbitrary and deprived the carriers of property without due process of law.

Accord: Chicago, M. & St. P. Ry. v. Kennedy, 232 U.S. 626 (1914).

199. *Harrison v. St. Louis, S. F. & T. R.R.*, 232 U.S. 318 (1914).

Oklahoma law which prohibited foreign corporations, upon penalty of forfeiting their license to do business in that State, from invoking the diversity of citizenship jurisdiction of federal courts and instituting actions therein exacted an unconstitutional condition.

200. *Foote v. Maryland*, 232 U.S. 495 (1914).

Maryland Oyster Inspection tax of 1910, levied on oysters coming from other States, the proceeds from which were used partly for inspection and partly for other purposes, such as the policing of state waters, was void as imposing a burden on interstate commerce in excess of the expenses absolutely necessary for inspection.

201. *Farmers Bank v. Minnesota*, 232 U.S. 516 (1914).

Minnesota tax on bonds issued by a municipality of the Territory of Oklahoma and held by Minnesota corporations was void as a tax on a federal instrumentality (Art. VI).

202. *Russell v. Sebastian*, 233 U.S. 195 (1914).

Amendment in 1911 of California constitution of 1879, and municipal ordinances of Los Angeles adopted in pursuance of the amendment were ineffectual by reason of the prohibition against impairment of contracts contained in Art. I, § 10, of the Federal Constitution, to deprive a utility of rights acquired before said amendment, which embraced the privilege of laying gas pipes under the streets of Los Angeles.

203. *Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304 (1914).

Alabama sewing machine license tax could not be collected from those agencies of a foreign corporation engaged wholly in an interstate business, that is, in soliciting orders for machines to be accepted and fulfilled at the Georgia office of the seller.

204. *Tennessee Coal Co. v. George*, 233 U.S. 354 (1914).

Since venue is not part of a transitory cause of action, Alabama law which created such cause of action by making the employer liable to the employee for injuries attributable to defective machinery was inoperative insofar as it sought to withhold from such employee the right to sue on such action in courts of any State other than Alabama; the full faith and credit clause of Art. IV does not preclude a court in another State which acquired jurisdiction from enforcing such right of action.

205. *Carondelet Canal Co. v. Louisiana*, 233 U.S. 362 (1914).

Louisiana act of 1906 repealing prior act of 1858 and sequestering with compensation certain property acquired by a canal company under the repealed enactment impaired an obligation of contact.

206. *Smith v. Texas*, 233 U.S. 630 (1914).

Texas act of 1914 stipulating that only those who have previously served two years as freight train conductors or brakemen shall be eligible to serve as railroad train conductors was arbitrary and effected a denial of the equal protection of the laws.

207. *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914).

Kentucky criminal and antitrust provisions, both constitutional and statutory, were void for vagueness and hence violative of due process because a prohibition of combinations which establish prices that are greater or lower than the "real market value" of an article as established by "fair competition" and "under normal market conditions" afforded no standard that was possible to know in advance and to obey.

Justices concurring: Holmes, Hughes, Lamar, Day, Lurton, Van Devanter, White, C.J..
Justices dissenting: McKenna, Pitney.

Accord: International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); *Collins v. Kentucky*, 234 U.S. 634 (1914); *American Machine Co. v. Kentucky*, 236 U.S. 660 (1915).

208. *Missouri Pacific Ry. v. Larabee*, 234 U.S. 459 (1914).

Kansas statute empowering a Kansas court to award against a litigant attorney's fees attributable to the presentation before the United States Supreme Court of an appeal in a mandamus proceeding was inoperative consistently with the principle of national supremacy, for a state court cannot be empowered by state law to assess fees for services rendered in a federal court when such assessment is sanctioned neither by federal law nor by the rules of the Supreme Court.

209. *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914).

South Carolina law making mental anguish resulting from negligent non-delivery of a telegram a cause of action could not be invoked to support an action for negligent non-delivery in the District of Columbia, an area beyond the jurisdiction of South Carolina and, consistent with due process, removed from the scope of its legislative power. The statute, as applied to messages sent from South Carolina to another jurisdiction, also was an invalid regulation of interstate commerce.

210. *United States v. Reynolds*, 235 U.S. 133 (1914).

Alabama law which permitted person convicted of an offense to contract with another whereby, in consideration of the latter becoming surety for the convicted person's fine, the convicted person agreed to perform certain services, and which further stipulated that if such contract was breached, the convicted person would become subject to a fine equal to the damages sustained by the other contracting party

and payment of which would be remitted to said contracting party imposed a form of peonage proscribed by the Thirteenth Amendment.

Justices concurring: Holmes (separately).

211. *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914).

Oklahoma Separate Coach Law violated the equal protection clause of the Fourteenth Amendment by permitting carriers to provide sleeping, dining, and chair cars for whites but not for Negroes.

Justices concurring: White, C.J. (separately), Holmes (separately), Lamar (separately), McReynolds (separately).

212. *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914).

South Dakota law which required a foreign corporation to appoint a local agent to accept service of process as a condition precedent to suing in state courts to collect a claim arising out of interstate commerce imposed an invalid burden on said commerce.

213. *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914).

Oklahoma privilege tax, insofar as it was levied on sale of coal extracted from lands owned by Indian tribes and leased on their behalf by the Federal Government was invalid as a tax on federal instrumentality.

214. *Coppage v. Kansas*, 236 U.S. 1 (1915).

Kansas law proscribing "yellow dog" contracts whereby the employer exacted of employees an agreement not to join or remain a member of a union as a condition of acquiring and retaining employment deprived employees of liberty of contract contrary to due process.

Justices concurring: Pitney, McKenna, Van Devanter, Lamar, McReynolds, White, C.J..
Justices dissenting: Day, Hughes, Holmes (separately).

215. *Heyman v. Hays*, 236 U.S. 178 (1915).

Tennessee county privilege tax law, insofar as it was enforced as to a liquor dealer doing a strictly mail-order business confined to shipments to out-of-state destinations was void as a burden on interstate commerce.

Accord: Southern Operating Co. v. Hayes, 236 U.S. 188 (1915).

216. *Northern Pacific Ry. v. North Dakota ex rel. McCue*, 236 U.S. 585 (1915).

North Dakota law compelling carriers to haul certain commodities at less than compensatory rates deprived them of property without due process.

Justices concurring: Hughes, McKenna, Holmes, Day, Van Devanter, Lamar, McReynolds, White, C.J..

Justice dissenting: Pitney.

217. *Norfolk & Western Ry. v. Conley*, 236 U.S. 605 (1915).

West Virginia law which compelled carriers to haul passengers at noncompensatory rates deprived them of property without due process.

Justices concurring: Hughes, McKenna, Holmes, Day, Van Devanter, Lamar, McReynolds, White, C.J..
Justice dissenting: Pitney.

218. *Wright v. Central of Georgia Ry.*, 236 U.S. 674 (1915).

Since the lessee of two railroads, built under special charters containing irrepealable contracts exempting the railway property from taxation in excess of a given rate was to be viewed as in the same position as the owners, Georgia's levy of an ad valorem tax on the lessee in excess of the charter rate impaired the obligation of contract (Art. I, § 10).

Justices concurring: Holmes, McKenna, Day, Van Devanter, White, C.J..
Justices dissenting: Hughes, Pitney, McReynolds.

Accord: Wright v. Louisville & Nashville R.R., 236 U.S. 687 (1915).

Justices concurring: Holmes, McKenna, Day, Van Devanter, White, C.J..
Justices dissenting: Hughes, Pitney, McReynolds.

219. *Davis v. Virginia*, 236 U.S. 697 (1915).

Solicitation by a peddler in Virginia of orders for portraits made in another State, with an option to the purchaser to select frames upon delivery of the portrait by the peddler, amounted to a single transaction in interstate commerce, and Virginia therefore could not validly impose a peddler's license tax on the solicitor of such orders.

220. *Chicago, B. & Q. Ry. v. Wisconsin R.R. Comm'n*, 237 U.S. 220 (1915).

Wisconsin statute requiring interstate trains to stop at villages of a specified number of inhabitants, without regard to the volume of business done there, was void as imposing an unreasonable burden on interstate commerce.

221. *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915).

Florida statute denied due process insofar as it provided, after execution against a corporation had been returned "no property," a second execution to issue against a stockholder for the same debt to be enforced against his property to the extent of any unpaid subscription owing on his stock and without notice to such stockholder.

222. *Charleston & W. C. Ry. v. Varnville Co.*, 237 U.S. 597 (1915).

South Carolina law which imposed a penalty on carriers for their failure to adjust claims within 40 days imposed an invalid burden on

interstate commerce and also was in conflict with the federal Carmack Amendment.

223. *Atchison, T. & S. F. Ry. v. Vosburg*, 238 U.S. 56 (1915).

Kansas Reciprocal Demurrage Law of 1905 which allowed recovery of an attorney's fee by the shipper in case of delinquency by the carrier but which accorded the carrier no like privilege in case of delinquency on the part of the shipper denied the carrier equal protection of the law.

224. *Guinn v. United States*, 238 U.S. 347 (1915).

Oklahoma grandfather clause, in its 1910 constitution, exempting from a literacy requirement and automatically enfranchising all entitled to vote as of January 1, 1866, or who were descendants of those entitled to vote on the latter date, was violative of the Fifteenth Amendment protecting Negroes from discriminatory denial of the right to vote based on race.

225. *Accord: Mayers v. Anderson*, 238 U.S. 368 (1915), voiding a similar Maryland grandfather clause.

226. *Southwestern Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

Arkansas statute was held to be unreasonable and violative of due process for the reason that, as enforced, it subjected a telephone company to a $6300 penalty for discriminatory refusal to serve when, pursuant to company regulations known to the State and uniformly enforced for economical collection of its approved rates, it suspended services to a delinquent and refused to resume services, while the delinquency remained unpaid, at the reduced rate afforded to those who paid the monthly service charge in advance.

227. *Chicago, M. & St. P. Ry. v. Wisconsin*, 238 U.S. 491 (1915).

Wisconsin statute which compelled sleeping car companies, if upper berth was not sold, to accord use of the space thereof to purchaser of a lower berth took salable property from the owner without compensation and therefore effected a deprivation of property without due process of law.

Justices concurring: Lamar, Day, Hughes, Van Devanter, Pitney, McReynolds, White, C.J..
Justices dissenting: McKenna, Holmes.

228. *Truax v. Raich*, 239 U.S. 33 (1915).

Arizona statute which compelled establishments hiring five or more workers to reserve 80 per cent of the employment opportunities to U.S. citizens denied aliens the equal protection of the laws.

Justices concurring: Hughes, Holmes, Pitney, Lamar, Day, Van Devanter, McKenna, White, C.J..

Justice dissenting: McReynolds.

229. *Provident Savings Ass'n v. Kentucky*, 239 U.S. 103 (1915).

Kentucky statute levying tax, in the nature of a license tax for the doing of local business, on premiums collected in New York by a foreign insurance company after it had ceased to do business in that State was violative of due process by reason of affecting activities beyond the jurisdiction of the State.

230. *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916).

Oklahoma tax on lessee's interest in Indian lands, acquired pursuant to federal statutory authorization, was void as a tax on a federal instrumentality.

231. *Rosenberger v. Pacific Express Co.*, 241 U.S. 48 (1916).

Texas statute imposing special licenses on express companies maintaining offices for C.O.D. delivery of interstate shipments of alcoholic beverages imposed an invalid burden on interstate commerce under the terms of the Wilson Act of 1890 (26 Stat. 313).

232. *McFarland v. American Sugar Co.*, 241 U.S. 79 (1916).

Louisiana law which established a rebuttable presumption that any person systematically purchasing sugar in Louisiana at a price below that which he paid in any other State was a party to a monopoly or conspiracy in restraint of trade was violative of both the due process and equal protection clauses of the Fourteenth Amendment in that it declared an individual presumptively guilty of a crime and exempted countless others paying the same price.

233. *Wisconsin v. Philadelphia & Reading Coal Co.*, 241 U.S. 329 (1916).

Wisconsin law which revoked the license of any foreign corporation which removed to a federal court a suit instituted against it by a Wisconsin citizen imposed an unconstitutional condition.

234. *Detroit United Ry. v. Michigan*, 242 U.S. 238 (1916).

Construction of acts of 1905 and 1907 as compelling a Detroit City Railway to extend its lines to suburban areas annexed by Detroit only on the same terms as were contained in its initial franchise as authorized by the Detroit ordinance of 1889, wherein its fare was fixed, operated to impair the obligation of contract.

Justices concurring: Pitney, Holmes, Day, Van Devanter, McReynolds, White, C.J..

Justices dissenting: Clarke, Brandeis.

235. *Rowland v. Boyle*, 244 U.S. 106 (1917).

The two-cent passenger rate fixed by act of the Arkansas legislature was confiscatory and accordingly deprived the railroad of its property without due process.

236. *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).

Georgia "Blow-Post" law imposed an unconstitutional burden on interstate commerce insofar as compliance with it would have required an interstate train to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia and would have added more than six hours to the running time of the train.

Justices concurring: McKenna, Holmes, McReynolds, Day, Clarke, Van Devanter.
Justices dissenting: White, C.J., Pitney, Brandeis.

237. *Western Oil Ref. Co. v. Lipscomb*, 244 U.S. 346 (1917).

Tennessee privilege tax could not validly be imposed on interstate sales consummated at either destination in Tennessee by an Indiana corporation which, for the purpose of filling orders taken by its salesmen in Tennessee, shipped thereto a tank car of oil and a carload of barrels and filled the orders through an agent who drew the oil from the tank car into the barrels, or into barrels furnished by customers, and then made delivery and collected the agreed price, and thereafter moved the two cars to another point in Tennessee for effecting like deliveries.

Justices concurring: Van Devanter, Holmes, Brandeis, Pitney, McReynolds, Day, Clarke, McKenna.
Justice dissenting: White, C.J..

238. *Adams v. Tanner*, 244 U.S. 590 (1917).

Washington law which proscribed private employment agencies by prohibiting them from collecting fees for their services deprived individuals of the liberty to pursue a lawful calling contrary to due process of law.

Justices concurring: McReynolds, Pitney, Van Devanter, White, C.J..
Justices dissenting: McKenna, Brandeis, Holmes, Clarke.

239. *Hendrickson v. Apperson*, 245 U.S. 105 (1917).

Kentucky act of 1906, amending act of 1894 and construed in such manner as to enable a county to avoid collection of taxes to repay judgment on unpaid bonds impaired the obligation of contract.

Accord: Hendrickson v. Creager, 245 U.S. 115 (1917).

240. *Looney v. Crane Co.*, 245 U.S. 178 (1917).

Texas law, which, under the guise of taxing the privilege of doing an intrastate business, imposed on an Illinois corporation a license tax based on its authorized capital stock, was void not only as imposing a burden on interstate commerce, but also as contravening the due process clause by affecting property outside the jurisdiction of Texas.

241. *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917).

Pennsylvania gross receipts tax on wholesalers, as applied to a merchant who sold part of his merchandise to customers in foreign countries either as the result of orders received directly from them or as the result of orders solicited by agents abroad was void as a regulation of foreign commerce and as a duty on exports.

242. *International Paper Co. v. Massachusetts*, 246 U.S. 135 (1918).

License fee or excise of a given per cent of the par value of the entire authorized capital stock of a foreign corporation doing both a local and interstate business and owning property in several States was a tax on the entire business and property of the corporation and was void both as an illegal burden on interstate commerce and as a violation of due process by reason of affecting property beyond the borders of the taxing State.

Accord: Locomobile Co. v. Massachusetts, 246 U.S. 146 (1918).

243. *Cheney Bros. v. Massachusetts*, 246 U.S. 147 (1918).

When a Connecticut corporation maintains and employs a Massachusetts office with a stock of samples and an office force and traveling salesmen merely to obtain local orders subject to confirmation at the Connecticut office and with deliveries to be made directly from the latter, its business was interstate commerce and a Massachusetts annual excise could not be validly applied thereto.

244. *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

Liberty of contract, as protected by the due process clause of the Fourteenth Amendment, precluded enforcement of the Missouri nonforfeiture statute, prescribing how net value of a life insurance policy is to be applied to avert a forfeiture in the event the annual premium is not paid, so as to prevent a Missouri resident from executing in the New York office of the insurer a different agreement sanctioned by New York law whereby the policy was pledged as security for a loan and later canceled in satisfaction of the indebtedness.

Justices concurring: McReynolds, McKenna, Holmes, Van Devanter, White, C.J..

Justices dissenting: Brandeis, Day, Pitney, Clarke.

245. *Georgia v. Cincinnati So. Ry.*, 248 U.S. 26 (1918).

Georgia act of 1916 revoking a grant in 1879 of a perpetual right of way to a railroad impaired the obligation of contract (Art. I, § 10).

246. *Union Pac. R.R. v. Public Service Comm'n*, 248 U.S. 67 (1918).

Missouri act, insofar as it authorized the Missouri Public Service Commission to exact a fee of $10,000 for a certificate of authority for issuance by an interstate railroad, doing no intrastate business in Missouri, of a $30,000,000 mortgage bond issue to meet expenditures

incurred but in small part in that State, imposed an invalid burden on interstate commerce.

247. *Flexner v. Farson*, 248 U.S. 289 (1919).

Kentucky law, insofar as it authorized a judgment against nonresident individuals based on service against their Kentucky agent after his appointment had expired, was violative of due process.

248. *Central of Georgia Ry. v. Wright*, 248 U.S. 525 (1919).

Tax exemptions in charters granted to certain railroads inured to their lessee, and, accordingly, a Georgia tax authorized by a constitutional provision postdating such charters and imposed on the leasehold interest of the lessee impaired the obligation of contract.

249. *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919).

Georgia law under which a New Jersey company's tank cars operating in and out of that State were assessed upon a track-mileage basis, i.e., in an amount bearing the same ratio to the value of all its cars and other personal property as the ratio of the miles of railroad over which the cars were run in Georgia to the total miles over which they were run in all States, was invalid for the reason that the rule bore no necessary relation to the real value in Georgia and hence conflicted with due process.

Justices concurring: McReynolds, McKenna, Holmes, Day, Van Devanter, White, C.J..

Justices dissenting: Pitney, Brandeis, Clarke.

250. *Standard Oil Co. v. Graves*, 249 U.S. 389 (1919).

Washington law under which, in a ten-year period, inspection fees collected on oil products brought into the State for use or consumption amounted to $335,000, of which only $80,000 was disbursed for expenses, was deemed to impose an excessive charge and accordingly an invalid burden on interstate commerce.

251. *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919).

Tennessee act which made the annual tax for the privilege of doing railway construction work dependent on whether the person taxed had his chief office in Tennessee, i.e. $25 if he had and $100 if he did not, was violative of the privilege and immunities clause of Art. IV, § 2.

252. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).

New York income tax law which allowed exemptions to residents, with increases for married persons and dependents but which allowed no equivalent exemptions to nonresidents abridged the privileges and immunities clause of Art. IV, § 2.

253. *Okahoma Operating Co. v. Love*, 252 U.S. 331 (1920).

Oklahoma constitution and laws, under which an order of the State Corporation Commission declaring a laundry a monopoly and limiting its rates was not judicially reviewable, and which compelled litigant, for purposes of obtaining a judicial test of rates, to disobey the order and invite serious penalty for each day of refusal pending completion of judicial appeal, were violative of due process insofar as rates were enforced by penalties.

254. *Accord: Oklahoma Gin Co. v. Oklahoma*, 252 U.S. 339 (1920).

Illinois law denying Illinois courts jurisdiction in actions for wrongful death occurring in another State which was construed as barring jurisdiction of actions on a sister State judgment founded upon a like cause was, as so applied, violative of the full faith and credit clause.

255. *Askren v. Continental Oil Co.*, 252 U.S. 444 (1920).

New Mexico law levying annual license on distributors of gasoline plus 2 cents per gallon on all gasoline sold was a privilege tax, and, as applied to parties who bring gasoline from without and sell it in New Mexico, imposed an invalid burden on interstate commerce insofar as it related to their business of selling in tank car lots and in barrels or packages as originally imported.

256. *Wallace v. Hines*, 253 U.S. 66 (1920).

North Dakota act, as administered, imposed invalid burden on interstate commerce and took property without due process by reason of taxing an interstate railroad by assessing the value of its property in the State at that proportion of the total value of its stock and bonds that the main track mileage within the State bore to the main track mileage of the entire line; this formula was indefensible inasmuch as the cost of construction per mile was within than without the taxing State, and the large and valuable terminals of the railroad were located elsewhere.

257. *Hawke v. Smith (No. 1)*, 253 U.S. 221 (1920).

Action of Ohio legislature ratifying proposed Eighteenth Amendment could not be referred to the voters, and the provisions of the Ohio constitution requiring such referendum were inconsistent with Article V of the Federal Constitution.

Accord: Hawke v. Smith (No. 2), 253 U.S. 231 (1920), applicable to proposed Nineteenth Amendment.

258. *Ohio Valley Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

Since Pennsylvania Public Service Commission Law failed to provide opportunity by way of appeal to the courts or by injunctive proceedings to test issue as to whether rates fixed by Commission are

confiscatory, order of Commission establishing maximum future rates violated due process of law.

Justices concurring: McReynolds, Day, Van Devanter, Pitney, McKenna, White, C.J..
Justices dissenting: Brandeis, Holmes, Clarke.

259. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

Virginia law which taxed all income of local corporation derived from business within and without Virginia, while exempting entirely income derived outside of Virginia by local corporations which did no local business violated the equal protection clause of the Fourteenth Amendment.

Justices concurring: Pitney, McReynolds, McKenna, Day, Van Devanter, Clarke, White, C.J..
Justices dissenting: Brandeis, Holmes.

260. *Johnson v. Maryland*, 254 U.S. 51 (1920).

Maryland law requiring operator's license of drivers of motor trucks could not constitutionally be applied to a Postal Department employee operating a federal mail truck in the performance of official duty.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Brandeis, Clarke, White, C.J..
Justices dissenting: Pitney, McReynolds.

261. *Turner v. Wade*, 254 U.S. 64 (1920).

Georgia Tax Equalization Act denied due process insofar as it authorized an increase in the assessed valuation of the taxpayer's property without notice and hearing and accorded him an abortive remedy of arbitration which was nullified by the inability of the arbitrators to agree on a lower assessment before the expiration of the time when the assessment became final and binding.

262. *Bank of Minden v. Clement*, 256 U.S. 126 (1921).

Louisiana law which exempted proceeds of insurance policy, payable upon death of insured to his executor, from the claims of insured's creditors impaired the obligation of contract as enforced against a debt on a promissory note antedating such laws and also as enforced against policies which antedated the law.

Justices concurring: McReynolds, McKenna, Holmes, Day, Van Devanter, Pitney, Brandeis, White, C.J..
Justice dissenting: Clarke.

263. *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921).

North Carolina statute which exacted a $500 license fee of every automobile manufacturer as a condition precedent to selling cars in the State and which imposed a like requirement on any firm selling

cars of a manufacturer who had not paid the tax, but which reduced the fee to $100 in the event that the manufacturer had invested three-fourths of his assets in North Carolina state and municipal securities or properties, was invalid as violative of the commerce clause and of the equal protection clause when enforced against nonresident manufacturers selling cars in North Carolina directly or through local dealers.

Justices concurring: McKenna, Holmes, Day, Van Devanter, McReynolds, Clarke.
Justices dissenting: Pitney, Brandeis.

264. *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921).

New Mexico statute which imposed a tax of 2 cents per gallon sold on distributors of gasoline was void insofar as it embraced interstate transactions, but the annual license fee of $50 imposed thereby on each gasoline station was totally void insofar as interstate sales could not be separated from the intrastate sales.

265. *Kansas City So. Ry. v. Road Improv. Dist. No. 6*, 256 U.S. 658 (1921).

Arkansas statute which authorized local assessments for road improvements denied equal protection of the laws insofar as railroad property was burdened for local improvement on a basis totally different from that used for measuring the contribution demanded of individual owners.

266. *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921).

West Virginia statute which forbade engaging in the business of transporting petroleum in pipe lines without the payment of a tax of 2¢ for each barrel of oil transported imposed an invalid burden on interstate commerce as applied to company's volume of oil produced in, but moving out of, West Virginia to extra-state destinations.

Justices concurring: Holmes, McKenna, Day, Van Devanter, McReynolds, Taft, C.J..
Justices dissenting: Clarke, Pitney, Brandeis.

Accord: United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921), voiding like application of the West Virginia tax to the interstate movement of natural gas.

Justices concurring: Holmes, Pitney, McReynolds, Day, Van Devanter, McKenna, Taft, C.J..
Justices dissenting: Brandeis, Clarke.

267. *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282 (1921).

Kentucky law prescribing conditions under which foreign corporations could do business in that State and which precluded enforcement in Kentucky courts of contracts made by foreign corporations not complying with said conditions could not be enforced against Tennessee corporation which sued in a Kentucky court for breach of a

contract consummated in that State for the purchase of grain to be delivered to and used in Tennessee; such transaction was in interstate commerce, notwithstanding that the Tennessee purchaser might change its mind after delivery to a carrier in Kentucky and sell the grain in Kentucky or consign it to some other place in Kentucky.

Justices concurring: Van Devanter, Holmes, Pitney, Day, McKenna, McReynolds, Taft, C.J..
Justices dissenting: Brandeis, Clarke.

268. *Truax v. Corrigan*, 257 U.S. 312 (1921).

Arizona statute, regulating injunctions in labor disputes which exempted ex-employees, when committing tortious injury to the business of their former employer in the form of mass picketing, libelous utterances, and inducement of customers to withhold patronage, while leaving subject to injunctive restraint all other tort-feasors engaged in like wrong-doing, deprived the employer of property without due process and denied him equal protection of the law.

Justices concurring: Van Devanter, Day, McKenna, McReynolds, Taft, C.J..
Justices dissenting: Holmes, Pitney, Clarke, Brandeis.

269. *Gillespie v. Oklahoma*, 257 U.S. 501 (1922).

Oklahoma income tax law could not validly be enforced as to net income of lessee derived from the sales of his share of oil and gas received under leases of restricted Indian lands which constituted him in effect an instrumentality used by the United States in fulfilling its duties to the Indians.

Justices concurring: Holmes, Day, Van Devanter, McKenna, McReynolds, Taft, C.J..
Justices dissenting: Pitney, Brandeis, Clarke.

270. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

Arkansas law which revoked the license of a foreign corporation to do business in that State whenever it resorted to the federal courts sitting in that State exacted an unconstitutional condition.

271. *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922).

North Dakota statute which required purchasers of grain to obtain a license to act under a defined system of grading, inspection, and weighing, and to abide by regulations as to prices and profits imposed an invalid burden on interstate commerce insofar as it was applied to a North Dakota association which bought grain in the State and loaded it promptly on cars for shipment to other States for sale, notwithstanding occasional diversion of the grain for local sales.

Justices concurring: Day, McKenna, McReynolds, Van Devanter, Pitney, Taft, C.J..
Justices dissenting: Brandeis, Holmes, Clarke.

Accord: Lemke v. Homer Farmers Elevator Co., 258 U.S. 65 (1922).

Justices concurring: Day, McKenna, McReynolds, Pitney, Van Devanter, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Clarke.

272. *Newton v. Consolidated Gas Co.*, 258 U.S. 165 (1922).

Rates fixed for the sale of gas by New York statute were confiscatory and deprived the utility of its property without due process of law.

Accord: Newton v. New York Gas Co., 258 U.S. 178 (1922); *Newton v. Kings County Lighting Co.*, 258 U.S. 180 (1922); *Newton v. Brooklyn Union Gas Co.*, 258 U.S. 604 (1922); *Newton v. Consolidated Gas Co.*, 259 U.S. 101 (1922).

273. *Forbes Pioneer Boat Line v. Everglades Drainage Dist.*, 258 U.S. 338 (1922).

Florida law retroactively validating collection of fee for passage through a canal, the use of which was then free by law, was ineffective; a legislature could not retroactively approve what it could not lawfully do.

274. *Texas Co. v. Brown*, 258 U.S. 466 (1922).

Georgia law levying inspection fees and providing for inspection of oil and gasoline was unconstitutional as applied to gasoline and oil in interstate commerce; for the fees clearly exceeded the cost of inspection and amounted to a tariff levied without the consent of Congress.

275. *Chicago & N.W. Ry. v. Nye Schneider Fowler Co.*, 260 U.S. 35 (1922).

Nebraska law, as construed, which authorized imposition against carrier, in favor of claimant, of an additional attorney's fee of $100, upon the basis of the service rendered, time and labor bestowed, and recovery secured by claimant's attorney in resisting appeal by which the carrier obtained a large reduction of an excessive judgment was unreasonable in that it deterred carrier from vindicating its rights by appeal and therefore was violative of due process.

276. *St. Louis Compress Co. v. Arkansas*, 260 U.S. 346 (1922).

Arkansas law exacting of persons insuring property in Arkansas a five percent tax on amounts paid on premiums to insurers not authorized to do business in Arkansas was violative of due process insofar as it was applied to insurance contracted and paid for outside Arkansas by a foreign corporation doing a local business.

277. *Champlain Co. v. Brattleboro*, 260 U.S. 366 (1922).

A Vermont levy of a property tax on logs under control of the owner which, in the course of their interstate journey, were being

temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss, was void as a burden on interstate commerce.

278. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Pennsylvania law which forbade mining in such a way as to cause subsidence of any human habitation or public street or building and which thereby made commercially impracticable the removal of valuable coal deposits was deemed arbitrary and amounted to a deprivation of property without due process. As applied to an owner of land who, prior to this enactment, had validly deeded the surface with express reservation of right to remove coal underneath and subject to waiver by grantee of damage claims resulting from such mining, said law also impaired the obligation of contract.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Pitney, McReynolds, Sutherland, Taft, C.J..
Justice dissenting: Brandeis.

279. *Columbia Ry., Gas & Electric Co. v. South Carolina*, 261 U.S. 236 (1923).

South Carolina statute, as construed, which sought to convert a covenant in a prior legislative contract into a condition subsequent, and to impose as a penalty for its violation the forfeiture of valuable property, impaired the obligation of contract.

280. *Federal Land Bank v. Crosland*, 261 U.S. 374 (1923).

A first mortgage executed to a Federal Land Bank is a federal instrumentality and cannot be subjected to an Alabama recording tax.

281. *Phipps v. Cleveland Refg. Co.*, 261 U.S. 449 (1923).

Ohio law, which was applicable to interstate and intrastate commerce and which exacted fees for inspection of petroleum products in excess of the legitimate cost of inspection, imposed an invalid import tax to the extent that the excess could not be separated and assigned solely to intrastate commerce.

282. *Thomas v. Kansas City So. Ry.*, 261 U.S. 481 (1923).

Insofar as drainage district tax authorized under Arkansas law imposed upon a railroad a levy disproportionate to the value of the benefits derived from said improvement, the tax was violative of the equal protection clause.

283. *Davis v. Farmers Co-operative Co.*, 262 U.S. 313 (1923).

Minnesota law which provided that interstate railroads which had an agent in Minnesota to solicit traffic over lines outside Minnesota may be served with summons by delivery of copy thereof to the agent imposed an invalid burden on interstate commerce as applied to a carrier which owned and operated no facilities in Minnesota and

which was sued by a plaintiff who did not reside therein on a cause of action arising outside the State.

284. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Nebraska law which forbade the teaching of any language other than English in any school, private, denominational, or public, maintaining classes for the first eight grades affected a denial of liberty without due process of law.

Justices concurring: McReynolds, Brandeis, Butler, Sanford, Van Devanter, McKenna, Taft, C.J..
Justices dissenting: Holmes, Sutherland.

285. *Accord: Bartels v. Iowa*, 262 U.S. 404 (1923). A similar Iowa law violates due process. Same division of Justices as in Meyer v. Nebraska.

286. *Accord: Bohning v. Ohio*, 262 U.S. 404 (1923), as to Ohio law.

287. *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432 (1923).

Georgia law which extended corporate limits of a town and which, as judicially construed, had the effect of rendering applicable to the added territory street railway rates fixed by an earlier contract between the town and the railway impaired the obligation of that contract by adding to its burden.

Accord: Georgia Ry. v. College Park, 262 U.S. 441 (1923).

288. *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923).

Kansas law which compelled business engaged in manufacturing and in the processing of food to continue operation in the event of a labor dispute, to submit the controversy to an arbitration board, and to abide by the latter's recommendations pertaining to the payment of minimum wages subjected both employers and employees to a denial of liberty without due process of law.

Accord: Dorchy v. Kansas, 264 U.S. 286 (1924), same Kansas law voided when applied to labor disputes affecting coal mines; *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923), voiding other provisions of this Kansas law which authorized arbitration tribunal in the course of compulsory arbitration, to fix the hours of labor to be observed by an employer involved in a labor dispute.

289. *Kentucky Co. v. Paramount Exch.*, 262 U.S. 544 (1923).

Wisconsin law which required a foreign corporation not doing business in Wisconsin, or having property there, other than that sought to be recovered in a suit, to send, as a condition precedent to maintaining such action, its officer with corporate records pertinent to the matter in controversy, and to submit to an adversary examination before answer, but which did not subject nonresident individuals to such examination, except when served with notice and subpoena within Wisconsin, and then only in the court where the service was

had, and which limited such examinations, in the case of residents of Wisconsin, individual or corporate, to the county of their residence violated the equal protection clause.

Justices concurring: Van Devanter, Sanford, Butler, McKenna, McReynolds, Sutherland, Taft, C.J..
Justices dissenting: Brandeis, Holmes.

290. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

West Virginia law which required pipe line companies to fill all local needs before endeavoring to export any natural gas extracted in West Virginia was void as a prohibited interference with interstate commerce.

Justices concurring: Van Devanter, Sutherland, Butler, McKenna, Taft, C.J..
Justices dissenting: Holmes, McReynolds, Brandeis, Sanford.

291. *Clallam County v. United States*, 263 U.S. 341 (1923).

Washington state and county property taxes cannot be levied on the property of a corporation which, though formed under Washington law, was a federal instrumentality created and operated by the United States as an instrument of war.

292. *Tampa Interocean Steamship Co. v. Louisiana*, 266 U.S. 594 (1925).

Louisiana license tax law could not validly be enforced as to the business of companies employed as agents by owners of vessels engaged exclusively in interstate and foreign commerce when the services performed by the agents consisted of the soliciting and engaging of cargo, and the nomination of vessels to carry it, etc. (*See Texas Transp. Co. v. New Orleans*, 264 U.S. 150 (1924), voiding like application of a similar New Orleans ordinance.)

293. *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).

Nebraska law which prescribed the minimum weights of loaves of bread to be made and sold and which, in order to prevent the palming off of smaller for larger sizes, fixed a maximum for each class and allowed a "tolerance" of only two ounces per pound in excess of the minimum was found to be unreasonable, to be unnecessary to protect purchasers against the imposition of fraud by short weights, and therefore to deprive bakers and sellers of bread of their liberty without due process of law.

Justices concurring: Butler, Sanford, McReynolds, Sutherland, McKenna, Van Devanter, Taft, C.J..
Justices dissenting: Brandeis, Holmes.

294. *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924).

Texas law which permitted a nonresident to prosecute a case which arose outside of Texas against a railroad corporation of another State which was engaged in interstate commerce and neither owned

nor operated facilities in Texas was inoperative by reason of imposing a burden on interstate commerce.

295. *Air-Way Corp. v. Day*, 266 U.S. 71 (1924).

Ohio law which levied an annual fee on foreign corporations for the privilege of exercising their franchise in the State, which was computed at the rate of 5¢ per share upon the proportion of the number of shares of authorized common stock represented by property owned and used and business transacted in Ohio was void as imposing a burden on interstate commerce when applied to a foreign corporation all of whose business, intrastate and interstate, and all of whose property were represented by the shares outstanding; application of the rate to all shares authorized, or even to a greater number than the total outstanding, amounted to a burden on all property and business including interstate commerce. As imposed, the tax also violated the equal protection clause.

296. *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924).

Policy of insurance originally issued to insurer in Tennessee and converted by him in Texas from term insurance to 20 year payment life was deemed to be a mere continuation of the original policy, and upon suit on the policy in Texas, a Texas law imposing a penalty and allowing an attorney's fee could not constitutionally be applied against the insurer for the reason that Texas could not regulate contracts consummated outside its limits in conformity with the laws of the place where the contract was made without violating full faith and credit clause.

297. *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1925).

Missouri law which required foreign corporations doing business therein to pay an annual franchise tax of 1/10 of 1% of the par value of capital stock and surplus employed in business in the State could not constitutionally be exacted of a pipe line company for the privilege of doing in Missouri what was exclusively an interstate business.

Justices concurring: Sutherland, Holmes, Van Devanter, McReynolds, Butler, Sanford, McKenna, Taft, C.J..

Justice dissenting: Brandeis.

298. *Michigan Commission v. Duke*, 266 U.S. 570 (1925).

Michigan law which converted an interstate contract motor carrier into a public utility by legislative fiat in effect took property for public use without compensation in violation of the due process clause, and also imposed unreasonable conditions on the right to carry on interstate commerce.

299. *Flanagan v. Federal Coal Co.*, 267 U.S. 222 (1925).

In a suit for breach of contract, plaintiff's right to maintain suit could not be barred by his failure to pay a Tennessee license tax for the reason that the state law levying the same could not be applied to a contract for the purchase of coal to be delivered to customers in other States, that is, in interstate commerce.

300. *Buck v. Kuykendall*, 267 U.S. 307 (1925).

Washington law which prohibited motor vehicle common carriers for hire from using its highways without obtaining a certificate of convenience could not validly be exacted of an interstate motor carrier; the law was not a regulation designed to promote public safety but a prohibition of competition and, accordingly, burdened interstate commerce.

Justices concurring: Brandeis, Sanford, Sutherland, Van Devanter, Butler, Holmes, Taft, C.J..
Justice dissenting: McReynolds.

301. *Accord: Bush Co. v. Maloy*, 267 U.S. 317 (1925), voiding like application of a similar Maryland law.

Justices concurring: Brandeis, Sutherland, Van Devanter, Holmes, Sanford, Butler, Taft, C.J..
Justice dissenting: McReynolds.

302. *Accord: Allen v. Galveston Truck Line Corp.*, 289 U.S. 708 (1933), voiding like application of a Texas law.

303. *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925).

North Dakota Grain Grading Act which required locally grown wheat, 90% of which was for interstate shipment, to be graded by licensed inspectors and imposed various requirements, such as the keeping of records of quantity purchased and price paid and the exaction of bonds from purchasers maintaining grain elevators was not supportable as an inspection law and was void by reason of imposing undue burdens on interstate commerce.

Justices concurring: Van Devanter, Holmes, Butler, McReynolds, Sutherland, Sanford, Stone, Taft, C.J..
Justice dissenting: Brandeis.

304. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203 (1925).

Massachusetts law which imposed excise tax on foreign corporations doing business therein, measured by a combination of the total value of capital shares attributable to transactions therein and the proportion of net income attributable to such transactions, could not validly be applied to a foreign corporation which transacted only as interstate business therein. The tax as here imposed also violated the due process clause by affecting property beyond Massachusetts borders.

Justices concurring: McReynolds, Holmes, Van Devanter, Butler, Sutherland, Stone, Sanford, Taft, C.J..
Justice dissenting: Brandeis.

305. *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

Pennsylvania estate tax law, insofar as it measured the tax on the transfer of that part of the decedent's estate located within Pennsylvania by taking the whole of the decedent's estate which included tangible personal property located outside Pennsylvania, was violative of due process.

306. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Oregon Compulsory Education Law which required every parent to send his child to a public school was an unconstitutional interference with the liberty of parents and guardians to direct the upbringing of children and was violative of due process.

307. *Lee v. Osceola Imp. Dist.*, 268 U.S. 643 (1925).

Arkansas statute which imposed special assessment on lands acquired by private owners from the United States on account of benefits resulting from road improvements completed before the United States parted with title effected a taking of property without due process of law.

308. *Connally v. General Const. Co.*, 269 U.S. 385 (1926).

Iowa law which imposed severe, cumulative punishments upon contractors with the State who paid their workers less than "the current rate of per diem wages in the locality where the work is performed" was void for vagueness and violative of due process.

Justices concurring: Brandeis, Holmes.

309. *Browning v. Hooper*, 269 U.S. 396 (1926).

Texas statute which permitted property taxpaying voters to originate an election approving creation of a road improvement district with power to float bond issue and to levy taxes to amortize the same, with provision for establishment of the district if approved by two-thirds of those voting in the election, was procedurally defective in that each taxpayer to be assessed for the improvement was not accorded a notice and opportunity to be heard on the question of the benefits and hence denied due process.

310. *Rhode Island Trust Co. v. Doughton*, 270 U.S. 69 (1926).

North Carolina law purporting to tax inheritance of shares owned by nonresident in a foreign corporation having 50% or more of its property in North Carolina was violative of due process inasmuch as the property of a corporation is not owned by a shareholder and presence of corporate property in the State did not give it jurisdiction over his shares for tax purposes.

311. *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926).

Wisconsin law which established a conclusive presumption that all gifts of a material part of a decedent's estate made by him within six years of his death were made in contemplation of death and therefore subject to the graduated inheritance tax created an arbitrary classification violative of the due process and equal protection clauses.

Justices concurring: McReynolds, Butler, Sutherland, Sanford, Van Devanter, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Stone.

Accord: Uihlein v. Wisconsin, 273 U.S. 642 (1926).

312. *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926).

Pennsylvania law which prohibited the use of shoddy, even when sterilized, in the manufacture of bedding materials, was so arbitrary and unreasonable as to be violative of due process.

Justices concurring: Butler, Van Devanter, Sutherland, Sanford, McReynolds, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Stone.

313. *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926).

New Mexico law which forbade insurance companies authorized to do business in that State to pay any nonresident any fee for the obtaining or placing of any policies covering risks in New Mexico was violative of due process by reason of attempting to control conduct beyond the jurisdiction of New Mexico.

Justices concurring: Holmes, Van Devanter, Sutherland, Stone, Butler, Taft, C.J..
Justices dissenting: McReynolds, Brandeis, Sanford.

314. *Childers v. Beaver*, 270 U.S. 555 (1926).

Oklahoma inheritance tax law, applied to inheritance by Indians of Indian lands as determined by federal law, was void as a tax on a federal instrumentality.

315. *Appleby v. City of New York*, 271 U.S. 365 (1926).

Acts of New York of 1857 and 1871 authorizing New York City to erect piers over submerged lots impaired the obligation of contract as embraced in deeds to such submerged lots conveyed to private owners for valuable consideration through deeds executed by New York City in 1852.

316. *Appleby v. Delaney*, 271 U.S. 403 (1926).

Act of New York of 1871 whereby New York City was authorized to construct certain harbor improvements impaired the obligation of contract embraced in prior deeds to grantees whereunder the latter were accorded the privilege of filling in their underwater lots and constructing piers thereover.

317. *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926).

California law whereunder private carriers by automobile for hire could not operate over California highways between fixed points in the State without obtaining a certificate of convenience and submitting to regulation as common carriers exacted an unconstitutional condition and effected a denial of due process.

Justices concurring: Sutherland, McReynolds (separately), Taft, C.J., Sanford, Stone, Butler, Van Devanter.
Justices dissenting: Holmes, Brandeis.

318. *Jaybird Mining Co. v. Wier*, 271 U.S. 609 (1926).

Oklahoma law which levied an *ad valorem* tax on ores mined and in bins on the land was void as a tax on federal instrumentality when applied to a lessee of Indian land leased with the approval of the Secretary of the Interior.

Justices concurring: Butler, Stone, Holmes, Sanford, Sutherland, Van Devanter, Taft, C.J..
Justices dissenting: McReynolds, Brandeis.

319. *Hughes Bros. v. Minnesota*, 272 U.S. 469 (1926).

Minnesota law levying personal property tax could not be collected on logs cut in Minnesota pursuant to a contract of sale for delivery in Michigan while they were in transit in interstate commerce by a route from Minnesota to Michigan.

320. *Hanover Ins. Co. v. Harding*, 272 U.S. 494 (1926).

When an Illinois tax law originally is construed as a personal property tax whereby the local net receipts of foreign insurance companies were subjected to assessment at only 30% of full value, but at a later date is construed as a privilege tax with the result that all the local net income of such foreign companies was taxed at the rate applicable to personal property while domestic companies continued to pay the tax on their personal property assessed at the reduced valuation, the resulting discrimination denied the foreign companies the equal protection of the laws.

321. *Wachovia Trust Co. v. Doughton*, 272 U.S. 567 (1926).

North Carolina inheritance tax law could not validly be applied to property constituting a trust fund in Massachusetts established under the will of a Massachusetts resident and bestowing a power of appointment upon a North Carolina resident who exercised that power through a will made in North Carolina; the levy by a State of the tax on property beyond its jurisdiction was violative of due process.

Justices concurring: Holmes, Brandeis, Stone.

322. *Ottinger v. Consolidated Gas Co.*, 272 U.S. 576 (1926).

Act of New York prescribing a gas rate of $1 per thousand feet was confiscatory and deprived the utility of its property without due process of law.

Accord: Ottinger v. Brooklyn Union Co., 272 U.S. 579 (1926).

323. *Miller v. City of Milwaukee*, 272 U.S. 713 (1927).

Wisconsin law which exempted income of corporation derived from interest received from tax exempt federal bonds owned by said corporation, but which attempted to tax such income indirectly by taxing only so much of the stockholder's dividends as corresponded to the corporate income not assessed, was invalid.

Justices concurring: Brandeis, Stone.

324. *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927).

Pennsylvania law exacting a license from persons engaged in the State in the sale of steamship tickets and orders for transportation to or from foreign countries was void as imposing an undue burden on foreign commerce.

Justices concurring: Butler, McReynolds, Van Devanter, Sutherland, Sanford, Taft, C.J..
Justices dissenting: Brandeis, Holmes, Stone.

325. *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927).

New York law which prohibited ticket agencies from selling theatre tickets at prices in excess of 50¢ over the price printed on the ticket was void by reason of regulating a business not affected with the public interest and depriving such business of due process.

Justices concurring: Sutherland, Van Devanter, Butler, McReynolds, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Stone, Sanford.

326. *Tumey v. Ohio*, 273 U.S. 510 (1927).

Ohio law which compensated mayors serving as judges in minor prohibition offenses solely out of the fees and costs collected from defendants who were convicted was violative of due process.

327. *Nixon v. Herndon*, 273 U.S. 536 (1927).

Texas White Primary Law which barred Negroes from participation in Democratic party primary elections denied them the equal protection of the laws.

328. *Fairmont Co. v. Minnesota*, 274 U.S. 1 (1927).

Minnesota law which punished anyone who discriminated between different localities of that State by buying dairy products in one locality at a higher price than was paid for the same commodities in another locality infringed liberty of contract as protected by the due process clause.

Justices concurring: McReynolds, Butler, Van Devanter, Sanford, Sutherland, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Stone.

329. *Ohio Pub. Serv. Co. v. Ohio ex rel. Fritz*, 274 U.S. 12 (1927).

Ohio law which destroyed assignability of a franchise previously granted to an electric company by a municipal ordinance impaired the obligation of contract.

Justices concurring: McReynolds, Sutherland, Stone, Sanford, Butler, Van Devanter, Taft, C.J..
Justices dissenting: Holmes, Brandeis.

330. *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927).

Kentucky law which imposed a franchise tax on railroad corporations was constitutionally defective and violative of due process insofar as it was computed by including mileage outside the State which did not in any plain and intelligible way add to the value of the road and the rights exercised in Kentucky.

Justices concurring: Butler, Holmes, Sutherland, Stone, McReynolds, Van Devanter, Sanford, Taft, C.J..
Justice dissenting: Brandeis.

331. *Road Improv. Dist. v. Missouri Pacific R.R.*, 274 U.S. 188 (1927).

Special assessments levied against a railroad by a road district pursuant to an Arkansas statute and based on real property and rolling stock and other personalty were unreasonably discriminatory and excessive and deprived the railroad of property without due process by reason of the fact that other assessments for the same improvement were based solely on real property.

332. *Fiske v. Kansas*, 274 U.S. 380 (1927).

As construed and applied to an organization not shown to have advocated any crime, violence, or other unlawful acts, the Kansas criminal syndicalism law was violative of due process.

333. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

By reason of the exception contained therein, whereby its prohibitions were not to apply to conduct engaged in by participants whenever necessary to obtain a reasonable profit from products traded in, the Colorado Antitrust Law was void for want of a fixed standard for determining guilt and violative of due process.

334. *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927).

As applied to a foreign corporation having a fixed place of business and an agent in one county, but no property, debts or anything also in the county in which it was sued, Arkansas law which authorized actions to be brought against a foreign corporation in any county in the State, while restricting actions against domestic corporations

to the county where it had a place of business or where its chief officer resided, deprived the foreign corporation of equal protection of the laws.

Justices concurring: Van Devanter, McReynolds, Sutherland, Stone, Sanford, Butler, Taft, C.J..

Justices dissenting: Holmes, Brandeis.

335. *Northwestern Ins. Co. v. Wisconsin*, 275 U.S. 136 (1927).

Wisconsin law levying a tax on the gross income of domestic insurance companies was void where the income was derived in part as interest on United States bonds.

336. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

New Jersey statute which provided that in suits by residents against nonresidents for injuries resulting from operation of motor vehicles by the latter, service might be made on the Secretary of State as their agent, but which failed to provide any assurance that notice of such service would be communicated to the nonresidents, was violative of due process.

Justices concurring: Taft, C.J., Van Devanter, Butler, Sutherland, Sanford, McReynolds.

Justices dissenting: Brandeis, Holmes, Stone.

337. *Accord: Consolidated Flour Mills Co. v. Muegge*, 278 U.S. 559 (1928), voiding similar service as authorized by an Oklahoma law.

338. *Missouri ex rel. Robertson v. Miller*, 276 U.S. 174 (1928).

Mississippi statute which terminated right of retired revenue agent to prosecute suits for unpaid taxes in the name of his successor by requiring that the successor approve and join in such suits, and which further stipulated that the successor share equally in the commissions hitherto accruing solely to the retired agent, was held to impair the latter's rights under the contract clause insofar as it was enforced retroactively to accord a share to the successor in suits instituted by the retired agent before this legislative alteration.

339. *New Brunswick v. United States*, 276 U.S. 547 (1928).

Property taxes assessed under New Jersey law on land acquired from the United States Housing Corporation by private purchasers subject to retention of mortgage by the federal agency could not be collected by sale of the land unless the federal liens were excluded and preserved as prior liens.

Justices concurring: Sanford, Stone, Sutherland, Butler, Brandeis, Holmes, Van Devanter, Taft, C.J..

Justice dissenting: McReynolds.

340. *Brooke v. City of Norfolk*, 277 U.S. 27 (1928).

State and city taxes authorized under laws of Virginia may not be levied on the corpus of a trust located in Maryland, the income from which accrued to a beneficiary resident in Virginia; the corpus was beyond the jurisdiction of Virginia and accordingly the assessments were violative of due process.

341. *Louisville Gas Co. v. Coleman*, 277 U.S. 32 (1928).

Kentucky law which conditioned the recording of mortgages not maturing within five years upon the payment of a tax of 20¢ for each $100 of value secured, but which exempted mortgages maturing within that period was void as denying equal protection of the laws.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Sanford, Stone.

342. *Long v. Rockwood*, 277 U.S. 142 (1928).

Massachusetts income tax law could not validly be imposed on income received by a citizen as royalties for the use of patents issued by the United States.

Justices concurring: McReynolds, Butler, Van Devanter, Sanford, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Sutherland, Stone.

343. *Standard Pipe Line v. Highway Dist.*, 277 U.S. 160 (1928).

Arkansas law which purported to validate assessments by the district was ineffective to sustain an arbitrary assessment against the pipe line at the rate of $5,000 per mile in view of the fact that the pipe line originally was constructed in 1909-1915 at a cost under $9,000 per mile, and the benefit, if any, which accrued to the pipe line was small.

344. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928).

Mississippi law imposing tax on the sale of gasoline was void as applied to sales to federal instrumentalities such as the Coast Guard or a Veterans' Hospital.

Justices concurring: Butler, Sutherland, Van Devanter, Sanford, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Stone, McReynolds.

345. *Accord: Graysburg Oil Co. v. Texas*, 278 U.S. 582 (1929), voiding application of Texas gasoline tax statute to gasoline sold to the United States.

346. *Ribnik v. McBride*, 277 U.S. 350 (1928).

New Jersey law empowering Secretary of Labor to fix the fees charged by employment agencies was violative of due process inasmuch as the regulation was not imposed on a business affected with a public interest.

Justices concurring: Sutherland, Taft, C.J., Sanford, Butler, McReynolds, Van Devanter.
Justices dissenting: Stone, Holmes, Brandeis.

347. *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928).

Pennsylvania law which taxed gross receipts of foreign and domestic corporations derived from intrastate operation of taxicabs, but exempted like receipts derived by individuals and partnerships, denied equal protection of the laws.

Justices concurring: Butler, Sutherland, Sanford, Van Devanter, McReynolds, Taft, C.J..
Justices dissenting: Holmes, Brandeis, Stone.

348. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

Louisiana Shrimp Act which permitted shipment of shrimp taken in Louisiana tidal waters only if the heads and hulls had previously been removed, and which was designed to favor the canning in Louisiana of shrimp destined for the interstate market, was unconstitutional; those taking the shrimp immediately became entitled to ship them in interstate commerce.

Justices concurring: Butler, Sutherland, Sanford, Stone, Van Devanter, Holmes, Brandeis, Taft, C.J..
Justice dissenting: McReynolds.

349. *Accord: Johnson v. Haydel*, 278 U.S. 16 (1928), voiding the Louisiana Oyster Act for like reasons.

350. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

Pennsylvania law which prohibited corporate ownership of a drug store unless all of the stockholders were licensed pharmacists had no reasonable relationship to public health and therefore was violative of due process.

Justices concurring: Sutherland, Butler, Van Devanter, Stone, Sanford, McReynolds, Taft, C.J..
Justices dissenting: Holmes, Brandeis.

351. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

Tennessee law which fixed the prices at which gasoline may be sold violated the due process clause inasmuch as the business sought to be regulated was not affected with a public interest.

Justices concurring: Sutherland, Stone (separately), Sanford, McReynolds, Butler, Brandeis (separately), Van Devanter, Taft, C.J..
Justice dissenting: Holmes.

352. *Cudahy Co. v. Hinkle*, 278 U.S. 460 (1929).

Where the local property of a foreign corporation and the part of its business transacted in the State, less than half of which was intrastate, were but small fractions of its entire property and its nation-

wide business, Washington law which imposed a tax on such company in the form of a filing fee and a license tax, both reckoned upon its authorized capital stock, was inoperative by reason of burdening interstate commerce and reaching property beyond the State contrary to due process.

Justices concurring: McReynolds, Sutherland, Stone, Sanford, Butler, Van Devanter, Taft, C.J..
Justices dissenting: Brandeis, Holmes.

353. *Frost v. Corporation Comm'n*, 278 U.S. 515 (1929).

Oklahoma law which permitted an individual to engage in the business of ginning cotton only upon a showing of public necessity, but allowed a corporation to engage in said business in the same locality without such showing denied the individual equal protection of the law.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Sanford, Taft, C.J..
Justices dissenting: Brandeis, Holmes, Stone.

354. *Manley v. Georgia*, 279 U.S. 1 (1929).

Georgia banking law which declared every insolvency of a bank shall be deemed to have been fraudulent, with provision for rebutting said presumption, was arbitrary and unreasonable and violative of due process.

355. *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929).

Louisiana tax law could not be enforced against oil purchased at interior points for export in foreign commerce for the oil did not lose its character as goods in foreign commerce merely because, after shipment to the exporter at a Louisiana port, the oil was temporarily stored there preparatory to loading on vessels of foreign consignees.

Justices concurring: Taft, C.J., Holmes, Brandeis, Stone, Sanford, Van Devanter, Butler.
Justices dissenting: McReynolds, Sutherland.

356. *London Guarantee & Accident Co. v. Industrial Comm'n*, 279 U.S. 109 (1929).

California workmen's compensation act could not be applied in settlement of a claim for the death of a seaman in a case that was subject to the exclusive maritime jurisdiction of federal courts.

Justices concurring: Taft, C.J., Holmes, Stone, Sanford, Sutherland, McReynolds, Butler, Van Devanter.
Justice dissenting: Brandeis.

357. *Helson v. Kentucky*, 279 U.S. 245 (1929).

Kentucky law imposing a tax on the sale of gasoline could not be applied to gasoline purchased outside Kentucky for use in a ferry en-

gaged as an instrumentality of interstate commerce, that is, in operation on the Ohio River between Kentucky and Illinois.

Justices concurring: Sutherland, Butler, Van Devanter, Sanford, Stone (separately), Brandeis (separately), Holmes (separately), Taft, C.J..
Justice dissenting: McReynolds.

358. *Macallen Co. v. Massachusetts*, 279 U.S. 620 (1929).

Massachusetts law imposing an excise on domestic business corporations was in reality a statute imposing a tax on income rather than a tax on the corporate privilege and, as an income tax law, could not be imposed on income derived from United States bonds nor, by reason of impairment of the obligation of contract on income from local county and municipal bonds exempt by statutory contract.

Justices concurring: Sutherland, Sanford, Butler, Van Devanter, McReynolds, Taft, C.J..
Justices dissenting: Stone, Holmes, Brandeis.

359. *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929).

Georgia law which viewed a fatal collision between railroad and motor car at grade crossing as raising a presumption of negligence on the part of the railroad and as the proximate cause of death and which permitted the jury to weigh the presumption as evidence against the testimony of the railroad's witnesses tending to prove due care was unreasonable and violative of due process.

360. *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929).

Virginia law which levied a property tax on corpus of a trust consisting of securities managed by a Maryland trustee which paid over to children of settlor, all of whom resided in Virginia, the income therefrom, was violative of due process in that it taxed intangibles with a taxable situs in Maryland, where the trustee and owner of the legal title was located.

Justices concurring: McReynolds, Van Devanter, Butler, Sutherland, Sanford, Stone (separately), Brandeis (separately), Holmes (separately), Taft, C.J..

361. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204 (1930).

Minnesota inheritance tax law, insofar as it was applied to Minnesota securities kept in New York by the decedent who died domiciled in New York was violative of due process.

Justices concurring: McReynolds, Van Devanter, Butler, Sutherland, Sanford, Stone (separately), Taft, C.J..

362. *New Jersey Tel. Co. v. Tax Board*, 280 U.S. 338 (1930).

New Jersey franchise tax law, levied at the rate of 5% of gross receipts of a telephone company engaged in interstate and foreign commerce, was a direct tax on foreign and interstate commerce and void.

Justices concurring: Butler, Sutherland, Sanford, Van Devanter, McReynolds.

Justices dissenting: Holmes, Brandeis.

363. *Moore v. Mitchell*, 281 U.S. 18 (1930).

Indiana was powerless to give any force or effect beyond her borders to its law of 1927 purporting to authorize a county treasurer to institute suits for unpaid taxes owed by a nonresident; such officer derived no authority in New York from this Indiana law and hence had no legal capacity to institute the suit in a federal court in the latter State.

364. *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930).

Missouri law which provided that, in taxing assets of insurance companies, the amounts of their legal reserves and unpaid policy claims should first be deducted was invalid as applied to a company owning nontaxable United States bonds insofar as the law was construed to require that the deduction should be reduced by the proportion that the value which such bonds bore to total assets; the company thus was saddled with a heavier tax burden than would have been imposed had it not owned such bonds.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J. (separately).

Justices dissenting: Stone, Holmes, Brandeis.

365. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

Texas law, which forbade insurance stipulations limiting the time for suit on a claim for a period less than two years, could not constitutionally be applied, consistently with due process, to permit recovery contrary to the terms of a fire insurance policy executed in Mexico by a Mexican insurer and covered in part by reinsurance effected in Mexico and New York by New York insurers licensed to do business in Texas who defended against a Texas claimant to whom the policy was assigned while he was a resident of Mexico and where he resided when the loss was sustained.

366. *Baldwin v. Missouri*, 281 U.S. 586 (1930).

Missouri not having jurisdiction for tax purposes of various intangibles, such as bank accounts and federal securities held in banks therein and owned by a decedent domiciled in Illinois, its transfer tax law could not be applied, consistently with due process, to the transfer thereof, under a will probated in Illinois, to the decedent's son who also was domiciled in Illinois.

Justices concurring: McReynolds, Van Devanter, Sutherland, Butler.

Justices dissenting: Holmes, Brandeis, Stone (separately).

367. *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930).

Arkansas personal property tax laws could not be enforced against the purchaser of army blankets situate within an army cantonment in that State, as to which exclusive federal jurisdiction attached under Art. I, § 8, cl. 17.

368. *Beidler v. South Carolina Tax Comm'n*, 282 U.S. 1 (1930).

South Carolina inheritance tax law could not be applied, consistently with due process, to affect the transfer by will of shares in a South Carolina corporation and debts owed by the latter belonging to a decedent who died domiciled in Illinois; such intangibles were not shown to have acquired any taxable business situs in South Carolina.

Justices concurring: Hughes, C.J., Holmes (separately), Brandeis (separately), Van Devanter, McReynolds, Sutherland, Butler, Stone, Roberts.

369. *Chicago, St. P., M. & O. Ry. v. Holmberg*, 282 U.S. 162 (1930).

Nebraska law, as construed, which required a railroad to provide an underground cattle-pass across its right of way partly at its own expense for the purpose, not of advancing safety, but merely for the convenience of a farmer owning land on both sides of the railroad, deprived the latter of property without due process.

370. *Furst v. Brewster*, 282 U.S. 493 (1931).

Arkansas law which withheld from a foreign corporation the right to sue in state courts unless it had filed a copy of its charter and a financial statement and had designated a local office and an agent to accept service of process could not constitutionally be enforced to prevent suit by a non-complying foreign corporation to collect a debt which arose out of an interstate transaction for the sale of goods.

371. *Coolidge v. Long*, 282 U.S. 582 (1931).

Massachusetts law which imposed succession taxes on all property within Massachusetts transferred by deed or gift intended to take effect in possession or enjoyment after the death of the grantor, or transferred to any person absolutely or in trust, could not, consistently with due process and the contract clause, be enforced with reference to rights of succession or rights effected by gift which vested under trust agreements created prior to passage of said act, notwithstanding that the settlor died after its passage.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J..

Justices dissenting: Roberts, Holmes, Brandeis, Stone.

372. *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931).

North Carolina income tax law, as applied to income of New York corporation which manufactured leather goods in North Carolina for

sale in New York, was violative of due process by reason of the fact that the formula for allocating income to that State, namely, that part of the corporation's net income which bears the same ratio to entire net income as the value of its tangible property in North Carolina bears to the value of all its tangible property, attributed to North Carolina a portion of total income which was out of all appropriate proportion to the business of the corporation conducted in North Carolina.

373. *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931).

Tennessee law which imposed a privilege tax graduated to carrying capacity on motor buses, the proceeds from which were not segregated for application to highway maintenance, was void insofar as the privilege tax was imposed on a bus carrier engaged exclusively in interstate commerce.

Justices concurring: Brandeis, Van Devanter, Butler, Sutherland, Roberts, Stone, Holmes, Hughes, C.J..
Justice dissenting: McReynolds.

374. *Stromberg v. California*, 283 U.S. 359 (1931).

California law which prohibited the display of a red flag in a public or meeting place as a symbol of opposition to organized government or as a stimulus to anarchistic action or as an aid to seditious propaganda was so vague and indefinite as to permit punishment of the fair use of opportunity for free political discussion and therefore, as enforced, effected a denial of liberty without due process.

Justices concurring: Hughes, C.J., Holmes, Stone, Brandeis, Roberts, Van Devanter, Sutherland.
Justices dissenting: Butler, McReynolds.

375. *Smith v. Cahoon*, 283 U.S. 553 (1931).

Florida law which required motor carriers to furnish bond or an insurance policy for the protection of the public against injuries but which exempted vehicles used exclusively in delivering dairy products and carriers engaged exclusively in transporting fish, agricultural, and dairy products between production to shipping points en route to primary market denied the equal protection of the laws; and insofar as it subjected carriers for hire to the same requirements as to procurement of a certificate of convenience and necessity and rate regulation as were exacted of common carriers the law was violative of due process.

376. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

Minnesota law which authorized the enjoinder of one engaged regularly in the business of publishing a malicious, scandalous, and defamatory newspaper or magazine, as applied to publications charging neglect of duty and corruption on the part of state law enforce-

ment officers, effected an unconstitutional infringement of freedom of the press as safeguarded by the due process clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Brandeis, Holmes, Stone, Roberts.
Justices dissenting: Butler, Van Devanter, McReynolds, Sutherland.

377. *State Tax Comm'n v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931).

Mississippi privilege tax could not be enforced as to an interstate pipe line company which sold gas wholesale to local, independent distributors from a supply which passed into and through the State in interstate commerce; fact that pipe line company, in order to make delivery, used a thermometer and reduced pressure, did not convert the sale into an intrastate transaction.

378. *Hoeper v. Tax Commission*, 284 U.S. 206 (1931).

Wisconsin income tax law which authorized an assessment against a husband of a tax computed on the combined total of his and his wife's incomes, augmented by surtaxes resulting from the combination, notwithstanding that under the laws of Wisconsin the husband had no interest in, or control over, the property or income of his wife, was violative of the due process and equal protection clauses of the Fourteenth Amendment.

Justices concurring: Roberts, Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J..
Justices dissenting: Holmes, Brandeis, Stone.

379. *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932).

Maine transfer tax law could not be applied, consistently with due process, to the inheritance of shares in a Maine corporation passing under the will of a Massachusetts testator who died a resident of Massachusetts and owning the shares.

Justices concurring: Sutherland, Butler, Van Devanter, Roberts, McReynolds, Hughes, C.J..
Justices dissenting: Stone, Holmes, Brandeis.

380. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

Oklahoma law which prohibited anyone from engaging in the manufacture, sale, or distribution of ice without a state license, to be issued only on proof of public necessity and capacity to meet public demand, effected an invalid regulation of a business not affected with a public interest and a denial of liberty to pursue a lawful calling contrary to the due process clause of the Fourteenth Amendment.

Justices concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts, Hughes, C.J..
Justices dissenting: Brandeis, Stone.

381. *Coombes v. Getz*, 285 U.S. 434 (1932).

Repeal of California constitutional provision making directors of corporations liable to creditors for all moneys misappropriated or embezzled impaired the obligation of contract as to creditors who dealt with corporations during the period when such constitutional provision was in force, and inclusion in the state constitution of another provision whereunder the State reserved the power to alter or repeal all existing or future laws concerning corporations could not be invoked to destroy vested rights contrary to due process.

Justices concurring: Sutherland, Roberts, Butler, McReynolds, Van Devanter, Hughes, C.J..

Justices dissenting: Cardozo, Brandeis, Stone.

382. *Nixon v. Condon*, 286 U.S. 73 (1932).

Texas White Primary Law which empowered the state executive committee of a political party to prescribe the qualifications of members of the party and thereby to exclude Negroes from voting in primaries conducted by the party amounted to state action violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Cardozo, Brandeis, Stone, Roberts, Hughes, C.J..

Justices dissenting: McReynolds, Van Devanter, Butler, Sutherland.

383. *Champlin Rfg. Co. v. Corporation Comm'n*, 286 U.S. 210 (1932).

Section of Oklahoma law which provided that any person violating the statute shall be subject to have his oil producing property placed in the hands of a receiver by a court at the instance of a suit filed by the state Attorney General but which restricted such receivership to the operation of producing wells and the marketing of the production thereof in conformity with this law was a penal provision and as such was void under the due process clause for the reason that it punished violations of regulatory provisions of the statute that were too vague to afford a standard of conduct.

384. *Anglo-Chilean Corp. v. Alabama*, 288 U.S. 218 (1933).

Alabama law which subjected foreign corporations to an annual franchise tax for doing business, levied at the rate of $2 for each $1,000 of capital employed in the State, violated both Art. I, § 10, cl. 2, prohibiting state import duties and the commerce clause, when enforced against a foreign corporation, whose sole business in Alabama consisted of the landing, storing, and selling in original packages of goods imported from abroad.

Justices concurring: Butler, McReynolds, Van Devanter, Roberts, Sutherland, Hughes, C.J..

Justices dissenting: Cardozo, Brandeis, Stone.

385. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933).

Florida Chain Store Tax Law, which levied a heavier privilege tax per store on the owner whose stores were in different counties than on the owner whose stores were all in the same county, effected an arbitrary discrimination amounting to a denial of equal protection of the laws.

Justices concurring: Roberts, McReynolds, Sutherland, Butler, Van Devanter, Hughes, C.J..
Justices dissenting: Brandeis, Cardozo, Stone.

386. *Consolidated Textile Co. v. Gregory*, 289 U.S. 85 (1933).

Wisconsin law, insofar as it authorized service of process on a foreign corporation which sold goods in Wisconsin through a controlled subsidiary and hence was not carrying on any business in the State at the time of the attempted service was violative of due process, notwithstanding that the summons was served on an officer of the corporation temporarily in Wisconsin for the purpose of negotiating a controversy with a local attorney.

387. *Johnson Oil Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158 (1933).

Oklahoma property tax law could not be enforced, consistently with due process, against the entire fleet of tank cars of an Illinois corporation that were used in transporting oil from its refinery in Oklahama to other States; instead, the State may base its tax on the number of cars which on the average were physically present within its boundaries.

388. *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

Virginia law which authorized an administrative officer to require railroads to eliminate grade crossing whenever, in his opinion, such alterations were necessary to promote public safety and convenience and afforded the railroads no notice or hearing on the existence of such necessity and no means of reviewing the officer's decision was violative of due process.

Justices concurring: McReynolds, Roberts, Butler, Van Devanter, Sutherland, Brandeis.
Justices dissenting: Hughes, C.J., Stone, Cardozo.

389. *Morrison v. California*, 291 U.S. 82 (1934).

Section of California Alien Land Law which stipulated that when the State, in a prosecution for violation thereof, proved use or occupancy by an alien lessee, alleged in the indictment to be an alien ineligible for naturalization, the onus of proving citizenship shall devolve upon the defense, was arbitrary and violative of due process as applied to the lessee for the reason that a lease of land conveys no hint of criminality and there is no practical necessity for relieving the prosecution of the obligation of proving Japanese race.

390. *Standard Oil Co. v. California*, 291 U.S. 242 (1934).

California law which levied a license upon every distributor for each gallon of motor vehicle fuel sold and delivered by him in the State could not constitutionally be applied to the sale and delivery of gasoline to a military reservation as to which the United States had acquired exclusive jurisdiction.

391. *Hartford Accident & Ins. Co. v. Delta Pine Land Co.*, 292 U.S. 143 (1934).

As judicially applied, Mississippi statutes which deemed all contracts of insurance and surety covering its citizens to have been made therein and which were enforced to facilitate recovery under an indemnity contract, consummated in Tennessee in conformity with the law of the latter where the insured, a Mississippi corporation, also conducted its business, and to nullify as contrary to Mississippi law nonobservance of a contractual stipulation as to the time for filing claims, were violative of due process in that the Mississippi laws were accorded effect beyond the territorial limits of Mississippi.

392. *McKnett v. St. Louis & S. F. Ry.*, 292 U.S. 230 (1934).

Alabama law, as judicially construed, which precluded Alabama courts from entertaining actions against foreign corporations arising in other States under federal law, while permitting entertainment of like actions arising in other States under state law, was violative of the Constitution.

393. *W. B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934).

Arkansas law which exempted life insurance proceeds from judicial process, when applied to prevent recovery by a creditor of the insured who had garnished the insurer prior to passage of the law, impaired the obligation of contract.

Justices concurring: Hughes, C.J., Cardozo, Brandeis, Roberts, Stone, Sutherland (separately), Van Devanter (separately), McReynolds (separately), Butler (separately).

394. *Concordia Ins. Co. v. Illinois*, 292 U.S. 535 (1934).

Illinois tax laws were discriminatory and violative of the equal protection clause for the reason that they (1) subjected foreign insurance companies selling fire, marine, inland marine, and casualty insurance to two property taxes, one on tangible property and a second, on net receipts, including net receipts from their casualty business, while subjecting competing foreign insurance companies selling only casualty insurance to the single tax on tangible property; and (2) insofar as the net receipts were assessed at full value while other personal property in general was assessed at only 60% of value.

Justices concurring: Van Devanter, Sutherland, Butler, McReynolds, Roberts.

Justices dissenting: Cardozo, Brandeis, Stone.

395. *Cooney v. Mountain States Tel. Co.*, 294 U.S. 384 (1935).

Montana laws which imposed an occupation tax on every telephone company providing service in the State imposed an invalid burden on interstate commerce when applied to a company which used the same facilities to furnish both interstate as well as intrastate services.

396. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935).

New York Milk Control Act, insofar as it prohibited the sale of milk imported from another State unless the price paid to the producer in the other State equalled the minimum prescribed for purchases from local producers, imposed an invalid burden on interstate commerce irrespective of resale of such milk in the original or other containers.

397. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935).

Kentucky law which taxed the sales of retailers at the rate of 1/20 of 1% on the first $400,000 of gross sales, and which imposed increasing rates on each additional $100,000 of gross sales up to $1,000,000, with a maximum rate of 1% on sales over $1,000,000, was arbitrary and violative of the equal protection clause for the reason that there existed no reasonable relation between the amount of the tax and the value of the privilege of merchandising or between gross sales, the measure of the tax, and net profits.

Justices concurring: Roberts, Sutherland, Van Devanter, Butler, McReynolds, Hughes, C.J..

Justices dissenting: Cardozo, Brandeis, Stone.

398. *Accord: Valentine v. A. & P. Tea Co.*, 299 U.S. 32 (1936), voiding a similar Iowa Chain Store Tax Act.

Justices concurring: Roberts, Sutherland, Butler, McReynolds, Van Devanter, Hughes, C.J..

Justices dissenting: Brandeis, Cardozo.

399. *Panhandle Co. v. Highway Comm'n*, 294 U.S. 613 (1935).

Kansas law which, as judicially construed, empowered the state highway commission to order a pipe line company, at its own expense, to relocate its pipe and telephone lines, then located on a private right of way, in order to conform to plans adopted for new highways across the right of way, deprived the company of property without due process of law.

Justices concurring: McReynolds, Butler, Van Devanter, Sutherland, Brandeis, Roberts, Stone (separately), Cardozo (separately), Hughes, C.J..

400. *Broderick v. Rosner*, 294 U.S. 629 (1935).

New Jersey law, which prohibited institution of suits in New Jersey courts to enforce a stockholder's statutory personal liability arising under the laws of another State and which was invoked to bar a suit by the New York Superintendent of Banks to recover assessments levied on New Jersey residents holding stock in a New York bank, was ineffective to prevent New Jersey courts from entertaining said action consistently with the full faith and credit clause.

Justices concurring: Brandeis, Sutherland, Butler, Van Devanter, Stone, Roberts, McReynolds, Hughes, C.J..
Justices dissenting: Cardozo.

401. *Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935).

Arkansas law which reduced the remedies available to mortgagees in the event of a default on mortgage bonds issued by an improvement district, with the result that they were deprived of effective means of recovery for 6 ½ years, impaired the obligation of contract.

402. *Georgia Ry. & Elec. Co. v. Decatur*, 295 U.S. 165 (1935).

Insofar as a Georgia law, which authorized a municipality to effect certain street improvements and to assess railways having tracks on such streets with the cost of such improvement, supported a presumption that a benefit accrued to the railway from said improvements which could not be rebutted by contrary proof offered in a court of law, the effect of the statute was to deny the railway a hearing essential to due process of law.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Roberts, Hughes, C.J..
Justices dissenting: Stone, Brandeis, Cardozo.

403. *Senior v. Braden*, 295 U.S. 422 (1935).

Insofar as trust certificates held by a resident represented interests in various parcels of land located in, and outside of, Ohio, which afforded the holder no voice in the management of such property but only a right to share in the net income therefrom and in the proceeds from the sale thereof, such interests could be taxed only by a uniform rule according to value, and Ohio law which levied an intangible property tax thereon measured by income was violative of the equal protection and due process clauses.

Justices concurring: McReynolds, Butler, Van Devanter, Sutherland, Roberts, Hughes, C.J..
Justices dissenting: Stone, Brandeis, Cardozo.

404. *Colgate v. Harvey*, 296 U.S. 404 (1935).

Vermont law which levied a 4% tax on income derived from loans made outside the State but which exempted entirely like income de-

rived from money loaned within Vermont at interest not exceeding 5% per year embodied an arbitrary discrimination and abridged the privileges and immunities of United States citizens contrary to the Fourteenth Amendment.

Justices concurring: Sutherland, Van Devanter, Butler, McReynolds, Roberts, Hughes, C.J..
Justices dissenting: Stone, Brandeis, Cardozo.

405. *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936).

Louisiana law which abolished prior requirement that building and loan associations, when income was insufficient to pay all demands of withdrawing stockholders within 60 days, set apart 50% of receipts to pay such withdrawals and provided, instead, that the directors be vested with sole discretion as to the amount to be allocated for such withdrawals, impaired the obligation of contract as to a stockholder who, prior to such amending statute, gave notice of withdrawal and whose demand had not been paid.

406. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Louisiana law which imposed a tax on the gross receipts derived from the sale of advertisements by newspapers enjoying a circulation of more than 20,000 copies per week unconstitutionally restricted freedom of the press contrary to the due process clause of the Fourteenth Amendment.

407. *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936).

New York Milk Control Act, which permitted milk dealers without well advertised trade names who were in business before April 10, 1933, to sell milk in New York City at a price one cent below the minimum binding on competitors with well advertised trade names, subjected dealers without well advertised names who established their business after that date to a denial of equal protection of the law.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Sutherland, Butler, McReynolds.
Justices dissenting: Cardozo, Brandeis, Stone.

408. *Bingaman v. Golden Eagle Lines*, 297 U.S. 626 (1936).

New Mexico law which imposed an excise tax on the sale and use of gasoline and motor fuel and collected a license tax of $25 from users who import for use in New Mexico gasoline purchased in another State could not validly be imposed on a motor vehicle carrier engaged exclusively in interstate commerce which imported out-of-state gasoline for use in New Mexico; for the tax was levied, not as compensation for the use of that State's highways, but on the use of an instrumentality of interstate commerce.

409. *Fisher's Blend Station v. State Tax Comm'n*, 297 U.S. 650 (1936).

Washington law which levied an occupation tax measured by gross receipts of radio broadcasting stations within that State whose programs were received by listeners in other States imposed an unconstitutional burden on interstate commerce.

410. *International Steel & I. Co. v. National Surety Co.*, 297 U.S. 657 (1936).

Tennessee law relative to settlement of public construction contracts which retroactively released the surety on a bond given by a contractor as required by prior law for the security of claims of materialmen and substituted therefor, without the latter's consent, the obligation of another bond impaired the obligation of contract.

411. *Graves v. Texas Company*, 298 U.S. 393 (1936).

Alabama law which imposed an excise tax on the sale of gasoline could not be enforced as to sales of gasoline to the United States.

Justices concurring: Butler, Sutherland, Van Devanter, Roberts, Hughes, C.J., McReynolds.

Justices dissenting: Cardozo, Brandeis.

412. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

New York law which required employers to pay women minimum wages that would be not only equal to the fair and reasonable value of the services rendered but also sufficient to meet the minimum cost of living necessary for health deprived employers and employees of their freedom of contract without due process of law.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Roberts.

Justices dissenting: Hughes, C.J., Brandeis, Stone, Cardozo.

413. *Binney v. Long*, 299 U.S. 280 (1936).

Massachusetts succession tax law whereunder succession to property through failure of an intestate to exercise a power of appointment under a non-testamentary conveyance of the property by deed or trust made after September 1, 1907, was not taxed, whereas if the conveyance was made before that date, the succession was not only taxable but the rate might be substantially increased by aggregating the value of that succession with other interests derived by the transferee by inheritance from the donee of the power, was discriminatory and violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Butler, Sutherland, McReynolds.

Justices dissenting: Cardozo, Brandeis.

414. *De Jonge v. Oregon*, 299 U.S. 353 (1937).

Oregon Criminal Syndicalism Law, invoked to punish participation in the conduct of a public meeting devoted to a lawful purpose merely because the meeting had been held under the auspices of an organization which taught or advocated the forcible overthrow of government but which did not engage in such advocacy during the meeting, was violative of freedom of assembly and freedom of speech guaranteed by the due process clause of the Fourteenth Amendment.

415. *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937).

New York income tax law could not be extended to salaries of employees of the Panama Railroad Company by reason of the fact that the latter together with its employees was a federal instrumentality (Art. VI).

416. *Ingels v. Morf*, 300 U.S. 290 (1937).

California Caravan Act, which imposed a $15 fee on each motor vehicle transported from another State into California for the purposes of sale, imposed an unconstitutional burden on interstate commerce; the proceeds from such fees were not used to meet the cost of highway construction or maintenance, but instead to reimburse the State for the added expense of policing caravan traffic, and for that purpose the fee was excessive.

417. *Herndon v. Lowry*, 301 U.S. 242 (1937).

Georgia insurrection statute, which punished as a crime the acts of soliciting members for a political party and conducting meetings of a local unit of that party, where one of the doctrines of the party, established by reference to a document not shown to have been exhibited by any one, may be said to embrace ultimate resort in the indefinite future to violence against government, invaded freedom of speech as guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Roberts, Brandeis, Stone, Hughes, C.J., Cardozo.
Justices dissenting: Van Devanter, McReynolds, Butler, Sutherland.

418. *Lindsey v. Washington*, 301 U.S. 397 (1937).

Washington statute which increased the severity of a penalty for a specific offense by mandating a sentence of 15 years and thereby removing the discretion of the judge to sentence for less than the maximum of 15 years, when applied retroactively to a crime committed before its enactment, was invalid as an *ex post facto* law.

419. *Hartford Ins. Co. v. Harrison*, 301 U.S. 459 (1937).

Georgia law which prohibited stock insurance companies writing fire and casualty insurance from acting through agents who were their salaried employees, but which permitted mutual companies

writing such insurance to do so, violated the equal protection clause of the Fourteenth Amendment.

Justices concurring: McReynolds, Sutherland, Van Devanter, Butler, Hughes, C.J..
Justices dissenting: Roberts, Brandeis, Stone, Cardozo.

420. *Puget Sound Co. v. Tax Commission*, 302 U.S. 90 (1937).

Washington gross receipts tax law could not validly be enforced as to receipts accruing to a stevedoring corporation acting as an independent contractor in loading and unloading cargoes of vessels engaged in interstate or foreign commerce by longshoremen subject to its own direction and control; such business was a form of interstate and foreign commerce.

421. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

West Virginia gross receipts tax law could not validly be enforced to sustain levy on that part of gross receipts of a federal contractor working on a federal installation in West Virginia which was derived from the fabrication of equipment at its Pennsylvania plant for which the contractor received payment prior to installation of such equipment on the West Virginia site owned by the Federal Government; for such compensable activities were completed beyond the jurisdiction of West Virginia.

422. *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

California law which levied a privilege tax on admitted foreign insurers, measured by gross premiums received, was violative of due process insofar as it affected premiums received in Connecticut on contracts of reinsurance consummated in the latter State and covering policies of life insurance issued by other insurers to residents of California; California was without power to tax activities conducted beyond its borders.

Justices concurring: Stone, Hughes, C.J., McReynolds, Brandeis, Butler, Roberts.
Justice dissenting: Black.

423. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938).

Indiana law of 1933 which repealed tenure rights of certain teachers accorded under a Tenure Act of 1927 impaired the obligation of contract.

Justices concurring: Roberts, Hughes, C.J., McReynolds, Brandeis, Butler, Stone.
Justice dissenting: Black.

Accord: Indiana ex rel. Valentine v. Marker, 303 U.S. 628 (1938).

424. *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

Indiana gross receipts tax law could not constitutionally be applied to gross receipts derived by an Indiana corporation from sales

in other States of goods manufactured in Indiana; as thus applied the law burdened interstate commerce.

Justices concurring: Roberts, Hughes, C.J., Brandeis, Butler, Stone, Reed.
Justices dissenting: Black (in part), McReynolds (in part).

425. *Freeman v. Hewit*, 329 U.S. 239 (1946).

The Indiana gross income tax imposes an unconstitutional burden on interstate commerce when applied to the receipt by one domiciled in the State of the proceeds of a sale of securities sent out of the State to be sold.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Rutledge, Burton.
Justices dissenting: Black, Douglas, Murphy.

426. *Indiana Dep't of Revenue v. Nebeker*, 348 U.S. 933 (1955).

Indiana's gross receipts tax law also could not be levied on receipts from the purchase and sale on margin of securities by resident owners through a nonresident broker engaged in interstate commerce.

Justices concurring: Warren, C.J., Reed, Frankfurter, Burton, Clark, Minton.
Justices dissenting: Black, Douglas.

427. *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).

California Alcoholic Beverages Control Act, as to its regulatory provisions which embraced a fee for a license to import alcoholic beverages and control over importation of such beverages, could not be enforced, consistently with the Twenty-first Amendment, against a retail dealer doing business in a National Park as to which California retained no jurisdiction.

428. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

A Missouri statute which accorded Negro residents financial aid to enable them to obtain instruction at out-of-state universities equivalent to that afforded exclusively to white students at the University of Missouri denies such Negroes the equal protection of the laws. The obligation of a State to give equal protection of the laws can be performed only where its laws operate, that is, within its own jurisdiction.

Justices concurring: Hughes, C.J., Brandeis, Stone, Roberts, Black, Reed.
Justices dissenting: McReynolds, Butler.

429. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939).

A Washington gross receipts tax levied on the privilege of engaging in business in the State cannot constitutionally be imposed on the gross receipts of a marketing agent for a federation of fruit growers whose business consists of the marketing of fruit shipped from Washington to places of sale in other States and foreign countries. Such a

tax burdens interstate and foreign commerce contrary to Art. I, § 8, cl. 3.

Justices concurring: Butler, McReynolds, Hughes, C.J., Brandeis, Stone, Roberts, Reed.
Justice dissenting: Black.

430. *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939).

Florida statute imposing an inspection fee of 15 cents per cwt. (60 times the cost of the inspection) on cement imported from abroad is invalid under the commerce clause (Art. I, § 8, cl. 3).

431. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

A New Jersey statute which stipulated that "any person not engaged in a lawful occupation, known to be a member of a gang of two or more persons, who had been convicted at least three times of being a disorderly person, or who has been convicted of any crime in New Jersey or any other State, is declared to be a gangster" and punishable upon conviction, is repugnant to the due process clause of the Fourteenth Amendment because of vagueness and uncertainty.

432. *Lane v. Wilson*, 307 U.S. 268 (1939).

An Oklahoma statute which provided that all persons, other than those who voted in 1914, qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, should be perpetually disenfranchised was found to be repugnant to the Fifteenth Amendment.

Justices concurring: Hughes, C.J., Roberts, Black, Reed, Frankfurter.
Justices dissenting: McReynolds, Butler.

433. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

An Alabama statute which forbids the publicizing of facts concerning a labor dispute, whether by printed sign, pamphlet, by word of mouth, or otherwise in the vicinity of the business involved, and without regard to the number of persons engaged in such activity, the peaceful character of their conduct, the nature of the dispute, or the accuracy or restraint of the language used in imparting information, is violative of freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy.
Justice dissenting: McReynolds.

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

A Connecticut statute which forbids any person to solicit money or valuables for any alleged religious cause, unless a license has first been procured from an official who is required to determine whether such cause is a religious one and who may deny issuance if he deter-

mines that the cause is not, imposes a previous restraint of the free exercise of religion and effects a deprivation of liberty without due process of law in violation of the Fourteenth Amendment.

435. *McCarroll v. Dixie Lines*, 309 U.S. 176 (1940).

Gasoline carried by interstate motor busses through Arkansas for use as fuel in interstate transportation beyond the Arkansas line cannot be subject to an Arkansas tax imposed for maintenance of state highways and collected on every gallon of gasoline above 20 brought into the State in any motor vehicle for use in operating the same. The statute levying this tax imposes an unconstitutional burden on interstate commerce.

Justices concurring: McReynolds, Stone, Hughes, C.J., Roberts, Reed (separately).

Justices dissenting: Black, Frankfurter, Douglas.

436. *Best v. Maxwell*, 311 U.S. 454 (1940).

A North Carolina statute which levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the State, who displays samples in any hotel room or house rented for the purpose of securing retail orders, cannot be applied to a nonresident merchant who took orders in the State and shipped interstate directly to customers. In view of the imposition of a one dollar per year license tax collected from regular retail merchants, the enforcement of the statute as to nonresidents effects an unconstitutional discrimination in favor of intrastate commerce contrary to Art. I, § 8, cl. 3.

437. *Wood v. Lovett*, 313 U.S. 362 (1941).

When Arkansas, with the help of a statute curing irregularities in a tax proceeding, sold land under a tax title which was valid, subsequent repeal of such curative statute was unconstitutional by reason of effecting an impairment of the obligation of contract (Art. I, § 10, cl. 1).

Justices concurring: Hughes, C.J., Stone, Roberts, Reed, Frankfurter.

Justices dissenting: Black, Douglas, Murphy.

438. *Edwards v. California*, 314 U.S. 160 (1941).

A California statute making it a misdemeanor for any one knowingly to bring, or assist in bringing, into the State a nonresident, indigent person is invalid by reason of imposing an unconstitutional burden on interstate commerce.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Byrnes, Douglas, Black, Murphy, Jackson would have rested the invalidity on § 1 of the Fourteenth Amendment..

439. *Taylor v. Georgia*, 315 U.S. 25 (1942).

A Georgia statute making it a crime for any person to contract with another to perform services of any kind, and thereupon obtain in advance money or other thing of value, with intent not to perform such service, and providing further that failure to perform the service or to return the money, without good and sufficient cause, shall amount to presumptive evidence of intent, at the time of making the contract, not to perform such service, is violative of the Thirteenth Amendment.

440. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

As applied to one convicted once of stealing chickens, and twice of robbery, an Oklahoma statute providing for the sterilization of habitual criminals, other than those convicted of embezzlement, or violation of prohibition and revenue laws, violates the equal protection clause of the Fourteenth Amendment.

Justices concurring specially: Stone, C.J., Jackson.

441. *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943).

Calif. Agric. Code provided that the selling and delivery of milk "at less than the minimum wholesale, retail prices effective in a marketing area" was an unfair practice warranting revocation of license or prosecution. Sales and deliveries of milk to the War Department on a federal enclave within a State over which the United States has acquired exclusive jurisdiction are not subject to regulation under a state milk stabilization law.

Justices concurring: Stone, C.J., Roberts, Black, Reed, Douglas, Jackson.
Justices dissenting: Frankfurter, Murphy.

442. *Mayo v. United States*, 319 U.S. 441 (1943).

The Florida Commercial Fertilizer Law, a comprehensive regulation of the sale or distribution of commercial fertilizer that required a label or stamp on each bag evidencing the payment of an inspection fee, could not constitutionally be applied to fertilizer that the United States owned and was distributing within the State pursuant to a provision of the Soil Conservation and Domestic Allotment Act. Federal instrumentalities are immune from state taxation and regulation unless Congress provides othewise, and Congress had not done so.

443. *Taylor v. Mississippi*, 319 U.S. 583 (1943).

General Laws of Mississippi, 1943, ch. 178, provided, in part, that the teaching and dissemination of printed matter designed to encourage disloyalty to the national and state governments, and the distribution of printed matter reasonably tending "to create an attitude of stubborn refusal to salute, honor, or respect the flag or Government of the United States, or of the State of Mississippi" was a felony. The

Fourteenth Amendment of the Constitution prohibits the imposition of punishment for: (1) urging and advising on religious grounds that citizens refrain from saluting the flag; and (2) the communication of beliefs and opinion concerning domestic measures and trends in national and world affairs, when this is without sinister purpose and not in advocacy of, or incitement to, subversive action against the Nation or State and does not involve any clear and present danger to our institutions or our Government. Conviction under the statute for disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor or respect the national and state flags and governments denies the liberty guaranteed by the Fourteenth Amendment.

444. *Pollock v. Williams*, 322 U.S. 4 (1944).

Florida Statute of 1941, sec. 817.09 and sec. 817.10, made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained prima facie evidence of intent to defraud. The statute is violative of the Thirteenth Amendment and the Federal Antipeonage Act for it cannot be said that a plea of guilty is uninfluenced by the statute's threat to convict by its prima facie evidence section.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge.
Justices dissenting: Stone, C.J., Reed.

445. *United States v. Allegheny County*, 322 U.S. 174 (1944).

Pennsylvania law provided in part that "The following subjects and property shall be valued and assessed, and subject to taxation,"and that taxes are declared "to be a first lien on said property." The effect of an *ad valorem* property tax is to increase the valuation of the land and buildings of a manufacturer by the value of machinery leased to him by the United States and is therefore a tax on property owned by the United States and is violative of the Constitution.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge.
Justices dissenting: Roberts, Frankfurter.

446. *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944).

The commerce clause prohibits the imposition of an Arkansas sales tax on sales to residents of the State which are consummated by acceptance of orders in, and the shipments of goods from, another State, in which title passes upon delivery to the carrier.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Jackson.
Justices dissenting: Black, Douglas, Murphy, Rutledge.

447. *Thomas v. Collins*, 323 U.S. 516 (1945).

A Texas statute required union organizers, before soliciting members, to obtain an organizer's card from the Secretary of State. As applied in this case, the statute is violative of the First and Fourteenth Amendments in that it imposes a previous restraint upon the rights of free speech and free assembly. The First Amendment's safeguards are not inapplicable to business or economic activity and restrictions of these activities can be justified only by clear and present danger to the public welfare.

Justices concurring: Black, Douglas, Murphy, Jackson, Rutledge.
Justices dissenting: Stone, C.J., Roberts, Reed, Frankfurter.

448. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945).

An Ohio *ad valorem* tax on Philippine importations was violative of the constitutional prohibition of state taxation of imports for the reason that the place from which the imported articles are brought is not a part of the United States in the constitutional sense.

Justices concurring: Stone, C.J., Roberts, Reed (dissenting in part), Frankfurter, Douglas (concurring in part), Murphy (concurring in part), Jackson, Rutledge (concurring in part).
Justice dissenting: Black.

449. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

The Arizona Train Limit Law makes it unlawful to operate a train of more than fourteen passenger or seventy freight cars. As applied to interstate trains, this law contravenes the commerce clause of the Constitution. The state regulation passes beyond what is plainly essential for safety, since it does not appear that it will lessen, rather than increase, the danger of accident.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Murphy, Jackson, Rutledge.
Justices dissenting: Black, Douglas.

450. *Marsh v. Alabama*, 326 U.S. 501 (1946).

Alabama law makes it a crime to enter or remain on the premises of another after having been warned not to do so. A State, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town's management, where the town and its shopping district are freely accessible to and freely used by the public in general.

Justices concurring: Black, Frankfurter, Douglas, Murphy, Rutledge.
Justices dissenting: Stone, C.J., Reed, Burton.

451. *Tucker v. Texas*, 326 U.S. 517 (1946).

Texas Penal Code makes it an offense for any "peddler or hawker of goods or merchandise" willfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof. A State, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment upon a person engaged in religious activities and distributing religious literature in a village owned by the United States under a congressional program designed to provide housing for workers engaged in national defense activities, where the village is freely accessible and open to the public.

Justices concurring: Black, Frankfurter, Douglas, Murphy, Rutledge.
Justices dissenting: Stone, C.J., Reed, Burton.

452. *Republic Pictures Corp. v. Kappler*, 327 U.S. 757 (1946).

Iowa statute, insofar as it required actions on claims arising under a federal statute not containing any period of limitations, to be commenced within six months, effected a denial of equal protection of law when enforced as to one seeking to recover under the Federal Fair Labor Standards Act; a State may not discriminate against rights accruing under federal laws by imposing as to the former a special period of limitations not applicable to other claims.

453. *Morgan v. Virginia*, 328 U.S. 373 (1946).

Virginia Code required motor carriers, both interstate and intrastate, to separate without discrimination white and colored passengers in their motor buses so that contiguous seats would not be occupied by persons of different races at the same time. Even though Congress has enacted no legislation on the subject, the state provisions are invalid as applied to passengers in vehicles moving interstate because they burden interstate commerce.

Justices concurring: Black (separately), Reed, Frankfurter (separately), Douglas, Murphy, Rutledge.
Justice dissenting: Burton.

454. *Richfield Oil Corp. v. State Board*, 329 U.S. 69 (1946).

The California Retail Sales Tax, measured by gross receipts, cannot constitutionally be collected on exports in the form of oil delivered from appellant's dockside tanks to a New Zealand vessel in a California port for transportation to Auckland pursuant to a contract of sale with the New Zealand Government.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Jackson, Rutledge, Burton.
Justice dissenting: Black.

455. *Order of Travelers v. Wolfe*, 331 U.S. 586 (1947).

A South Dakota Law setting a six-year statute of limitations for commencing actions on contract and declaring void every stipulation in a contract which reduces the time during which a party may bring suit to enforce his rights cannot be applied to an action brought in South Dakota for benefits arising under the constitution of a fraternal benefit society incorporated in Ohio and licensed to do business in South Dakota. The claimant is bound by the limitation prescribed in the society's constitution barring actions on claims six months after disallowance by the society, and South Dakota is required under the Federal Constitution to give full faith and credit to the public acts of Ohio.

Justices concurring: Vinson, C.J., Frankfurter, Reed, Jackson, Burton.
Justices dissenting: Black, Douglas, Murphy, Rutledge.

456. *United States v. California*, 332 U.S. 19 (1947).

California statutes granting permits to California residents to prospect for oil and gas offshore, both within and outside a three-mile marginal belt, are void. California is not the owner of the three-mile marginal belt along its coast; the Federal Government rather than the State has paramount rights in and power over that belt, and full dominion over the resources of the soil under that water area. The United States is therefore entitled to a decree enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

Justices concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge, Burton.
Justices dissenting: Reed, Frankfurter.

457. *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

Oklahoma constitutional and statutory provisions barring Negroes from the University of Oklahoma Law School violate the equal protection clause of the Fourteenth Amendment because the University Law School is the only institution for legal education maintained by the State.

458. *Oyama v. California, 332 U.S. 633 (1948)*.

The California Alien Land Law, forbidding aliens ineligible for American citizenship to acquire, own, occupy, lease or transfer agricultural land, and providing for escheat of any property acquired in violation of the statutes, cannot constitutionally by applied to effect an escheat of agricultural lands acquired in the name of a minor American citizen with funds contributed by his father, a Japanese alien ineligible for naturalization. The statute deprived the son of the equal protection of the laws and of his privileges as an American citizen, in violation of the Fourteenth Amendment.

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge.

Justices dissenting: Reed, Jackson, Burton.

459. *Winters v. New York*, 333 U.S. 507 (1948).

A New York law creating a misdemeanor offense for publishing, selling, or otherwise distributing "any book, pamphlet, magazine, newspaper or other printed matter devoted to the publication, and principally made up of criminal laws, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime. . . ," as construed by the state Court of Appeals to prohibit distribution of a magazine principally made up of news or stories of criminal deeds of bloodshed or lust so massed as to become a vehicle for inciting violent and depraved crimes against the person, is so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

Justices concurring: Vinson, Black, Reed, Douglas, Murphy, Rutledge.

Justices dissenting: Frankfurter, Jackson, Burton.

460. *Toomer v. Witsell*, 334 U.S. 385 (1948).

A South Carolina law requiring a license of shrimp boat owners, the fee for which was $25 per boat for residents and $2,500 per boat for nonresidents, plainly discriminated against nonresidents and violated the privileges and immunities clause of Art. IV, § 2. The same law unconstitutionally burdened interstate commerce by requiring all boats licensed to trawl for shrimp in South Carolina waters to dock in the State and to unload their catch, pack, and properly stamp the catch before shipping or transporting it to another State.

Justices concurring: Vinson, C.J., Reed, Douglas, Murphy, Rutledge, Burton, Black (dissenting in part), Frankfurter (dissenting in part), Jackson (dissenting in part).

461. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

California's requirement that every person bringing fish ashore in the State for sale obtain a commercial fishing license, but denying such a license to any person ineligible for citizenship, precluded a resident Japanese alien from earning his living as a commercial fisherman in the ocean waters off the State and was invalid both under the equal protection clause of the Fourteenth Amendment and under federal statutory law (42 U.S.C. § 1981).

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge, Burton.

Justices dissenting: Reed, Jackson.

462. *Greyhound Lines v. Mealey*, 334 U.S. 653 (1948).

New York constitutionally may tax gross receipts of a common carrier derived from transportation apportioned as to mileage within the State, but collection of the tax on gross receipts from that portion of the mileage outside the State unduly burdens interstate commerce in violation of the commerce clause of the Constitution.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Rutledge, Burton.
Justices dissenting: Black, Douglas, Murphy.

463. *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949).

Denial of a license under the New York Agricultural and Market Law violated the commerce clause of the Constitution and the Federal Agricultural Marketing Act where the denial was based on grounds that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.

Justices concurring: Vinson, C.J., Reed, Douglas, Jackson, Burton.
Justices dissenting: Black, Frankfurter, Murphy, Rutledge.

464. *Schnell v. Davis*, 336 U.S. 933 (1949).

The Boswell Amendment to the Alabama Constitution, which vested unlimited authority in electoral officials to determine whether prospective voters satisfied the literacy requirement, violated the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment.

465. *Union Nat'l Bank v. Lamb*, 337 U.S. 38 (1949).

Missouri law, providing that a judgment could not be revived after ten years from its rendition, could not be invoked, consistently with the full faith and credit clause, to prevent enforcement in a Missouri court of a Colorado judgment obtained in 1927 and revived in Colorado in 1946.

Justices concurring: Vinson, C.J., Reed, Douglas, Murphy, Jackson, Burton.
Justices dissenting: Black, Frankfurter, Rutledge.

466. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

The Ohio *ad valorem* tax levied on accounts receivable of foreign corporations derived from sales of goods manufactured within the State, but exempting receivables owned by residents and domestic corporations, denied foreign corporations equal protection of the laws in violation of the Fourteenth Amendment. The tax was not saved from invalidity by the "reciprocity" provision of the statute imposing it, since this plan is not one which, by credit or otherwise, protects the nonresident or foreign corporation against discrimination.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Murphy, Jackson, Rutledge, Burton.

Justices dissenting: Black, Douglas.

467. *Treichler v. Wisconsin*, 338 U.S. 251 (1949).

Insofar as the Wisconsin emergency tax on inheritances is measured by tangible property located outside the State, the tax violates the due process clause of the Fourteenth Amendment.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Burton, Clark, Minton.
Justice dissenting: Black.

468. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Notice by publication, as authorized by the New York Banking Law for purposes of enabling banks managing common trust funds to obtain a judicial settlement of accounts binding on all having an interest in such funds, is not sufficient under the due process clause of the Fourteenth Amendment for determining property rights of persons whose whereabouts are known.

Justices concurring: Vinson, C.J., Black, Reed, Jackson, Clark, Minton, Frankfurter.
Justice dissenting: Burton.

469. *Sweatt v. Painter*, 339 U.S. 629 (1950).

Texas constitutional and statutory provisions restricting admission to the University of Texas Law School to white students violate the equal protection clause of the Fourteenth Amendment by reason of the fact that Negro students denied admission are afforded educational facilities inferior to those available at the University.

470. *United States v. Louisiana*, 339 U.S. 699 (1950).

The Louisiana Constitution provides that the Louisiana boundary includes all islands within three leagues of the coast; and Louisiana statutes provide that the State's southern boundary is 27 marine miles from the shore line. Since the three-mile belt off the shore is in the domain of the Nation rather than that of the States, it follows that the area claimed by Louisiana extending 24 miles seaward beyond the three-mile belt is also in the domain of the Nation rather than Louisiana. The marginal sea is a national, not a state, concern and national rights are paramount in that area. The United States, therefore, is entitled to a decree upholding such paramount rights and enjoining Louisiana and all persons claiming under it from trespassing upon the area in violation of the rights of the United States, and requiring Louisiana to account for the money derived by it from the area after June 23, 1947.

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Burton.
Justices dissenting: Reed, Minton.

471. *United States v. Texas*, 339 U.S. 707 (1950).

Notwithstanding provisions in Texas laws whereby that State extended its boundary to a line in the Gulf of Mexico 24 marine miles beyond the three-mile limit and asserted ownership of the bed within that area and to the outer edge of the continental shelf, the United States is entitled to a decree sustaining its paramount rights to dominion of natural resources in said area, beyond the low-water mark on the coast of Texas and outside inland waters. Any claim which Texas may have asserted over the marginal belt when she existed as an independent Republic was relinquished upon her admission into the Union on an equal footing with the existing States.

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Burton.
Justices dissenting: Reed, Minton.

472. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

Oklahoma law required segregation in educational facilities at institutions of higher learning. As applied to assign an African American student to a special row in the classroom, to a special table in the library, and to a special table in the cafeteria, the law impaired and inhibited the student's ability to study, engage in discussion, exchange views with other students, and in general to learn his profession. The conditions under which the student was required to receive his education deprived him of his right to equal protection guaranteed by the Fourteenth Amendment.

473. *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951).

The Illinois occupation tax, levied on gross receipts from sales of tangible personal property, cannot be collected on orders sent directly by the customer to the head officer of a corporation in Massachusetts and shipped directly to the customers from that office. These sales are interstate in nature and are immune from state taxation by virtue of the commerce clause.

Justices concurring: Vinson, C.J., Black (dissenting in part), Reed (dissenting in part), Frankfurter, Douglas (dissenting in part), Jackson, Burton, Clark (dissenting in part), Minton.

474. *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951).

A Connecticut franchise tax for the privilege of doing business in the State, computed at a nondiscriminatory rate on that part of a foreign corporation's net income which is reasonably attributed to its business activities within the State and not levied as compensation for the use of highways, or collected in lieu of an *ad valorem* property tax, or imposed as a fee for inspection, or as a tax on sales or use, cannot constitutionally be applied to a foreign motor carrier engaged exclusively in interstate trucking. A State cannot exact a franchise tax for the privilege of engaging in interstate commerce.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Minton.
Justices dissenting: Black, Douglas, Clark.

475. *Hughes v. Fetter*, 341 U.S. 609 (1951).

The Wisconsin Wrongful Death Act, authorizing recovery ". . . only for a death caused in this State," and thereby blocking recovery under statutes of other states, must give way to the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each State of the obligations or rights created or recognized by the statutes of sister states.

Justices concurring: Vinson, C.J., Black, Douglas, Burton, Clark.
Justices dissenting: Reed, Frankfurter, Jackson, Minton.

476. *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952).

When boats and barges of an Ohio corporation used in transporting oil along the Mississippi River do not pick up or discharge oil in Ohio, and, apart from stopping therein occasionally for fuel and repairs, are almost continuously outside Ohio and are subject, on an apportionment basis, to taxation by other States, an Ohio tax on their full value violates the due process clause of the Fourteenth Amendment.

Justices concurring: Vinson, C.J., Reed, Clark, Frankfurter, Douglas, Jackson, Burton.
Justices dissenting: Black, Minton.

477. *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

A Mississippi privilege tax, levied on the privilege of soliciting business for a laundry not licensed in the State and collected at the rate of $50 on each vehicle used in the business cannot validly be imposed on a foreign corporation operating an establishment in Tennessee and doing no business in Mississippi other than sending trucks thereto to solicit business, and pick up, deliver, and collect for laundry. A tax so administered burdens interstate commerce.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton.
Justice dissenting: Black.

478. *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952).

Illinois law provided that "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and services of process in such suit may be had upon the defendant in such place." In a suit brought in a federal district court in Illinois on grounds of diversity of citizenship to recover under the Utah death statute for a death oc-

curring in Utah, the Illinois statute was held to violate the full faith and credit clause.

Justices concurring: Vinson, C.J., Black, Douglas, Jackson, Burton, Clark, Minton.
Justices dissenting: Reed, Frankfurter.

479. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

Insofar as the New York Education Law forbids the commercial showing of any motion picture without a license and authorizes denial of a license on a censor's conclusion that a film is "sacrilegious," it is void as a prior restraint on freedom of speech and of the press under the First Amendment, made applicable to the States by the due process clause of the Fourteenth Amendment. The statute authorized designated officers to refuse to license the showing of any film which is obscene, indecent, immoral, inhuman, sacrilegious, or the exhibition of which would tend to corrupt morals or incite to crime.

480. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

As construed and applied, Art. 5-C of the New York Religious Corporations Laws, which authorized transfer of administrative control of the Russian Orthodox churches of North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches, is invalid. Legislation which determines, in a hierarchical church, ecclesiastical administration or the appointment of the clergy, or transfers control of churches from one group to another, interferes with the free exercise of religion contrary to the Constitution.

Justices concurring: Black, Douglas, Frankfurter, Vinson, C.J., Reed, Burton, Clark, Minton.
Justice dissenting: Jackson.

481. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

Oklahoma law requires each state officer and employee, as a condition of his employment, to take a "loyalty oath," that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive." As construed, this statute excludes persons from state employment on the basis of membership in an organization, regardless of their knowledge concerning the activities and purposes of the organization, and therefore violates the due process clause of the Fourteenth Amendment.

482. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954).

The Arkansas Gross Receipts Tax, levied on the gross receipts of sales within the State, cannot be applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a

cost-plus-fixed-fee contract. Applicable federal laws provide that in procuring articles required for accomplishment of the agreement, the contractor shall act as purchasing agent for the Government and that the Government not only acquires title but shall be directly liable to the vendor for the purchase price. The tax is void as a levy on the Federal Government.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Clark, Minton.
Justices dissenting: Warren, C.J., Black, Douglas.

483. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

A Texas tax on the occupation of "gathering gas" measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, is violative of the commerce clause. As here applied, the State delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun, so that the tax is not levied on the capture or production of the gas, but on its introduction into interstate commerce after production, gathering and processing.

484. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954).

Where residents of nearby Maryland make purchase from appellant in Delaware, some deliveries being made in Maryland by common carrier and some by appellant's truck, seizure of the appellant's truck in Maryland and holding it liable for the Maryland use tax on all goods sold in Delaware to Maryland customers is a denial of due process. The Delaware corporation has not subjected itself to the taxing power of Maryland and has not afforded Maryland a jurisdiction or power to impose upon it a liability for collections of the Maryland use tax.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Minton.
Justices dissenting: Warren, C.J., Black, Douglas, Clark.

485. *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954).

In addition to "taxes on property of express companies," Virginia provided that "for the privilege of doing business in the State," express companies shall pay an "annual license tax" upon gross receipts earned in the State "on business passing through, into, or out of, this State." The gross-receipts tax is in fact and effect a privilege tax, and its application to a foreign corporation doing an exclusively interstate business violated the commerce clause of the Constitution.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Minton.
Justices dissenting: Warren, C.J., Black, Douglas, Clark.

486. *Brown v. Board of Education*, 347 U.S. 483 (1954).

Kansas statutory provisions that authorized segregation of white and Negro children in "separate but equal" public schools denies to such Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment.

487. *Accord: Briggs v. Elliott*, 347 U.S. 483 (1954).

South Carolina constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.

488. *Accord: Davis v. County School Bd.*, 347 U.S. 483 (1954).

Virginia constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.

489. *Accord: Gebhart v. Belton*, 347 U.S. 483 (1954).

Delaware constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.

490. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954).

An Illinois law providing for a 90-day suspension of a motor carrier upon a finding of 10 or more violations of regulations calling for a balanced distribution of freight loads in relation to the truck's axles cannot be applied to an interstate motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act. A State may not suspend the carrier's rights to use the State's highways in its interstate operations. The Illinois law, as applied to such carrier, also violates the commerce clause.

491. *Society for Savings v. Bowers*, 349 U.S. 143 (1955).

Levy of Ohio's property tax against a mutual saving bank and a federal savings and loan association in their own names, measured by the amount of each bank's capital, surplus, or reserve and undivided profits, without deduction of the value of federal securities owned by each or provision for reimbursement of each bank by its depositors for the tax, is void as a tax upon obligations of the Federal Government (Art. VI, cl. 2).

492. *Griffin v. Illinois*, 351 U.S. 12 (1956).

Illinois statutes provide that a writ of error may be prosecuted on a "mandatory record" kept by the court clerk and consisting of the indictment, arraignment, plea, verdict, and sentence. The "mandatory record" can be obtained free of charge by an indigent defendant. In such instances review is limited to errors on the face of the mandatory record, and there is no review of trial errors such as an erro-

neous ruling on admission of evidence. No provision was made whereby a convicted person in a non-capital case can obtain a bill of exceptions or report of the trial proceedings, which by statute is furnished free only to indigent defendants sentenced to death. Griffin, an indigent defendant convicted of robbery, accordingly was refused a free certified copy of the entire record, including a stenographic transcript of the proceedings, and therefore was unable to perfect his appeal founded upon nonconstitutional errors of the trial court. Petitioner was held to have been denied due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Clark.
Justices dissenting: Reed, Burton, Minton, Harlan.

493. *Covey v. Town of Somers*, 351 U.S. 141 (1956).

New York statutory procedure which sanctioned notice by mail together with the posting of a copy of said notice at a local post office and the publication thereof in two local newspapers of proceedings to foreclose a lien for delinquent real estate taxes, was constitutionally inadequate and effected a taking of property without due process when employed in the foreclosure of the property of a mentally incompetent woman resident in the taxing jurisdiction and known by the officials thereof to be financially responsible but incapable of handling her affairs.

Justice concurring: Frankfurter (separately).

494. *Walker v. Hutchinson City*, 352 U.S. 112 (1956).

Kansas statutes permitted condemnation proceedings to be instituted by notice either in writing or by publication in an official city paper. Where the commissioners, appointed to determine compensation in condemnation of appellant's land, gave no notice of a hearing except by publication in the official city newspaper, though appellant was a resident of Kansas and his name was known to the city and on its official records, and there was no reason why direct notice could not be given, the newspaper publication alone did not measure up to the quality of notice the due process clause of the Fourteenth Amendment requires as a prerequisite to this type of proceeding.

Justices concurring: Warren, C.J., Black, Reed, Douglas, Clark, Harlan.
Justices dissenting: Frankfurter, Burton.

495. *Butler v. Michigan*, 352 U.S. 380 (1957).

The Michigan Penal Code proscribed the sale to the general reading public of any book containing obscene language "tending to the corruption of the morals of youth." When invoked to convict a proprietor who sold a book having such a potential effect on youth to an adult police officer, the statute violated the due process clause of the

Fourteenth Amendment. Thus enforced, the statute would permit the adult population of Michigan to read only what is fit for children.

496. *Gayle v. Browder*, 352 U.S. 903 (1956).

Alabama statutes and Montgomery City ordinances which required segregation of "white" and "colored" races on motor buses in the City were violative of the equal protection clause of the Fourteenth Amendment.

497. *Morey v. Doud*, 354 U.S. 457 (1957).

A provision of the Illinois Community Currency Exchange Act exempting money orders of a named company, the American Express Company, from the requirement that any firm selling or issuing money orders in the State must secure a license and submit to state regulation, denies equal protection of the laws to those entities that are not exempted. Although the Equal Protection Clause does not require that every state regulation apply to all in the same business, a statutory discrimination must be based on differences that are reasonably related to the purposes of the statute.

Justices concurring: Warren, C.J., Douglas, Burton, Clark, Brennan, Whittaker.
Justices dissenting: Black, Frankfurter, Harlan.

498. *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958).

Denial of a free trial transcript to an indigent criminal defendant pursuant to a Washington statute that authorized a trial judge to furnish a transcript to an indigent defendant if in the judge's opinion ″justice will thereby be promoted″ denied equal protection and due process because the indigent defendant did not have the same opportunity that was available to those who could afford the transcripts to have his case reviewed by an appellate court.

Justices concurring: Warren, C.J., Douglas, Clark, Black, Burton, Brennan.
Justices dissenting: Harlan, Whittaker.

499. *Speiser v. Randall*, 357 U.S. 513 (1958).

The California statutory provisions exacting as a prerequisite for property tax exemption that applicants therefor swear that they do not advocate the forcible overthrow of federal or state governments or the support of a foreign government against the United States during hostilities are unconstitutional insofar as they are enforced by procedures placing upon the taxpayer the burden of proving that he is not guilty of advocating that which is forbidden. Such procedures deprive the taxpayer of freedom of speech without the procedural safeguards required by the due process clause of the Fourteenth Amendment.

Justices concurring: Black, Frankfurter, Douglas, Burton, Harlan, Brennan, Whittaker.

Justice dissenting: Clark.

Accord: First Unitarian Church v. City of Los Angeles, 357 U.S. 545 (1958).Enforcement of the same oath requirement through statutory procedures which place upon taxpayers the burden of proving nonadvocacy violates the due process clause of the Fourteenth Amendment.Same division of Justices as in Speiser v. Randall.

500. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

Illinois statute which requires trucks and trailers operating on state highways to be equipped with specified type of rear fender mudguard, which is different from those permitted in at least 45 other States, and which would seriously interfere with "interline operations" of motor carriers cannot validly be applied to interstate motor carriers certified by the Interstate Commerce Commission, for the reason that interstate commerce is unreasonably burdened thereby.

Justices concurring: Harlan (separately), Stewart (separately).

501. *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959).

Louisiana statute prohibiting athletic contests between Negroes and white persons was violative of the equal protection clause of the Fourteenth Amendment.

502. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

As construed and applied, the New York Education Law, which requires denial of a license to show a motion picture "presenting adultery as being right and desirable for certain people under certain circumstances," is unconstitutional. Refusal of a license to show a motion picture found to portray adultery alluringly as proper behavior violates the freedom to advocate ideas guaranteed by the First Amendment and protected by the Fourteenth Amendment from infringement by the States.

Justices concurring: Black (separately), Frankfurter (separately), Douglas (separately), Clark (separately), Harlan (separately).

503. *Faubus v. Aaron*, 361 U.S. 197 (1959).

Arkansas statutes which empowered the Governor to close the public schools and to hold an election as to whether or not the schools were to be integrated as well as to withhold public moneys, hitherto allocated to such schools, on the occasion of their closing and to make such funds available to other public schools or nonprofit private schools to which pupils from a closed school might transfer were violative of the due process and equal protection clauses of the Fourteenth Amendment.

504. *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376 (1960).

Texas statutes discriminated against the United States in violation of Article VI, clause 2, by levying a tax on federally owned land

and improvements used and occupied by a private concern that was more burdensome than the tax imposed on similarly situated lessees of property owned by Texas and its subdivisions.

Justices concurring: Brennan, Clark, Black, Douglas, Stewart, Warren, C.J., Whittaker, Harlan, Frankfurter (separately).

505. *Rohr Aircraft Corp. v. San Diego County*, 362 U.S. 628 (1960).

Property taxes assessed under California law could not be levied on real estate owned by the Reconstruction Finance Corporation after the latter had declared the property to be surplus and surrendered it to the War Assets Administration for disposal; this exemption arose even before execution of a quitclaim deed transferring title from the RFC to the United States and even though a property had been leased to a private lessee in the name of both the RFC and the United States.

Justices concurring: Clark, Warren, C.J., Harlan, Stewart, Frankfurter, Brennan, Whittaker.
Justices dissenting: Douglas, Black.

506. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Alabama statute which altered the boundaries of the City of Tuskegee in such manner as to eliminate all but four or five of its 400 African American voters without eliminating any white voter was violative of the Fifteenth Amendment.

Justice concurring: Whittaker (separately).

507. *Shelton v. Tucker*, 364 U.S. 479 (1960).

Arkansas statute which required every school teacher, as a condition of employment in state-supported schools and colleges, to file an affidavit listing every organization to which he had belonged or contributed within the preceding five years deprived teachers of associational freedom guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Stewart, Warren, C.J., Brennan, Douglas, Black.
Justices dissenting: Frankfurter, Clark, Harlan, Whittaker.

508. *Bush v. Orleans Parish School Bd.*, 364 U.S. 500 (1961).

The Louisiana interposition statute, which averred that the decision in the school segregation case (*Brown v. Board of Education*, 347 U.S. 483 (1954)) constituted usurpation of state power and which interposed the sovereignty of the State against enforcement of that decision, did not assert "a constitutional doctrine," and if taken seriously, is legal defiance of constitutional authority.

509. *Orleans Parish School Bd. v. Bush*, 365 U.S. 569 (1961).

Louisiana statutes which (1) provided for segregation of races in public schools and the withholding of funds from integrated schools;

(2) conferred on the Governor the right to close all schools upon the integration of any one of them; and (3) directed the Governor to supersede a school board under a court order to desegregate and take over management of public schools, were unconstitutional and denial of equal protection of the laws.

510. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

When, by reason of a Georgia law which granted defendant in a criminal trial the right to make an unsworn statement to the jury without subjecting himself to cross-examination, defendant's counsel was denied the right to ask him any question when he took the stand to make his unsworn statement, such application of the Georgia law deprived the defendant of the effective assistance of counsel without due process of law.

Justices concurring: Frankfurter (separately), Clark (separately).

511. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

Louisiana statute which prohibited any "non-trading" association from doing business in Louisiana if it is affiliated with any "foreign or out-of-state non-trading" association, any of the officers or directors of which are members of subversive organizations as cited by a House committee or by the United States Attorney General, and which required every non-trading association with an out-of-state affiliate to file annually an affidavit that none of the officers of the affiliate is a member of such organizations, was void for vagueness and violative of due process.

Justices concurring: Harlan (separately), Stewart (separately), Frankfurter (separately), Clark (separately).

512. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Maryland constitutional provision under which an appointed notary public who would not declare his belief in God was denied his commission imposed an invalid test for public office violative of freedom of belief and religion as guaranteed by the First Amendment, applicable through the due process clause of the Fourteenth Amendment.

Justices concurring: Frankfurter (separately), Harlan (separately).

513. *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

Missouri statutory procedure which enabled a city police officer, in an ex parte proceeding, to obtain from a trial judge search warrants authorizing seizure of all "obscene" material possessed by wholesale and retail distributors without granting the latter a hearing or even seeing any of such materials in question and without specifying any particular publications, sanctioned search and seizure tactics violative of due process.

Justices concurring: Black (separately), Douglas (separately).

514. *Tugwell v. Bush*, 367 U.S. 907 (1961).

Louisiana statute which punished the giving to or acceptance by any parent of anything of value as an inducement to sending his child to a school operated in violation of Louisiana law was void for vagueness and was designed to scuttle a desegregation program.

515. *Legislature of Louisiana v. United States*, 367 U.S. 908 (1961).

Louisiana statutes which purported to remove New Orleans school board and replace it with a new group appointed by the legislature, which deprived the board of its attorney and substituted the Louisiana Attorney General, and a resolution addressing out of office the school superintendent chosen by the board, were unconstitutional and violative of the equal protection clause of the Fourteenth Amendment.

516. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961).

Florida statute which required state and local public employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party," and which subjected them to discharge for refusal, was void for vagueness and violative of due process.

Justices concurring: Black (separately), Douglas (separately).

517. *St. Helena Parish School Bd. v. Hall*, 368 U.S. 515 (1962).

Louisiana statute which authorized the school board of a municipally operated school system to close the schools upon a vote of the electors and which provided that the board might then lease or sell any school building, but which subjected to extensive state control and financial aid the private schools which might acquire such buildings was violative of the equal protection of the laws in that it was intended to continue segregation in schools.

518. *Bailey v. Patterson*, 369 U.S. 31 (1962).

Mississippi statutes which required racial segregation at interstate and intrastate transportation facilities denied equal protection of the law.

519. *Turner v. City of Memphis*, 369 U.S. 350 (1962).

Tennessee statute, and administrative regulation issued under the authority thereof, insofar as they sanctioned racial segregation in a private restaurant operated on premises leased from a city at its municipal airport, denied equal protection of the law.

520. *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962).

Pennsylvania's capital stock tax, in the nature of a property tax, could not be collected on that portion of a railroad's cars (158 out of

3074) which represented the daily average of its cars located on a New Jersey railroad's lines during a taxable year; as to the latter portion of its cars the tax was violative of the commerce clause and the due process clause.

Justice concurring: Black (separately).

521. *Robinson v. California*, 370 U.S. 660 (1962).

California statute which, as construed, made the "status" of narcotics addiction a criminal offense, even though the accused had never used narcotics in California and had not been guilty of antisocial behavior in California, was void as inflicting cruel and unjust punishment proscribed by the due process clause of the Fourteenth Amendment.

Justices concurring: Stewart, Warren, C.J., Brennan, Douglas (separately), Harlan (separately), Black.
Justices dissenting: Clark, White.

522. *Lassiter v. United States*, 371 U.S. 10 (1962).

Louisiana laws which segregated passengers in terminal facilities of common carriers were unconstitutional by reason of conflict with federal law and the equal protection clause.

523. *NAACP v. Button*, 371 U.S. 415 (1963).

Virginia law which expanded malpractice by attorneys to include acceptance of employment or compensation from any person or organization not a party to a judicial proceeding and having no pecuniary right or liability in it and which made it an offense for such person or organization to solicit business for an attorney was violative of freedom of expression and association, as guaranteed by the due process clause of the Fourteenth Amendment when enforced against a corporation, including its attorneys and litigants, whose major purpose is the elimination of racial segregation through litigation which it solicits, institutes, and finances.

Justices concurring: Brennan, Warren, C.J., Goldberg, Douglas (separately), Black.
Justices dissenting: White (in part), Harlan, Clark, Stewart.

524. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Florida statutory provision which did not accord indigent defendants the protection of court appointed counsel in noncapital felony offenses deprived such defendants of due process of law.

Justices concurring: Douglas (separately), Clark (separately), Harlan (separately).

525. *Gray v. Sanders*, 372 U.S. 368 (1963).

Georgia county unit system for nominating candidates in primaries for state-wide offices, including United States Senators, as set

forth in statutory provisions, violated the principle of "one-person, one vote" as required by the equal protection clause of the Fourteenth Amendment.

Justices concurring: Douglas, Stewart (separately), Clark (separately), Warren, C.J., Brennan, White, Goldberg, Black.
Justice dissenting: Harlan.

526. *Lane v. Brown*, 372 U.S. 477 (1963).

Indiana Public Defender Act, insofar as it empowered the Public Defender to refuse to perfect an appeal for an indigent defendant whenever the former believed such an appeal would be unsuccessful and which, independently of such intervention by the Defender, afforded such defendant no alternative means of obtaining a transcript of a *coram nobis* hearing requisite to perfect an appeal from a trial court's denial of a writ of error coram nobis, effected a discriminatory denial of a privilege available as of right to a defendant with the requisite funds and was violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Harlan (separately), Clark (separately).

527. *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963).

Louisiana use tax, as herein enforced, effected an invalid discrimination against interstate commerce in that the isolated purchase of an item of used equipment in Louisiana was not subject to its sales tax whereas an Oklahoma contractor was subjected to the Louisiana use tax on an item of used equipment employed in servicing wells in Louisiana which had been acquired in Oklahoma; and further that the Louisiana sales or use tax was computed on the cost of components purchased in Louisiana or purchased out of state for assembly and use in Louisiana whereas here the contractor paid a use tax on equipment assembled in Oklahoma which reflected not only the purchase price of the components but also the cost of labor and shop overhead incurred in assembling the components into a usable item of equipment.

Justices concurring: Warren, C.J., Douglas, Goldberg, Stewart, White, Harlan, Brennan (separately).
Justices dissenting: Clark, Black.

528. *Willner v. Committee on Character*, 373 U.S. 96 (1963).

New York statutory procedure governing admission to practice law, insofar as it failed to make provision, in cases of denial of admission, for a hearing on the grounds for rejection to be accorded the applicant, either before the Committee on Character Fitness established by the Appellate Division of its Supreme Court, or before the Appellate Division itself, was defective and amounted to a denial of due process.

Justices concurring: Douglas, Black, White, Warren, C.J., Goldberg, Brennan, Stewart (separately).
Justices dissenting: Harlan, Clark.

529. *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

When a city ordinance required separation of the races in restaurants, South Carolina trespass statute, when enforced against African Americans who refused to leave a lunch counter in a retail store, amounted to a denial of equal protection of the laws.

Justice concurring: Harlan (separately).

530. *Accord: Gober v. City of Birmingham*, 373 U.S. 374 (1963), as to an Alabama law on trespass.

Justices concurring: Warren, C.J., Black, Douglas, Goldberg, White, Clark, Brennan, Stewart.
Justice dissenting: Harlan.

531. *Lombard v. Louisiana*, 373 U.S. 267 (1963).

When local community policy, as administered by municipal law enforcement officers, proscribed "sit-in demonstrations" protesting refusal of store proprietors to serve African Americans at lunch counters reserved for white patrons, the Louisiana Criminal Mischief Statute could not be invoked, without violation of the equal protection clause of the Fourteenth Amendment, to punish African Americans who engaged in such demonstrations.

Justices concurring: Warren, C.J., Douglas (separately), Black, Brennan, White, Stewart, Goldberg, Clark.
Justice dissenting: Harlan.

532. *Wright v. Georgia*, 373 U.S. 284 (1963).

Georgia unlawful assemblies act, which rendered persons open to conviction for a breach of the peace upon their refusal to disperse upon command of police officers, was void for vagueness and violative of due process in that it did not give adequate warning to Negroes that peaceable playing of basketball in a municipal park would expose them to prosecution for violation of said statute.

Justice concurring: Harlan (separately).

533. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

Pennsylvania law which required the reading, without comment, of verses from the Holy Bible at the opening of each public school day was violative of the prohibition against the enactment of any law respecting an establishment of religion as embraced within the due process clause of the Fourteenth Amendment.

Justices concurring: Clark, Douglas (separately), Brennan (separately), Goldberg (separately), Harlan (concurs with latter), Warren, C.J., White, Black.

Justice dissenting: Stewart.

534. *Sherbert v. Verner*, 374 U.S. 398 (1963).

South Carolina Unemployment Compensation Act, which withheld benefits and deemed ineligible for the receipt thereof a person who has failed without good cause to accept available work when offered to him, if construed as barring a Seventh-Day Adventist from relief because of religious scruples against working on Saturday, abridged the latter's right to the free exercise of religion contrary to the due process clause of the Fourteenth Amendment.

Justices concurring: Brennan, Clark, Warren, C.J., Goldberg, Black, Douglas, Stewart (separately).
Justices dissenting: Harlan, White.

535. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964).

Florida statute and regulations implementing it which required milk distributor to purchase its total supply of fluid milk from area producers at a fixed price and to take all milk which these producers offered was invalid under the commerce clause since they interfered with distributor's purchases of milk from out-of-state producers.

536. *Anderson v. Martin*, 375 U.S. 399 (1964).

Louisiana statute requiring that in all primary, general, or special elections, the nomination papers and ballots shall designate the race of the candidates violated the equal protection clause.

537. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Georgia statute establishing congressional districts of grossly unequal populations violates Article I, § 2, of the Constitution.

Justices concurring: Black, Douglas, Brennan, White, Goldberg, Warren, C.J..
Justices concurring in part and dissenting in part: Clark.
Justices dissenting: Harlan, Stewart.

538. *Accord: Martin v. Bush*, 376 U.S. 222 (1964).

Texas statute establishing congressional districts of grossly unequal populations is unconstitutional on authority of Wesberry v. Sanders, 376 U.S. 1 (1964). Same division of Justices as in Wesberry v. Sanders.

539. *City of New Orleans v. Barthe*, 376 U.S. 189 (1964).

District court decision holding unconstitutional Louisiana statute requiring segregation of races in public facilities is affirmed.

540. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

Illinois unfair competition law cannot be applied to bar or penalize the copying of a product which does not qualify for a federal patent inasmuch as this use of the state law conflicts with the exclusive

power of the Federal Government to grant patents only to true inventions and then only for a limited time.

541. *Baggett v. Bullitt*, 377 U.S. 360 (1964).

Washington statutes requiring state employees to swear that they are not subversive persons and requiring teachers to swear to promote by precept and example respect for flag and institutions of United States and Washington, reverence for law and order, and undivided allegiance to Federal Government, are void for vagueness.

Justices concurring: White, Black, Douglas, Brennan, Stewart, Goldberg, Warren, C.J..
Justices dissenting: Clark, Harlan.

542. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

New York law regulating sale of alcoholic beverages could not constitutionally be applied to dealer who sold bottled wines and liquors to departing international airline travelers at JFK airport in New York.

Justices concurring: Stewart, Douglas, Clark, White, Warren, C.J..
Justices dissenting: Black, Goldberg.

543. *Accord: Department of Alcoholic Beverage Control v. Ammex Warehouse Co.*, 378 U.S. 124 (1964). Lower court voiding of California law affirmed on authority of Hostetter. Same division of Justices as Hostetter.

544. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

Kentucky statute providing for a tax of ten cents per gallon on the importation of whiskey into the State, which was collected while the whiskey was in unbroken packages in importer's possession was unconstitutionally applied to the importer of Scotch whiskey from abroad under Art. I, § 10, cl. 2.

Justices concurring: Stewart, Douglas, Clark, White, Warren, C.J..
Justices dissenting: Black, Goldberg.

545. *Chamberlin v. Dade County Bd. of Public Instruction*, 377 U.S. 402 (1964).

Florida statute providing for prayer and devotional reading in public schools is unconstitutional.

546. *Reynolds v. Sims*, 377 U.S. 533 (1964).

Alabama constitutional and statutory provisions which do not apportion seats in both houses of legislature on a population basis violated the equal protection clause.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg, White.
Justices concurring specially: Clark, Stewart.

Justice dissenting: Harlan.

547. *Accord: WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

New York constitutional and statutory provisions which do not apportion seats in both houses of legislature on population basis is unconstitutional.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg, White.
Justice concurring specially: Clark.
Justices dissenting: Harlan, Stewart.

548. *Accord: Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964). Same division of Justices as in Lomenzo.

549. *Accord: Davis v. Mann*, 377 U.S. 678 (1964). Virginia. Same division of Justices as in Lomenzo.

550. *Accord: Roman v. Sincock*, 377 U.S. 695 (1964). Delaware. Same division of Justices as in Lomenzo, except Justice Stewart concurring specially.

551. *Accord: Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

Apportionment formula for state legislature written into state constitution invalid under equal protection clause even though approved by electorate in referendum.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg, White.
Justices dissenting: Clark, Harlan, Stewart.

552. *Accord: Meyers v. Thigpen*, 378 U.S. 554 (1964). Washington Legislature. Same division of Justices as in Lomenzo, except Justice Stewart favored limited remand.

553. *Accord: Williams v. Moss*, 378 U.S. 558 (1964). Oklahoma Legislature. Same division of Justices as in Reynolds v. Sims.

554. *Accord: Pinney v. Butterworth*, 378 U.S. 564 (1964). Connecticut Legislature. Same division of Justices as in Reynolds v. Sims.

555. *Accord: Hill v. Davis*, 378 U.S. 565 (1964). Iowa Legislature. Same division of Justices as in Reynolds v. Sims.

556. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

Statute authorizing issuance of *ex parte* warrant for seizure of allegedly obscene materials prior to a hearing on the issue of obscenity is invalid under First and Fourteenth Amendments.

Justices concurring: Brennan, White, Goldberg, Warren, C.J..
Justices concurring specially: Black, Douglas; Stewart.
Justices dissenting: Harlan, Clark.

557. *Tancil v. Woolls*, 379 U.S. 19 (1964).

District court decisions holding unconstitutional Virginia statutes requiring notation of race in divorce decrees and separation by race of names on registration, poll tax, and residence certificate lists, and on assessment rolls are affirmed.

558. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

Louisiana's Criminal Defamation Statute is unconstitutional as applied to criticism of official conduct of public officials because it incorporates standards of malice and truthfulness at variance with *New York Times v. Sullivan*, 376 U.S. 254 (1964).

559. *McLaughlin v. Florida*, 379 U.S. 184 (1964)

Criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room in the nighttime violates equal protection clause.

560. *Stanford v. Texas*, 379 U.S. 476 (1965).

Section of law providing for suppression of Communist Party and authorizing issuance of search warrants for subversive books and other materials is constitutionally defective because it does not require a description with particularity of the things to be seized.

561. *Cox v. Louisiana*, 379 U.S. 536 (1965).

Louisian breach of the peace statute is unconstitutionally vague.

562. *Freedman v. Maryland*, 380 U.S. 51 (1965).

Maryland censorship statute requiring prior submission of films for review is invalid in absence of procedural safeguards eliminating dangers of censorship.

563. *Carrington v. Rash*, 380 U.S. 89 (1965).

Texas constitutional provision prohibiting any member of Armed Forces who moves into the State from ever voting in Texas while a member of the Armed Forces violates the equal protection clause.

Justices concurring: Stewart, Black, Douglas, Clark, Brennan, White, Goldberg.
Justice dissenting: Harlan.

564. *Louisiana v. United States*, 380 U.S. 145 (1965).

Constitutional and statutory provisions requiring prospective voters to satisfy registrars of their ability to understand and give reasonable interpretation of any section of United States or Louisiana Constitutions violate Fourteenth and Fifteenth Amendments.

565. *Reserve Life Ins. Co. v. Bowers*, 380 U.S. 258 (1965).

Ohio statute imposing personal property tax upon furniture and fixtures used by foreign insurance company in doing business in Ohio

but not imposing similar tax upon furniture and fixtures used by domestic insurance companies violates equal protection clause.

566. *American Oil Co. v. Neill*, 380 U.S. 451 (1965).

Idaho tax statute applied to levy an excise tax on licensed Idaho motor fuel dealer's sale and transfer of gasoline in Utah for importation into Idaho by purchaser violated due process clause of Fourteenth Amendment.

Justices concurring: Warren, C.J., Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg.
Justices dissenting: Black.

567. *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Louisiana Subversive Activities and Communist Control Law is unconstitutional because of overbreadth of its coverage, violating First Amendment, and because of its lack of procedural due process.

Justices concurring: Brennan, Douglas, White, Goldberg, Warren, C.J..
Justices dissenting: Harlan, Clark.

568. *Harman v. Forssenius*, 380 U.S. 528 (1965).

Virginia statute requiring voters in federal election who do not qualify by paying poll tax to file a certificate of residence six months in advance of election is contrary to Twenty-fourth Amendment, which absolutely abolished payment of poll tax as a qualification for voting in federal elections.

569. *Jordan v. Silver*, 381 U.S. 415 (1965).

District court decision holding unconstitutional California constitutional provisions on apportionment of state senate is affirmed.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, White, Goldberg.
Justices dissenting: Harlan, Clark, Stewart.

570. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

A Connecticut statute making it a crime for any person to use any drug or article to prevent conception is an unconstitutional invasion of privacy of married couples.

Justices concurring: Douglas, Clark.
Justices concurring specially: Goldberg, Brennan, Warren, C.J., Harlan, White.
Justices dissenting: Black, Stewart.

571. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

A Pennsylvania statute permitting jurors to determine whether an acquitted defendant should pay the costs of the trial was void under the due process clause of the Fourteenth Amendment because of vagueness and the absence of any standard that would prevent arbitrary imposition of costs.

572. *Baxstrom v. Herold*, 383 U.S. 107 (1966).

New York statutory procedure for civil commitment of persons at the expiration of a prison sentence without the jury review available to all others civilly committed in New York and for commitment to an institution maintained by the Department of Correction beyond the expiration of their terms without a judicial determination of dangerous mental illness such as that afforded to all others violates the equal protection clause.

573. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

Virginia constitutional provisions making payment of poll taxes a qualification of eligibility to vote violate the equal protection clause.

Justices concurring: Douglas, Clark, Brennan, White, Fortas, Warren, C.J..
Justices dissenting: Black, Harlan, Stewart.

574. *Accord: Texas v. United States*, 384 U.S. 155 (1966).

Texas poll tax is unconstitutional.

575. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

Arizona loyalty oath is unconstitutionally overbroad and inclusive.

Justices concurring: Douglas, Black, Brennan, Fortas, Warren, C.J..
Justices dissenting: White, Clark, Harlan, Stewart.

576. *Mills v. Alabama*, 384 U.S. 214 (1966).

Alabama statute making it a criminal offense to electioneer or solicit votes on election day as applied to a newpaper editor who published an editorial on election day urging people to vote a certain way on a referendum issue violated First and Fourteenth Amendments.

577. *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

New Jersey statute requiring an unsuccessful appellant to repay the cost of a transcript used in preparing his appeal out of his institutional earning when he is jailed but which does not apply to unsuccessful appellants given suspended sentences, placed on probation, or fined violates equal protection clause.

Justices concurring: Stewart, Black, Douglas, Brennan, Clark, White, Fortas, Warren, C.J..
Justice dissenting: Harlan.

578. *Alton v. Tawes*, 384 U.S. 315 (1966).

District court decision holding unconstitutional Maryland congressional districting is affirmed.

579. *Carr v. City of Altus*, 385 U.S. 35 (1966).

District court decision holding unconstitutional under the commerce clause a Texas statute forbidding anyone to withdraw water from any underground sources in State without authorization of legislature is affirmed.

580. *Swann v. Adams*, 385 U.S. 440 (1967).

Florida statute apportioning legislative seats falls short of required population equality.

Justices concurring: White, Black, Douglas, Clark, Brennan, Fortas, Warren, C.J..
Justices dissenting: Harlan, Stewart.

581. *Kirkpatrick v. Preisler*, 385 U.S. 450 (1967).

District court decision holding unconstitutional Missouri's 1965 congressional districting law is summarily affirmed.

582. *Short v. Ness Produce Co.*, 385 U.S. 537 (1967).

District court decision holding unconstitutional as violating commerce clause Oregon statute requiring sellers of imported meat to label it with country of origin, post notices in their establishment that it is being sold, and keep record of transactions involving it, is affirmed.

583. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

New York statute requiring removal of teachers for "treasonable or seditious" utterances or acts is unconstitutionally vague since it apparently bans mere advocacy of abstract doctrine, and statute which makes Communist Party membership prima facie evidence of disqualification for teaching in public schools is unconstitutionally broad.

Justices concurring: Brennan, Black, Douglas, Fortas, Warren, C.J..
Justices dissenting: Clark, Harlan, Stewart, White.

584. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

Commerce clause forbids application of Illinois use tax statute to a seller whose only connection with customers in the State is by common carrier or by mail.

Justices concurring: Stewart, Brennan, Harlan, Clark, White, Warren, C.J..
Justices dissenting: Fortas, Black, Douglas.

585. *Holding v. Blankenship*, 387 U.S. 94 (1967).

Oklahoma obscenity statute empowering commission to investigate and to recommend prosecutions of offending parties is unconstitutional on authority of *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

586. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

California constitutional provision adopted on referendum repealing "open housing" law and prohibiting state abridgement of realty owner's right to sell and lease, or to refuse to sell and lease, as he pleases violates the equal protection clause.

Justices concurring: White, Douglas, Brennan, Fortas, Warren, C.J..

Justices dissenting: Harlan, Black, Clark, Stewart.

587. *Berger v. New York*, 388 U.S. 41 (1967).

New York eavesdrop statute that does not require particularity with respect to crime suspected and conversations sought, sufficiently limit period of order's effectiveness, terminate order once desired conversation is overheard, or require notice or showing of exigent circumstances to justify dispensing with notice violates Fourth and Fourteenth Amendments.

Justices concurring: Clark, Douglas, Brennan, Fortas, Warren, C.J..
Justices dissenting: Black, Harlan, White.

588. *Loving v. Virginia*, 388 U.S. 1 (1967).

Virginia statute prohibiting interracial marriage violates equal protection clause.

589. *Washington v. Texas*, 388 U.S. 14 (1967).

Texas statute prohibiting persons charged as co-participants in the same crime from testifying for one another violated Sixth and Fourteenth Amendments.

590. *Whitehill v. Elkins*, 389 U.S. 54 (1967).

Maryland loyalty oath is unconstitutionally vague when read with surrounding authorization and supplementary statutes which infringe on rights of association.

Justices concurring: Douglas, Black, Brennan, Fortas, Marshall, Warren, C.J..
Justices dissenting: Harlan, Stewart, White.

591. *Lucas v. Rhodes*, 389 U.S. 212 (1967).

Ohio's congressional districting statute violates principles of population equality established in *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Justices concurring: Warren, C.J., Black, Douglas, Brennan, White, Fortas.
Justices dissenting: Harlan, Stewart.

592. *Rockefeller v. Wells*, 389 U.S. 421 (1967).

District court decision holding unconstitutional New York's congressional districting statute is summarily affirmed.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Stewart, White, Fortas, Marshall.
Justice dissenting: Harlan.

593. *Zschernig v. Miller*, 389 U.S. 429 (1968).

Oregon statute which barred alien from taking personal property intestate unless American citizens had reciprocal rights with alien's country, unless American citizens had right to receive payment within United States from estates of decedents dying in that foreign country,

and unless Oregon courts were presented proof that alien heir would receive benefit, use, and control of inheritance without confiscation, was void as an intrusion by State into field of foreign affairs reserved to Federal Government.

Justices concurring: Douglas, Black, Brennan, Stewart, Fortas, Warren, C.J..
Justices concurring specially: Harlan.
Justice dissenting: White.

594. *Dinis v. Volpe*, 389 U.S. 570 (1968).

District court decision holding Massachusetts congressional districting statute unconstitutional is summarily affirmed.

595. *Louisiana Financial Assistance Comm'n v. Poindexter*, 389 U.S. 571 (1968).

District court decision holding unconstitutional tuition grant statute authorizing payments to children attending private schools as part of an anti-desegregation program is summarily affirmed.

596. *Kirk v. Gong*, 389 U.S. 574 (1968).

District court decision holding unconstitutional Florida congressional districting statute is affirmed.

597. *James v. Gilmore*, 389 U.S. 572 (1968).

District court decision holding unconstitutional Texas loyalty oath statute is summarily affirmed.

598. *Lee v. Washington*, 390 U.S. 333 (1968).

District court decisions holding that Alabama statutes requiring racial segregation in prisons and jails violate equal protection clause is summarily affirmed.

599. *Scafati v. Greenfield*, 390 U.S. 713 (1968).

District court decision holding unconstitutional as applied to a prisoner who had been sentenced prior to enactment of statute but paroled after its enactment a Massachusetts statute which forbade a prisoner from earning good conduct deductions for the first six months after his reincarceration following violation of parole is summarily affirmed.

600. *Levy v. Louisiana*, 391 U.S. 68 (1968).

Louisiana wrongful death statute creating right of action in surviving child or children as interpreted to mean only legitimate child or children denies illegitimate children equal protection of the laws.

Justices concurring: Douglas, Brennan, White, Fortas, Marshall, Warren, C.J..
Justices dissenting: Harlan, Black, Stewart.

601. *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

Louisiana statute barring wrongful death recovery by parents of illegitimate child while allowing recovery by parent of legitimate child violates equal protection.

602. *Rabeck v. New York*, 391 U.S. 462 (1968).

Provision of New York's obscenity law is unconstitutionally vague.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Stewart, White, Fortas, Marshall.
Justices dissenting: Harlan.

603. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

An Illinois statute, itself no longer in code but held to be incorporated in the general juror challenge statute, which authorizes automatic challenge for cause of any potential juror scrupled against capital punishment in capital cases, is invalid.

Justices concurring: Stewart, Brennan, Fortas, Marshall, Warren, C.J..
Justices concurring specially: Douglas.
Justices dissenting: Black, Harlan, White.

604. *Williams v. Rhodes*, 393 U.S. 23 (1968).

Series of Ohio election statutes which imposed insurmountable obstacles to success of independent parties and candidates obtaining a place on the ballot violate the equal protection clause.

Justices concurring: Black, Douglas, Brennan, Fortas, Marshall.
Justices concurring specially: Harlan.
Justices dissenting: Warren, C.J., Stewart, White.

605. *Louisiana Educ. Comm'n for Needy Children v. Poindexter*, 393 U.S. 17 (1968).

District court decision holding unconstitutional a Louisiana tuition grant statute as part of an anti-desegregation program is summarily affirmed.

606. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

Arkansas statute prohibiting the teaching of evolution in public schools of State violates First and Fourteenth Amendments.

607. *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968).

New Jersey statute providing for exemption from property taxes only of those nonprofit corporations chartered in New Jersey denies equal protection to Pennsylvania corporation qualified to do business in New Jersey.

Justices concurring: Warren, C.J., Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall.
Justice dissenting: Black.

608. *South Carolina State Bd. of Educ. v. Brown*, 393 U.S. 222 (1968).
District court decision holding unconstitutional South Carolina statute providing for scholarship grants for children attending private schools as part of antidesegregation program is summarily affirmed.

609. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1968).
Missouri congressional districting statute is unconstitutional because the population deviations from precise mathematical equality among districts were not unavoidable.

Justices concurring: Brennan, Black, Douglas, Marshall, Warren, C.J..
Justice concurring specially: Fortas.
Justices dissenting: Harlan, Stewart, White.

610. *Accord: Wells v. Rockefeller*, 394 U.S. 542 (1969), voiding New York's congressional districting plan.

611. *Stanley v. Georgia*, 394 U.S. 557 (1969).
Georgia statute construed to prohibit possession in the home of obscene materials for one's own private and personal use violates First and Fourteenth Amendments.

612. *Street v. New York*, 394 U.S. 576 (1969).
Statute insofar as it punishes verbal abuse of the flag violates First and Fourteenth Amendments.

Five-to-four division of Court not on this issue.

613. *Shapiro v. Thompson*, 394 U.S. 618 (1969).
Connecticut statute imposing one-year durational residency requirement on eligibility for welfare assistance infringes right to travel and violates equal protection clause.

Justices concurring: Brennan, Douglas, Fortas, Stewart, White, Marshall.
Justices dissenting: Warren, C.J., Black, Harlan.

614. *Accord: Reynolds v. Smith*, 394 U.S. 618 (1969).
Pennsylvania's one-year durational residence requirement for eligibility for welfare assistance infringes the right to travel and violates equal protection.

615. *Moore v. Ogilvie*, 394 U.S. 814 (1969).
Illinois statute requiring independent candidates to present 25,000 signatures, including 200 signatures from each of at least 50 of the State's 200 counties, violates the equal protection clause.

Justices concurring: Douglas, Black, Brennan, White, Fortas, Marshall, Warren, C.J..
Justices dissenting: Stewart, Harlan.

616. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).
Wisconsin prejudgment garnishment statute which authorizes freezing of defendant's wages in interim between garnishment and

culmination of suit without affording defendant a hearing violates due process clause.

Justices concurring: Douglas, Brennan, Stewart, White, Marshall, Warren, C.J..
Justice concurring specially: Harlan.
Justice dissenting: Black.

617. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Ohio's Criminal Syndicalism Statute, which proscribes advocacy of use of force in absence of requirement that such advocacy be directed to inciting or producing imminent lawless action and be likely to incite or produce such action, violates the First and Fourteenth Amendments.

618. *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

New York statute limiting eligibility to vote in school district elections to persons who own taxable real property in district or who are parents of children enrolled in the local public schools violates equal protection clause.

Justices concurring: Warren, C.J., Douglas, Brennan, White, Marshall.
Justices dissenting: Stewart, Black, Harlan.

619. *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

Louisiana statute limiting eligibility to vote on issuance of municipal utility revenue bonds to property owners violates equal protection clause.

Justices concurring: Warren, C.J., Douglas, Brennan, White, Marshall.
Justices concurring specially: Black, Stewart, Harlan.

620. *Turner v. Fouche*, 396 U.S. 346 (1969).

Georgia statute limiting eligibility for school board membership to property holders violates the equal protection clause.

621. *Wyman v. Bowens*, 397 U.S. 49 (1970).

District court decision holding unconstitutional New York statute denying welfare assistance to persons coming into State with intent to obtain such assistance is summarily affirmed.

622. *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970).

Missouri statutory scheme for election of trustees of junior college district which allocated trustees to lesser populated districts rather than those of greater populations violated equal protection clause.

Justices concurring: Black, Douglas, Brennan, White, Marshall.
Justices dissenting: Burger, C.J., Harlan, Stewart.

623. *In re Winship*, 397 U.S. 358 (1970).

New York statute providing that proof of acts establishing delinquency of a minor must be by a preponderance of the evidence vio-

lates due process clause, which requires proof beyond a reasonable doubt.

Justices concurring: Brennan, Douglas, Harlan, White, Marshall.
Justices dissenting: Burger, C.J., Black, Stewart.

624. *Baldwin v. New York*, 399 U.S. 66 (1970).

New York statute providing for trial without jury in New York City of misdemeanors punishable upon conviction with sentences of up to one year violates Sixth and Fourteenth Amendments, which require jury trials when possible sentence is six months or more.

Justices concurring: White, Brennan, Marshall.
Justices concurring specially: Black, Douglas.
Justices dissenting: Burger, C.J., Harlan, Stewart.

625. *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

Arizona constitutional and statutory provisions which limit eligibility to vote in referendum on issuance of general obligation bonds to property owners violate equal protection clause.

Justices concurring: White, Black, Douglas, Brennan, Marshall.
Justices dissenting: Stewart, Harlan, Burger, C.J..

626. *Williams v. Illinois*, 399 U.S. 235 (1970).

An Illinois statute providing for extension of jail sentences to work off unpaid fine at $5 a day violates the equal protection clause as applied to an indigent convict unable to pay his fine.

627. *Rockefeller v. Socialist Workers Party*, 400 U.S. 806 (1970).

District court decision holding unconstitutional New York statutory provisions for geographic dispersion of signatures on candidates' petitions and discriminating against independent candidates' ability to obtain signatures in ways absent from major party candidates is summarily affirmed.

628. *Parish School Bd. v. Stewart*, 400 U.S. 884 (1970).

District court decision holding unconstitutional Louisiana constitutional and statutory provisions limiting eligibility to vote in general obligation bond authorization elections is summarily affirmed.

629. *Bower v. Vaughan*, 400 U.S. 884 (1970).

District court decision holding unconstitutional Arizona's one-year residency requirement for treatment in state hospital is summarily affirmed.

630. *Rafferty v. McKay*, 400 U.S. 954 (1970).

District court decision holding unconstitutional a California loyalty oath similar to that condemned in *Baggett v. Bullitt*, 377 U.S. 360 (1964), is summarily affirmed.

631. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

Wisconsin statute providing for "posting" of "excessive" drinkers to bar them from taverns and similar places denies procedural due process by not requiring notice and opportunity to be heard.

632. *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

Wisconsin statute which categorically precludes a change of venue for trial of misdemeanor cases violates Sixth and Fourteenth Amendments.

Justices concurring: Stewart, Douglas, Harlan, Brennan, White, Marshall.
Justices concurring specially: Blackmun, Burger, C.J..
Justice dissenting: Black.

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

Connecticut's statutory imposition of fees as prerequisite to obtain judicial dissolution of marriage violates due process as applied to persons unable to pay the fees.

Justices concurring: Harlan, Stewart, White, Marshall, Blackmun.
Justices concurring specially: Douglas, Brennan.
Justice dissenting: Black.

634. *Tate v. Short*, 401 U.S. 395 (1971).

Texas statute (and ordinance of City of Houston) which provide for imprisonment of person unable to pay a fine for period calculated at $5 a day violate equal protection clause.

635. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

Anti-Busing Law which flatly forbids assignment of any student on account of race and prohibits busing for such purpose is unconstitutional.

636. *Bell v. Burson*, 402 U.S. 535 (1971).

Georgia statute providing for automatic suspension of driver's license upon involvement in auto accident unless security for amount of damages is posted violates due process in not first affording driver a hearing to establish a reasonable possibility that judgment may be rendered against him as result of accident.

637. *Nyquist v. Lee*, 402 U.S. 935 (1971).

District court decision holding unconstitutional New York anti-busing law is summarily affirmed.

638. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Legislative apportionment and districting statute of Indiana, though its multimember features are not unconstitutional, provides for too much population inequality and is void.

Justices concurring: White, Black, Douglas, Brennan, Marshall, Blackmun, Burger, C.J..

Justices dissenting: Harlan, Stewart.

639. *Connell v. Higginbotham*, 403 U.S. 207 (1971).

Florida loyalty oath provision which requires public employee to swear he does not believe in violent overthrow of government or be dismissed violates due process by not providing for an inquiry into his reasons for refusing to take the oath.

Justices concurring: Burger, C.J., Black, Harlan, White, Blackmun.
Justices concurring specially: Marshall, Douglas, Brennan.
Justice dissenting: Stewart.

640. *Graham v. Richardson*, 403 U.S. 365 (1971).

Arizona statute that denies welfare assistance to aliens who have not been in the United States for 15 years violates equal protection and intrudes into the Federal Government's exclusive powers over admission of aliens.

641. *Sailer v. Leger*, 403 U.S. 365 (1971).

A Pennsylvania statute that limits welfare assistance to United States citizens violates equal protection and intrudes into the Federal Government's exclusive powers over admission of aliens.

642. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Pennsylvania statute providing for reimbursement of sectarian schools for expenses of providing certain secular educational services violates the establishment clause of the First Amendment as applied to the States through the Fourteenth.

Justices concurring: Burger, C.J., Harlan, Stewart, Blackmun.
Justices concurring specially: Black, Douglas, Brennan, Marshall.
Justice dissenting: White.

643. *Earley v. DiCenso*, 403 U.S. 602 (1971).

Rhode Island statute providing for salary supplements to be paid to teachers in sectarian schools violates the establishment clause.

644. *Accord: Sanders v. Johnson*, 403 U.S. 955 (1971).

District court decision holding unconstitutional Connecticut Nonpublic School Secular Education Act is affirmed.

645. *Pease v. Hansen*, 404 U.S. 70 (1971).

Montana durational residency requirement as condition on eligibility to state-financed public assistance is unconstitutional under *Shapiro v. Thompson*, 394 U.S. 618 (1969).

646. *Reed v. Reed*, 404 U.S. 71 (1971).

Idaho statutory provision giving preference to males over females for appointment as administrator of decedent's estate violates equal protection clause.

647. *Dunn v. Rivera*, 404 U.S. 1054 (1972).

District court decision holding unconstitutional Connecticut one-year durational residency requirement for eligibility to welfare assistance is summarily affirmed.

648. *Wyman v. Lopez*, 404 U.S. 1055 (1972).

District court decision holding unconstitutional New York one-year durational residency requirement for eligibility to welfare assistance is summarily affirmed.

649. *Lindsey v. Normet*, 405 U.S. 56 (1972).

Oregon statutory provision requiring tenants who wish to appeal housing eviction order to file bond in twice the amount of rent expected to accrue during pendency of appeal violates equal protection clause.

650. *Bullock v. Carter*, 405 U.S. 134 (1972).

Texas' filing fee system, which imposes on candidates the costs of the primary election operation and affords no alternative opportunity for candidates unable to pay the fees to obtain access to the ballot, violates the equal protection clause.

651. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Tennessee durational residency requirement of one year as a condition of registration to vote burdens right to travel and violates equal protection clause.

Justices concurring: Marshall, Douglas, Brennan, Stewart, White.
Justices concurring specially: Blackmun.
Justice dissenting: Burger, C.J..

652. *Caniffe v. Burg*, 405 U.S. 1034 (1972).

District court decision invalidating Massachusetts statute that imposes as a condition for registering to vote an additional 6-month state residency requirement on persons who have already resided within the town or district for six months as violative of the Equal Protection Clause is summarily affirmed.

653. *Davis v. Kohn*, 405 U.S. 1034 (1972).

District court decision invalidating, as impermissibly burdening the right to vote and the right to travel, a Vermont one-year residency requirement for voting, is summarily affirmed.

654. *Cody v. Andrews*, 405 U.S. 1034 (1972).

District court decision invalidating on equal protection grounds a North Carolina one-year residency requirement for voting is summarily affirmed.

655. *Donovan v. Keppel*, 405 U.S. 1034 (1972).

District court decision invalidating on equal protection grounds a Minnesota six-month residency requirement for voting is summarily affirmed.

656. *Whitcomb v. Affeldt*, 405 U.S. 1034 (1972).

District court decision invalidating as burdening the right to vote and violating equal protection an Indiana six-month residency requirement for voting is summarily affirmed.

657. *Amos v. Hadnott*, 405 U.S. 1035 (1972).

District court decision invalidating on equal protection grounds Alabama's six-month county residency requirement and three-month precinct residency requirement for voting is summarily affirmed.

658. *Virginia State Bd. of Elections v. Bufford*, 405 U.S. 1035 (1972).

District court decision holding that Virginia's one-year residency requirement for voting violates equal protection is summarily affirmed.

659. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Massachusetts statute making it a crime to dispense any contraceptive article to an unmarried person, except to prevent disease, is unconstitutional.

Justices concurring: Brennan, Douglas, Stewart, Marshall.
Justices concurring specially: White, Blackmun.
Justice dissenting: Burger, C.J..

660. *Gooding v. Wilson*, 405 U.S. 518 (1972).

Georgia statute making it criminal offense to use language of or to another tending to cause a breach of the peace, which is not limited to "fighting words," is unconstitutionally vague and overbroad.

Justices concurring: Brennan, Douglas, Stewart, White, Marshall.
Justices dissenting: Blackmun, Burger, C.J..

661. *Stanley v. Illinois*, 405 U.S. 645 (1972).

Illinois statute which presumes without a hearing unfitness of father of illegitimate children to have custody upon death or disqualification of mother denies him due process and equal protection.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall.
Justices dissenting: Burger, C.J., Blackmun.

662. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

Louisiana workmen's compensation statute, which relegates unacknowledged illegitimate children to a status inferior to legitimate and acknowledged illegitimate children, violates equal protection clause.

Justices concurring: Powell, Douglas, Brennan, Stewart, White, Marshall, Burger, C.J..

Justices concurring specially: Blackmun.
Justice dissenting: Rehnquist.

663. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Wisconsin's compulsory school attendance law, insofar as it does not exempt Amish children from coverage following completion of the eighth grade, violates the Free Exercise Clause of the First Amendment, applicable via the Fourteenth Amendment.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Blackmun, (in part) Douglas.
Justices dissenting (in part): Douglas.

664. *Brooks v. Tennessee*, 406 U.S. 605 (1972).

A Tennessee statute that requires a criminal defendant if he is going to testify to do so before any other witness for him violates the Fifth, Sixth, and Fourteenth Amendments.

Justices concurring: Brennan, Douglas, White, Marshall, Powell.
Justice concurring specially: Stewart.
Justices dissenting: Burger, C.J., Blackmun, Rehnquist.

665. *Jackson v. Indiana*, 406 U.S. 715 (1972).

Indiana's pretrial commitment procedure for allegedly incompetent defendants, which provides more lenient standards for commitment than the procedure for those persons not charged with any offense, and more stringent standards for release, violates both due process and equal protection.

666. *James v. Strange*, 407 U.S. 128 (1972).

Kansas statute enabling State to recover in subsequent civil proceedings legal defense fees for indigent defendants violates equal protection clause because it dispenses with the protective exemptions state law has erected for other civil judgment debtors.

667. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Florida's replevin statutes, which permit installment sellers or other persons alleging entitlement to property to cause the seizure of the property without any notice or opportunity to be heard on the issues, violate due process clause.

Justices concurring: Stewart, Douglas, Brennan, Marshall.
Justices dissenting: White, Blackmun, Burger, C.J..

668. *Parham v. Cortese*, 407 U.S. 67 (1972).

Pennsylvania replevin statute, which permits installment sellers to cause the seizure of property without affording notice or opportunity to contest to the persons possessing the property, violates the due process clause. Same division of Justices as Fuentes v. Shevin.

669. *State Dep't of Health and Rehabilitative Servs. v. Zarate*, 407 U.S. 918 (1972).

District court decision holding unconstitutional under equal protection clause Florida's denial of welfare assistance to noncitizens is summarily affirmed.

670. *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

North Carolina statute which authorized creation of a new school district in a city that was part of a larger county school system is void inasmuch as its effect would be to impede the dismantling of the dual school system by affording a refuge to white students fleeing desegregation.

671. *Furman v. Georgia*, 408 U.S. 238 (1972).

Statutory imposition of capital punishment upon criminal conviction either at discretion of jury or of the trial judge may not be carried out. Georgia's statute in the view of two Justices is unconstitutional because the death penalty is cruel and unusual punishment per se in violation of the Eighth and Fourteenth Amendments, while in the view of three Justices the statute is unconstitutional as applied because of the discriminatory or arbitrary manner in which death is imposed upon convicted defendants in violation of the Eighth and Fourteenth Amendments.

Justices concurring specially: Douglas, Brennan, Stewart, White, Marshall.
Justices dissenting: Burger, C.J., Blackmun, Powell, Rehnquist.

672. *Texas Bd. of Barber Examiners v. Bolton*, 409 U.S. 807 (1972).

District court decision holding invalid under equal protection clause Texas statutes prohibiting licensed cosmetologists from working with male customers and prohibiting licensed barbers from working with female customers is summarily affirmed.

673. *Essex v. Wolman*, 409 U.S. 808 (1972).

District court decision holding void under the establishment clause of the First Amendment an Ohio statute providing a reimbursement grant to parents of children attending nonpublic schools is summarily affirmed.

674. *Robinson v. Hanrahan*, 409 U.S. 38 (1972).

Illinois statute providing for mailing of vehicle forfeiture proceeding notification to home address of vehicle owner is unconstitutional as applied to person known to the State to be incarcerated and not at home.

675. *Amos v. Sims*, 409 U.S. 942 (1972).

District court decision holding unconstitutional Alabama legislative apportionment law is summarily affirmed.

676. *Fugate v. Potomac Electric Power Co.*, 409 U.S. 942 (1972).

District court decision holding invalid under equal protection clause Virginia statute allowing reimbursement to utilities required by interstate highway construction to relocate their lines in cities and towns but denying reimbursement to utilities required by interstate highway construction to relocate lines in counties is summarily affirmed.

677. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Ohio statute authorizing trial for certain ordinance violations and traffic offenses before mayor responsible for village finances when the fines, forfeitures, costs, and fees imposed in the mayor's courts provided a substantial portion of village funds denied defendants opportunity for trial before an impartial and disinterested tribunal.

Justices concurring: Brennan, Douglas, Stewart, Marshall, Blackmun, Powell, Burger, C.J..
Justices dissenting: White, Rehnquist.

678. *Evco v. Jones*, 409 U.S. 91 (1972).

New Mexico's gross receipts tax is unconstitutionally applied to proceeds from transactions whereby material is produced in State under contract for delivery to out-of-state clients because it impermissibly burdens interstate commerce.

679. *Georges v. McClellan*, 409 U.S. 1120 (1973).

District court decision holding unconstitutional under due process clause Rhode Island prejudgment attachment statute is summarily affirmed.

680. *Gomez v. Perez*, 409 U.S. 535 (1973).

Texas law denying right of enforced paternal support to illegitimate children while granting it to legitimate children violates equal protection clause.

681. *Roe v. Wade*, 410 U.S. 113 (1973).

Texas statute making it a crime to procure or to attempt to procure an abortion except on medical advice to save the life of the mother infringes upon a woman's right of privacy protected by the due process clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, Burger, C.J..
Justices dissenting: White, Rehnquist.

682. *Doe v. Bolton*, 410 U.S. 179 (1973).

Georgia statute permitting abortions under prescribed circumstances nevertheless invalidly imposed a number of procedural limitations: that the abortion be performed in an accredited hospital,

be approved by a staff committee and two licensed physicians other than woman's own doctor, and be available only to residents.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, Burger, C.J..
Justices dissenting: White, Rehnquist.

683. *Mahan v. Howell*, 410 U.S. 315 (1973).

Portion of Virginia apportionment statute assigning large numbers of naval personnel to actual location of station when evidence showed substantial numbers resided in surrounding areas distorted population balance of districts and was void.

684. *Whitcomb v. Communist Party of Indiana*, 410 U.S. 976 (1973).

District court decision holding invalid under First and Fourteenth Amendments Indiana statute requiring political party to submit oath that party has no relationship to a foreign government as a condition of ballot access is summarily affirmed.

685. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

New Mexcio use tax may not constitutionally be applied on personal property that Indian tribe purchased out-of-state and installed as permanent improvement on off-reservation ski resort owned and operated by tribe.

686. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973).

Arizona income tax is invalidly applied to Navajo Indian residing on reservation and whose income is wholly derived from reservation sources.

687. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973).

New Jersey statute denying assistance to families in which parents are not ceremonially married denies equal protection to children in such families.

Justices concurring: Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, Burger, C.J..
Justice dissenting: Rehnquist.

688. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Wisconsin statute as interpreted to permit revocation of parole without a hearing denies due process of law.

689. *Parker v. Levy*, 411 U.S. 978 (1973).

A district court decision voiding as an arbitrary denial of equal protection Louisiana's constitutional provision and statute distributing a property relief fund among political subdivisions is summarily affirmed.

690. *Miller v. Gomez*, 412 U.S. 914 (1973).

District court decision holding a denial of equal protection New York statute denying jury trial on issue of dangerousness to persons being committed to hospitals for criminally insane after felony indictment but before trial is summarily affirmed.

691. *Vlandis v. Kline*, 412 U.S. 441 (1973).

Connecticut statute creating irrebuttable presumption that student from out-of-state at time of application to state college remained nonresident for tuition purposes for entire student career violated due process clause.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell.
Justice concurring specially: White.
Justices dissenting: Burger, C.J., Rehnquist, Douglas.

692. *Wardius v. Oregon*, 412 U.S. 470 (1973).

Oregon statute requiring defendant to give pretrial notice of alibi defense and names of supporting witnesses but denying defendant any reciprocal right of discovery of rebuttal evidence denies him due process of law.

693. *White v. Regester*, 412 U.S. 755 (1973).

Establishment of multimember legislative districts in certain Texas urban areas in context of pervasive electoral discrimination against blacks and Mexican-Americans denied equal protection of laws.

694. *White v. Weiser*, 412 U.S. 783 (1973).

Texas congressional districting law creates districts with too great a population disparity and is void under equal protection clause.

695. *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472 (1973).

New York statute to reimburse nonpublic schools for administrative expenses incurred in carrying out state mandated examination and record keeping requirements but requiring no accounting and separating of religious and nonreligious uses violates establishment clause.

Justices concurring: Burger, C.J., Stewart, Blackmun, Powell, Rehnquist.
Justices concurring specially: Douglas, Brennan, Marshall.
Justice dissenting: White.

696. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

New York statute providing that only United States citizens may hold permanent positions in competitive civil service violates equal protection clause.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, White, Marshall, Powell, Burger, C.J..

Justice dissenting: Rehnquist.

697. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

New York education and tax laws providing grants to nonpublic schools for maintenance and repairs of facilities and providing tuition reimbursements and income tax benefits to parents of children attending nonpublic schools violate the establishment clause.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall, Blackmun.
Justices concurring and dissenting: Burger, C.J., Rehnquist.
Justice dissenting: White.

698. *Sloan v. Lemon*, 413 U.S. 825 (1973).

Pennsylvania statute providing for reimbursement of parents for portion of tuition expenses in sending children to nonpublic schools violates establishment clause.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall, Blackmun.
Justices dissenting: White, Rehnquist, Burger, C.J..

699. *Grit v. Wolman*, 413 U.S. 901 (1973).

Ohio statute granting tax credits to parents of private school children violates the Establishment Clause.

700. *Stevenson v. West*, 413 U.S. 902 (1973).

South Carolina legislative apportionment statute is invalid.

701. *Nelson v. Miranda*, 413 U.S. 902 (1973).

Arizona constitutional and statutory provisions denying public employment to aliens violates equal protection clause.

702. *Texas v. Pruett*, 414 U.S. 802 (1973).

Federal court decision that Texas statutory system that denies good time credit to convicted felons in jail pending appeal while allowing good time credit to incarcerated nonappealing felons unconstitutionally burdens right of appeal is summarily affirmed.

703. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

An Illinois statute prohibiting anyone who has voted in one party's primary election from voting in another party's primary election for at least 23 months violates the First and Fourteenth Amendments.

Justices concurring: Stewart, Douglas, White, Marshall, Powell.
Justice concurring specially: Burger, C.J..
Justices dissenting: Blackmun, Rehnquist.

704. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

New York statute providing for cancellation of public contracts and disqualification of contractors from doing business with the State

for refusal to waive immunity from prosecution and to testify concerning state contracts violates the Fifth Amendment privilege against self-incrimination.

705. *Danforth v. Rodgers*, 414 U.S. 1035 (1973).
District court decision invalidating Missouri abortion statute is summarily affirmed.

706. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974).
Indiana statute prescribing loyalty oath as qualification for access to ballot violates First and Fourteenth Amendments.

707. *O'Brien v. Skinner*, 414 U.S. 524 (1974).
New York election law provisions that permit persons incarcerated outside county of residence while awaiting trial to register and vote absentee while denying absentee privilege to persons incarcerated in county of residence denies equal protection.

Justices concurring: Burger, C.J., Douglas, Brennan, Stewart, White, Marshall, Powell.
Justices dissenting: Blackmun, Rehnquist.

708. *Wallace v. Sims*, 415 U.S. 902 (1974).
District court decision holding invalid Alabama legislative apportionment statute is summarily affirmed.

709. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).
Arizona statute imposing one-year county residency requirement for indigents' eligibility for nonemergency medical care at state expense infringes upon right to travel and violates equal protection clause.

Justices concurring: Marshall, Brennan, Stewart, White, Powell.
Justices concurring specially: Douglas, Blackmun, Burger, C.J..
Justice dissenting: Rehnquist.

710. *Davis v. Alaska*, 415 U.S. 308 (1974).
Alaska statute protecting anonymity of juvenile offenders, as applied to prohibit cross-examination of prosecution witness for possible bias, violates confrontation clause.

Justices concurring: Burger, C.J., Douglas, Brennan, Stewart, Marshall, Blackmun, Powell.
Justices dissenting: White, Rehnquist.

711. *Smith v. Goguen*, 415 U.S. 566 (1974).
Massachusetts statute punishing anyone who treats the flag "contemptuously" without anchoring proscription to specified conduct and modes is unconstitutionally vague.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall.
Justice concurring specially: White.

Justices dissenting: Blackmun, Rehnquist, Burger, C.J..

712. *Lubin v. Panish*, 415 U.S. 709 (1974).

California statute imposing a filing fee as the only means of getting on the ballot denied indigents equal protection.

713. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm'n*, 416 U.S. 922 (1974).

District court decision holding invalid as burden on interstate commerce Louisiana statute construed to permit commission to regulate prices at which dairy products are sold outside the State to Louisiana retailers is affirmed.

714. *Indiana Real Estate Comm'n v. Satoskar*, 417 U.S. 938 (1974).

District court decision invalidating Indiana statute limiting real estate dealer licenses to citizens is summarily affirmed.

715. *Marburger v. Public Funds for Public Schools*, 417 U.S. (1974).

District court decisions invalidating under the establishment clause New Jersey laws providing reimbursement to parents of nonpublic school children for textbooks and other materials are summarily affirmed.

716. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Florida statute compelling newspapers to publish free replies by political candidates criticized by newspapers violates First Amendment.

717. *Spence v. Washington*, 418 U.S. 405 (1974).

Washington State statute prohibiting "improper use" of flag or display of the flag with any emblem superimposed on it was invalidly applied to a person who taped a peace symbol on the flag in a way as not to damage it and who then displayed it upside down from his own property.

Justices concurring: Brennan, Stewart, Marshall, Powell.
Justices concurring specially: Douglas, Blackmun.
Justices dissenting: Rehnquist, White, Burger, C.J..

718. *Cahn v. Long Island Vietnam Moratorium Comm.*, 418 U.S. 906 (1974).

Appellate court decision holding invalid on its face a New York statute restricting display of the American flag, and prohibiting superimposition of symbols on a flag, is summarily affirmed.

719. *Franchise Tax Board v. United Americans*, 419 U.S. 890 (1974).

District court decision striking down under First Amendment a California statute providing state income-tax reductions for taxpayers sending their children to nonpublic schools is summarily affirmed.

Justices concurring: Brennan, Douglas, Stewart, Marshall, Blackmun, Powell.
Justices dissenting: White, Rehnquist, Burger, C.J..

720. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

Constitutional and statutory provisions that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service violates Sixth Amendment right of defendants to be tried before juries composed of a representative cross section of the community.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall, Blackmun, Powell.
Justice concurring specially: Burger, C.J..
Justice dissenting: Rehnquist.

721. *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975).

Georgia statutes permitting writ of garnishment to be issued in pending suits on conclusory affidavit of plaintiff, prescribing filing of bond as the only method of dissolving the writ, which deprives defendant of the use of the property pending the litigation, and making no provision for an early hearing violates Fourteenth Amendment's due process clause.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall.
Justice concurring specially: Powell.
Justices dissenting: Blackmun, Rehnquist, Burger, C.J..

722. *Goss v. Lopez*, 419 U.S. 565 (1975).

Ohio statute authorizing suspension without a hearing of public school students for up to 10 days for misconduct denies students procedural due process in violation of the Fourteenth Amendment.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall.
Justices dissenting: Powell, Blackmun, Rehnquist, Burger, C.J..

723. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Georgia statute making it a misdemeanor to publish or broadcast the name of a rape victim may not be applied to such publishing or broadcasting when the name is part of a public record; consistent with the First Amendment, publication of such public record information is absolutely privileged.

724. *Austin v. New Hampshire*, 420 U.S. 656 (1975).

New Hampshire commuters income tax imposed on nonresidents violates the privileges and immunities clause, Art. IV. § 2, cl. 1, inasmuch as the State imposed no income tax on its residents' domestic income and exempted from tax income earned by its residents outside the State, since the tax falls exclusively on nonresidents and is not offset even approximately by other taxes imposed upon residents alone.

Justices concurring: Marshall, Brennan, Stewart, White, Powell, Rehnquist, Burger, C.J..
Justice dissenting: Blackmun.

725. *Stanton v. Stanton*, 421 U.S. 7 (1975).

Utah age of majority statute applied in the context of child support requirements obligating parental support of son to age 21 but daugther only to age 18 is an invalid gender classification under the equal protection clause of the Fourteenth Amendment.

726. *Hill v. Stone*, 421 U.S. 289 (1975).

Texas constitution and statutes and city charter limiting the right to vote in city bond issue elections to persons who have listed property for taxation in the election district in the year of the election is void under the equal protection clause of the Fourteenth Amendment.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell.
Justices dissenting: Rehnquist, Stewart, Burger, C.J..

727. *Meek v. Pittenger*, 421 U.S. 349 (1975) (subsequently overruled).

Pennsylvania laws authorizing direct provision to nonpublic school children of "auxiliary services", i.e., counseling, testing, speech and hearing therapy, etc., and loans to the nonpublic schools for instructional material and equipment constitute unlawful assistance to religion and are invalid under First Amendment.

Justices concurring: Stewart, Douglas, Brennan, Marshall, Blackmun, Powell.
Justices dissenting: Burger, C.J., Rehnquist.

728. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Virginia statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, as applied to the editor of a weekly newspaper who published an advertisement of an out-of-state abortion, is in violation of the First Amendment.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, Burger, C.J..
Justices dissenting: Rehnquist, White.

729. *Herring v. New York*, 422 U.S. 853 (1975).

New York statute granting trial judge in a nonjury criminal case the power to deny counsel the opportunity to make a summation of the evidence before the rendition of judgment violates the Sixth Amendment.

Justices concurring: Stewart, Douglas, Brennan, White, Marshall, Powell.
Justices dissenting: Rehnquist, Blackmun, Burger, C.J..

730. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

Utah statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before expected childbirth until six weeks following violates Fourteenth Amendment due process clause.

Justices concurring: Brennan, Stewart, White, Marshall, Powell.
Justices dissenting: Rehnquist, Blackmun, Burger, C.J. (from summary action only).

731. *Schwartz v. Vanasco*, 423 U.S. 1041 (1976).

District court decision invalidating as overbroad under the First Amendment New York law prohibiting attacks on candidate based on race, sex, religion, or ethnic background and prohibiting misrepresentations of candidate's qualifications, positions, or political affiliation is summarily affirmed.

732. *Tucker v. Salera*, 424 U.S. 959 (1976).

District court decision voiding Pennsylvania election law provision requiring that candidates of "political bodies" collect nominating petition signatures between 10th and 7th Wednesdays prior to primary election and file them no later than 7th Wednesday prior to primary, insofar as it disqualifies papers signed after 7th Wednesday, is affirmed summarily.

733. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

State statute declaring it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs violates the First Amendment right of citizens to receive the information thus suppressed.

Justices concurring: Blackmun, Brennan, Stewart, White, Marshall, Powell.
Justice concurring specially: Burger, C.J..
Justice dissenting: Rehnquist.

734. *California State Bd. of Pharmacy v. Terry*, 426 U.S. 913 (1976).

District court decision holding violative of the First Amendment a California statute prohibiting the advertisement of the retail price of prescription drugs and prohibiting representation that price is a discount price, is summarily affirmed.

735. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

Minnesota laws imposing personal property taxes cannot under the supremacy clause be constitutionally applied to an Indian's mobile home located on the reservation.

736. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

Missouri's abortion law that required, inter alia, spousal and parental consent before an abortion could be performed in appropriate

circumstances, and that proscribed the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy, was an unconstitutional infringement upon the liberty of pregnant women who wished to terminate their pregnancies.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Powell.
Justice dissenting: Stevens (on parental consent).
Justices dissenting: White, Rehnquist, Burger, C.J..

737. *Gerstein v. Coe*, 428 U.S. 901 (1976).

An appellate court decision invalidating the parental and spousal consent requirements of Florida's abortion statute is summarily affirmed on the basis of *Planned Parenthood v. Danforth*.

738. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

North Carolina statute making death penalty mandatory upon conviction of first-degree murder violates Eighth Amendment, since determination to impose death must be individualized.

Justices concurring: Stewart, Powell, Stevens.
Justices concurring specially: Brennan, Marshall.
Justices dissenting: Rehnquist, Blackmun, White, Burger, C.J..

739. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

Louisiana statute making death penalty mandatory upon conviction of first-degree murder violates the Eighth Amendment.

740. *Williams v. Oklahoma*, 428 U.S. 907 (1976).

Oklahoma's death penalty statute violates the Eighth Amendment for the same reasons that North Carolina's and Louisiana's were held invalid in *Woodson* and *Roberts*, supra.

741. *Sendak v. Arnold*, 429 U.S. 968 (1976).

Indiana statute requiring all abortions, including those during first trimester of pregnancy, to be performed in hospital or licensed health facility was held unconstitutional by district court and decision is summarily affirmed.

Justices concurring: Brennan, Stewart, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: White, Rehnquist, Burger, C.J..

742. *Exon v. McCarthy*, 429 U.S. 972 (1976).

District court holding that Nebraska statutory scheme that fails to provide method by which independent candidate for President may appear on ballot other than through certification by political party violates First and Fourteenth Amendments is summarily affirmed.

743. *Craig v. Boren*, 429 U.S. 190 (1976).

Oklahoma statutory prohibition of sale of "nonintoxicating" 3.2% beer to males under 21 and to females under 18 constituted an imper-

missible gender-based classification that denied to males 18-20 equal protection.

Justices concurring: Brennan, White, Marshall, Blackmun, Powell, Stevens.
Justice concurring specially: Stewart.
Justices dissenting: Burger, C.J., Rehnquist.

744. *Lefkowitz v. C.D.R. Enterprises*, 429 U.S. 1031 (1977).

District court decision holding invalid as a discrimination against aliens a New York law granting public works employment preference to citizens who have resided in State for at least 12 months is summarily affirmed.

745. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

New York transfer tax on securities transactions structured so that transactions involving an out-of-state sale are taxed more heavily than most transactions involving a sale within the State discriminates against interstate commerce in violation of the commerce clause.

746. *Guste v. Weeks*, 429 U.S. 1056 (1977).

A district court decision voiding a Louisiana statute that effectively forbade abortions, that prohibited publicizing availability of abortion services, that required spousal or parental consent, and that forbade state employees to recommend abortions, is summarily affirmed.

747. *Bowen v. Women's Services*, 429 U.S. 1067 (1977).

District court decision invalidating Indiana parental consent requirement for abortion upon minor during first 12 weeks of pregnancy is summarily affirmed.

748. *Wooley v. Maynard*, 430 U.S. 705 (1977).

New Hampshire requirement that state license plates bear motto "Live Free or Die" and making it a misdemeanor to obscure the motto coerces dissemination of ideological message by person on his own property and violates First Amendment.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Powell, Stevens.
Justices dissenting: Rehnquist, Blackmun.

749. *Trimble v. Gordon*, 430 U.S. 762 (1977).

Illinois law allowing illegitimate children to inherit by intestate succession only from their mothers while legitimate children may take from both parents denies illegitimates the equal protection of the laws.

Justices concurring: Powell, Brennan, White, Marshall, Stevens.
Justices dissenting: Burger, C.J., Stewart, Blackmun, Rehnquist.

750. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

Retroactive repeal of a New Jersey statutory covenant under which bonds had been sold by the Port Authority, the covenant having limited the authority's ability to subsidize rail passenger transportation from revenues and reserves pledged as security for the bonds, impaired the obligations of the contract and violated Article I, § 10, cl. 1

Justices concurring: Blackmun, Rehnquist, Stevens, Burger, C.J..
Justices dissenting: Brennan, White, Marshall.

751. *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).

Louisiana statutory qualification of ownership of assessed property in jurisdiction in which airport is located as condition of appointment to airport commission is invalid.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Blackmun, Powell, Stevens.
Justice dissenting: Rehnquist.

752. *Roberts v. Louisiana*, 431 U.S. 633 (1977).

Louisiana statute imposing mandatory death sentence upon one convicted of first-degree murder of police officer engaged in performance of his duties violates Eighth Amendment.

Justices concurring: Stewart, Powell, Stevens.
Justices concurring specially: Brennan, Marshall.
Justices dissenting: Burger, C.J., Blackmun, White, Rehnquist.

753. *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

New York law making it a crime (1) for any person to sell or distribute contraceptives to minors under 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over, and (3) for anyone to advertise or display contraceptives violates First and Fourteenth Amendments.

Justices concurring: Brennan, Stewart, Marshall, Blackmun.
Justices concurring specially: White, Powell, Stevens.
Justices dissenting: Burger, C.J., Rehnquist.

754. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

New York statute automatically removing from office and disqualifying from any office for next five years any political party officer who refuses to testify or to waive immunity against subsequent criminal prosecution when subpoenaed before an authorized tribunal violates Fifth Amendment self-incrimination clause.

Justices concurring: Burger, C.J., Stewart, White, Blackmun, Powell.
Justices concurring specially: Brennan, Marshall.
Justice dissenting: Stevens.

755. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

New York statutory provision barring from access to state financial assistance for higher education aliens who have not either applied for citizenship or affirmed the intent to apply when they qualify violates equal protection clause.

Justices concurring: Blackmun, Brennan, White, Marshall, Stevens.
Justices dissenting: Burger, C.J., Powell, Stewart, Rehnquist.

756. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

Washington statute requiring that all apples sold or shipped into State in closed containers be identified by no grade on containers other than applicable federal grade or a designation that apples are ungraded violates commerce clause by burdening and discriminating against interstate sale of Washington apples.

757. *Wolman v. Walter*, 433 U.S. 229 (1977) (subsequently overruled).

Ohio's provision of loan of instructional material and equipment to nonpublic religious schools and transportation and services for field trips for nonpublic school pupils violates First Amendment religion clauses.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Stevens.
Justices dissenting: Burger, C.J., White, Rehnquist; Powell (as to field trips only).

758. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

Delaware statute authorizing a court of the State to take jurisdiction of a lawsuit by sequestering property of defendant that happens to be located in State violates due process clause because it permits state courts to exercise jurisdiction in the absence of sufficient contacts among defendant, litigation, and State.

759. *Jernigan v. Lendall*, 433 U.S. 901 (1977).

District court decision invalidating Arkansas law that requires independent candidate for office to file for office no later than first Tuesday in April is summarily affirmed.

760. *Coker v. Georgia*, 433 U.S. 584 (1977).

Georgia statute authorizing death penalty as punishment for rape violates Eighth Amendment.

Justices concurring: White, Stewart, Blackmun, Stevens.
Justices concurring specially: Brennan, Marshall, Powell.
Justices dissenting: Burger, C.J., Rehnquist.

761. *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

New York's authorization for reimbursement to nonpublic schools for performance of certain state-mandated services for remainder of

school year to replace reimbursement program declared unconstitutional also violates First Amendment religion clause.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: White, Rehnquist, Burger, C.J..

762. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

A Wisconsin statute that requires court permission to marry for any resident having minor children in his custody and who is under a court order to support and that conditions permission on a showing that the support obligation has been met and that the children are not and are not likely to become public charges, violates equal protection clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Burger, C.J..
Justices concurring specially: Stewart, Powell, Stevens.
Justice dissenting: Rehnquist.

763. *Ballew v. Georgia*, 435 U.S. 223 (1978).

Provisions of Georgia state law directing certain trials in criminal cases to be before five-person juries unconstitutionally impair the right to trial by jury.

764. *McDaniel v. Paty*, 435 U.S. 618 (1978).

Tennessee's statutory qualification for delegates to state constitutional conventions, which incorporates a constitutional ban on ministers or priests serving as members of the legislature, violates the Free Exercise Clause.

765. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

Massachusetts criminal statute that banned banks and business corporations from making expenditures to influence referendum votes on any questions not affecting the property, business, or assets of the corporation violated the First Amendment.

Justices concurring: Powell, Stewart, Blackmun, Stevens, Burger, C.J..
Justices dissenting: White, Brennan, Marshall, Rehnquist.

766. *Landmark Communications v. Virginia*, 435 U.S. 829 (1978).

Virginia statute making it a misdemeanor to divulge information regarding proceedings before a state judicial review commission cannot constitutionally be applied to persons who are not parties before the commission.

767. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

"Alaska Hire" statute mandating that state residents be preferred to nonresidents in employment on oil and gas pipeline work violates Article IV, § 2, the privileges and immunities clause.

768. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

New Jersey law prohibiting importation into State for disposal at landfills of solid or liquid waste violates commerce clause.

Justices concurring: Stewart, Brennan, White, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: Rehnquist, Burger, C.J..

769. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Minnesota's statutory imposition on existing negotiated collective bargaining agreements of different terms respecting pensions impaired the employer's rights under the obligation of contracts clause.

Justices concurring: Stewart, Powell, Rehnquist, Stevens, Burger, C.J..
Justices dissenting: Brennan, White, Marshall.

770. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Ohio statute authorizing imposition of death penalty upon conviction of first-degree murder unconstitutionally restricted consideration of mitigating factors by the sentencing party.

Justices concurring: Burger, C.J., Stewart, Powell, Stevens.
Justices concurring specially: White, Marshall, Blackmun.
Justices dissenting: Rehnquist.

771. *Duren v. Missouri*, 439 U.S. 357 (1979).

Missouri statute, implementing a constitutional provision, which provides for the excusal of any women requesting exemption from jury service, operates to violate the fair cross section requirement of Sixth and Fourteenth Amendments because of the underrepresentation of women jurors that results.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, Burger, C.J..
Justice dissenting: Rehnquist.

772. *Colautti v. Franklin*, 439 U.S. 379 (1979).

Provisions of Pennsylvania abortion law that require the physician to make a determination that the fetus is not viable and if it is viable to exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive are void for vagueness under the due process clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Powell, Stevens.
Justices dissenting: White, Rehnquist, Burger, C.J..

773. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

Illinois law requiring new political parties and independent candidates to obtain signatures of 5% of the number of persons who voted

at the previous election for such office in order to get on the ballot in political subdivisions of the State, insofar as it applies to mandate the obtaining of a greater number and proportion of signatures than is required to get on the ballot for statewide office, lacks a rational basis and violates the equal protection clause of the Fourteenth Amendment.

Justices concurring: Marshall, Brennan, Stewart, White, Powell.
Justices concurring specially: Blackmun, Stevens, Rehnquist, Burger, C.J..

774. *Orr v. Orr*, 440 U.S. 268 (1979).

An Alabama statute that imposes alimony obligations on husbands but not wives violates the equal protection clause of the Fourteenth Amendment.

Justices concurring: Brennan, Stewart, White, Marshall, Blackmun, Stevens.
Justices dissenting (on other grounds): Powell, Rehnquist, Burger, C.J..

775. *Ashcroft v. Freiman*, 440 U.S. 941 (1979).

A federal court decision invalidating under the Fourteenth Amendment's due process clause a Missouri statute requiring doctor to verbally inform any woman seeking abortion that, if live born infant results, woman will lose her parental rights, is summarily affirmed.

776. *Quern v. Hernandez*, 440 U.S. 951 (1979).

District court decision voiding as denial of due process under Fourteenth Amendment Illinois attachment law because it permits attachment prior to filing of complaint and prior to notice to debtor is summarily affirmed.

777. *Burch v. Louisiana*, 441 U.S. 130 (1979).

Statutory implementation of Louisiana constitutional provision permitting conviction for a nonpetty offense by five out of six jurors violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.

778. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

Oklahoma statute prohibiting transportation or shipment for sale outside the State of natural minnows seined or procured from waters within the State violates the commerce clause.

Justices concurring: Brennan, Stewart, White, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: Rehnquist, Burger, C.J..

779. *Caban v. Mohammed*, 441 U.S. 380 (1979).

New York law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent is an impermissible gender distinction violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun.
Justices dissenting: Stewart, Stevens, Rehnquist, Burger, C.J..

780. *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979).

Imposition of California *ad valorem* property tax upon cargo containers which are based, registered, and subjected to property tax in Japan results in multiple taxation of instrumentalities of foreign commerce and violates the commerce clause.

Justices concurring: Blackmun, Brennan, Stewart, White, Marshall, Powell, Stevens, Burger, C.J..
Justice dissenting: Rehnquist.

781. *Beggans v. Public Funds for Public Schools*, 442 U.S. 907 (1979).

Federal court decision invalidating New Jersey statute that allowed taxpayers personal deduction from gross income for each of their dependent children attending nonpublic elementary or secondary schools as a violation of the First Amendment's religion clause is summarily affirmed.

782. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

West Virginia statute that makes it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender violates the First and Fourteenth Amendments.

783. *Bellotti v. Baird*, 443 U.S. 622 (1979).

Massachusetts law requiring parental consent for an abortion for a woman under age 18 and providing for a court order permitting abortion for good cause if parental consent is refused violates the due process clause of the Fourteenth Amendment.

Justices concurring: Powell, Stewart, Rehnquist, Burger, C.J..
Justices concurring specially: Stevens, Brennan, Marshall, Blackmun.
Justice dissenting: White.

784. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

Texas public nuisance statute authorizing state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene is an invalid prior restraint violative of the First and Fourteenth Amendments.

Justices concurring: Brennan, Stewart, Marshall, Blackmun, Stevens.
Justices dissenting (on other grounds): Powell, Burger, C.J..
Justices dissenting: White, Rehnquist.

785. *Vitek v. Jones*, 445 U.S. 480 (1980).

A Nebraska statute that authorizes authorities to summarily transfer a prison inmate from jail to another institution if a physician finds that he suffers from a mental disease or defect and cannot be

given proper treatment in jail violates the liberty guaranteed by the due process clause of the Fourteenth Amendment unless the transfer is accompanied by adequate procedural protections.

Justices concurring: White, Brennan, Marshall, Powell, Stevens.
Justices dissenting (on other grounds): Stewart, Blackmun, Rehnquist, Burger, C.J..

786. *Payton v. New York*, 445 U.S. 573 (1980).

New York statute authorizing police officers to enter a private residence without a warrant and without necessarily exigent circumstances to effectuate a felony arrest violates the Fourth and Fourteenth Amendments.

Justices concurring: Stevens, Brennan, Stewart, Marshall, Blackmun, Powell.
Justices dissenting: White, Rehnquist, Burger, C.J..

787. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

Missouri workers' compensation law denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on her earnings, but granting a widow death benefits regardless of her dependency, is a gender discrimination violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Burger, C.J..
Justice dissenting: Rehnquist.

788. *Lewis v. BT Investment Managers*, 447 U.S. 27 (1980).

Florida statute prohibiting out-of-state banks, bank holding companies, and trust companies from owning or controlling a business within the State that sells investment advisory services violates the commerce clause.

789. *Carey v. Brown*, 447 U.S. 455 (1980).

Illinois statute that prohibits picketing of residences or dwellings, but exempts peaceful picketing of such buildings that are places of employment in which there is a labor dispute, violates the equal protection clause of the Fourteenth Amendment.

Justices concurring: Brennan, Stewart, White, Marshall, Powell, Stevens.
Justices dissenting: Rehnquist, Blackmun, Burger, C.J..

790. *Beck v. Alabama*, 447 U.S. 625 (1980).

Alabama's capital punishment statute, which forbids giving the jury the option of convicting a defendant of a lesser included offense but requires it to convict on the capital offense or acquit, violates the Eighth and Fourteenth Amendments.

791. *Minnesota v. Planned Parenthood*, 448 U.S. 901 (1980).

A federal court decision holding that a Minnesota statute authorizing grants for pre-pregnancy family planning to hospitals and health maintenance organizations but prohibiting such grants to other nonprofit organizations if they perform abortions violates equal protection clause is summarily affirmed.

792. *Stone v. Graham*, 449 U.S. 39 (1980).

Kentucky statute requiring copy of Ten Commandments, purchased with private contributions, to be posted on the wall of each public classroom in the State violates the establishment clause of the First Amendment.

Justices concurring: Brennan, White, Marshall, Powell, Stevens.
Justices dissenting: Burger, C.J., Blackmun, Stewart, Rehnquist.

793. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).

Florida's statutory authorization for county to retain as its own interest accruing on interpleader fund deposited in registry of county court was a taking violating the Fifth and Fourteenth Amendments.

794. *Weaver v. Graham*, 450 U.S. 24 (1981).

Florida statute repealing an earlier law and reducing the amount of "gain time" for good conduct and obedience to prison rules deducted from a convicted prisoner's sentence is an invalid ex post facto law as applied to one whose crime was committed prior to the statute's enactment.

795. *Jefferson County v. United States*, 450 U.S. 901 (1981).

Court of Appeals decision holding invalid a Colorado statute that imposed use tax on government-owned, contractor operated facility as constituting *ad valorem* general property tax on federal government property and thus contravening the supremacy clause is summarily affirmed.

796. *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

Wisconsin law mandating national convention delegates chosen at party's state convention to vote at the national convention for the candidate prevailing in the State's preference primary, in which voters may participate without regard to party affiliation, violates the First Amendment right of association of the national party, whose rules preclude seating of delegates who were not selected in accordance with national party rules, including the limiting of the selection process to those voters affiliated with the party.

Justices concurring: Stewart, Brennan, White, Marshall, Stevens, Burger, C.J..
Justices dissenting: Powell, Blackmun, Rehnquist.

797. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

Louisiana statute giving husband unilateral right to dispose of jointly-owned community property without wife's consent is an impermissible sex classification and violates equal protection clause.

798. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

Iowa statute barring 65-foot double-trailer trucks on State's highways, while all neighboring States permit them, violates the commerce clause.

Justices concurring: Powell, White, Blackmun, Stevens.
Justices concurring specially: Brennan, Marshall.
Justices dissenting: Rehnquist, Stewart, Burger, C.J..

799. *Maryland v. Louisiana*, 451 U.S. 725 (1981).

Louisiana's ″first-use tax″ statute, which, because of exceptions and credits, imposes a tax only on natural gas moving out-of-state, impermissibly discriminates against interstate commerce, and another provision that required pipeline companies to allocate the cost of tax to ultimate consumer is preempted by federal law.

800. *Little v. Streater*, 452 U.S. 1 (1981).

Connecticut statute requiring person in paternity action who requests blood grouping tests to bear cost of tests denies due process in violation of Fourteenth Amendment to an indigent against whom State has required institution of paternity action.

801. *Campbell v. John Donnelly & Sons*, 453 U.S. 916 (1981).

Court of Appeals decision holding violative of First Amendment a Maine statute prohibiting roadside billboards, except for signs announcing place and time of religious or civic events, election campaign signs, and signs erected by historic and cultural institutions, is summarily affirmed.

802. *Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp.*, 454 U.S. 884 (1981).

Court of Appeals decision holding violative of the commerce clause a Louisiana milk industry regulatory statute, which required all dairy product processors, including out-of-state processors, who sell dairy products to retailer or distributor for resale in State to pay assessment per unit of milk for use in administration and enforcement of statute, is summarily affirmed.

803. *Brockett v. Spokane Arcades*, 454 U.S. 1022 (1981).

Court of Appeals decision holding violative of First Amendment a Washington statute which authorized courts to issue temporary and permanent injunctions, without providing prompt trial on merits, against any business that regularly sells or exhibits "lewd matter" is summarily affirmed.

804. *Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982).

Court of Appeals decision holding violative of the First Amendment a Florida statute that restricts size of contributions to political committees organized to support or oppose referenda is summarily affirmed.

805. *Treen v. Karen B.*, 455 U.S. 913 (1982).

Court of Appeals decision holding violative of First Amendment establishment clause Louisiana statute authorizing school boards to permit students to participate in one-minute prayer period at start of school day, upon parental consent, is summarily affirmed.

806. *Santosky v. Kramer*, 455 U.S. 745 (1982).

Provision of New York law authorizing termination of parental rights upon proof by only a fair preponderance of the evidence violates the due process clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens.
Justices dissenting: Rehnquist, White, O'Connor, Burger, C.J..

807. *California State Bd. of Equalization v. United States*, 456 U.S. 901 (1982).

A court of appeals decision invalidating as an impermissible infringement of the immunity of the United States from state taxation a California sales tax based on gross rentals paid by United States to lessors of data processing and other equipment, which permitted the lessor to maximize profit only by separately stating and collecting a tax from the lessee, is summarily affirmed.

808. *Brown v. Hartlage*, 456 U.S. 45 (1982).

Kentucky statute prohibiting candidate from offering material benefits to voters in consideration for their votes violates First Amendment speech clause as applied to a candidate's promise to lower salary of his office if elected.

809. *Mills v. Habluetzel*, 456 U.S. 91 (1982).

Texas statute imposing one-year period from date of birth to bring action to establish paternity of illegitimate child, paternity being necessary for child to obtain support from father at any time during his minority, denies equal protection of the laws.

810. *Larson v. Valente*, 456 U.S. 228 (1982).

Provision of Minnesota charitable solicitations law exempting from registration and reporting only those religious organizations that receive more than half of their total contributions from members or affiliated organizations is an impermissible denominational preference and violates First Amendment establishment clause.

Justices concurring: Brennan, Marshall, Blackmun, Powell, Stevens.

Justices dissenting: White, Rehnquist (on merits); O'Connor, Burger, C.J. (on standing).

811. *Greene v. Lindsey*, 456 U.S. 444 (1982).

Kentucky statute authorizing service of process in forcible entry and detainer action by posting summons in a conspicuous place if no one could be found on premises denies due process on showing that notices are often removed before defendants find them.

Justices concurring: Brennan, White, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: O'Connor, Rehnquist, Burger, C.J..

812. *Zobel v. Williams*, 457 U.S. 55 (1982).

Alaska law providing a dividend distribution to all State's adult residents from earnings on oil and mineral development in State denies equal protection of the laws by determining amount of dividend for each person by the length of residency in State.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun, Powell, Stevens.
Justice concurring specially: O'Connor.
Justice dissenting: Rehnquist.

813. *Plyler v. Doe*, 457 U.S. 202 (1982).

Texas statute withholding state funds from local school districts for the education of any children not legally admitted into United States and authorizing boards to deny enrollment to such children denies the equal protection of the laws.

Justices concurring: Brennan, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: Burger, C.J., White, Rehnquist, O'Connor.

814. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

Massachusetts statute requiring, under all circumstances, exclusion of press and public during testimony of minor victim of a sex offense violates the First Amendment.

Justices concurring: Brennan, White, Marshall, Blackmun, Powell.
Justice concurring specially: O'Connor.
Justices dissenting: Burger, C.J., Rehnquist, Stevens.

815. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

Illinois take-over statute which extensively regulates tender offerors and imposes registration and reporting requirements, because it directly regulates and prevents interstate tender offers and because the burdens on interstate commerce are excessive compared with local interests served, violates the commerce clause.

Justices concurring: White, Blackmun, Powell, Stevens, O'Connor, Burger, C.J..
Justices dissenting: Marshall, Brennan, Rehnquist (all on mootness grounds).

816. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

New York statute requiring landlords to permit installation of cable television wiring on their property and limiting fee charged to that determined to be reasonable by a commission (which set a one-time $1 fee) constituted a taking of property in violation of the Fifth and Fourteenth Amendments.

817. *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982).

Washington statutory provision, enacted by initiative vote of the electorate, barring school boards from busing students for racially integrative purposes denies the equal protection of the laws.

Justices concurring: Blackmun, Brennan, Marshall, White, Stevens.
Justices dissenting: Powell, Rehnquist, O'Connor, Burger, C.J..

818. *Enmund v. Florida*, 458 U.S. 782 (1982).

Florida's felony-murder statute, authorizing the death penalty solely for participation in a robbery in which another robber kills someone, violates the Eighth Amendment.

Justices concurring: White, Brennan, Marshall, Blackmun, Stevens.
Justices dissenting: O'Connor, Powell, Rehnquist, Burger, C.J..

819. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

A Nebraska state statute requiring a permit before anyone withdraws ground water from any well located in the State and transports it across state line and providing for denial of permit unless the State to which the water will be transported grants reciprocal rights to withdraw and transport water into Nebraska violates the commerce clause.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun, Powell, Burger, C.J..
Justices dissenting: Rehnquist, O'Connor.

820. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

Ohio statute requiring candidates to disclose the names and addresses of campaign contributors and the recipients of campaign expenditures is invalid, under the First Amendment, as applied to a minor political party whose members and supporters may be subjected to harassment or reprisals.

Justices concurring: Marshall, Brennan, White, Powell, Burger, C.J..
Justice concurring specially: Blackmun.
Justices concurring in part and dissenting in part: O'Connor, Rehnquist, Stevens.

821. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

Massachusetts statute permitting any church to block issuance of a liquor license to any establishment to be located within 500 feet of the church violates the Establishment Clause by delegating governmental decisionmaking to a church.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun, Powell, Stevens.
Justice dissenting: Rehnquist.

822. *King v. Sanchez*, 459 U.S. 801 (1982).

Federal district court's decision invalidating New Mexico legislative reapportionment as violating the one person, one vote requirement of the Equal Protection Clause because the "votes cast" formula resulted in substantial population variances among districts, is summarily affirmed.

823. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

Minnesota ink and paper use tax violates the First Amendment by providing "differential treatment" for the press.

Justices concurring: O'Connor, Brennan, Marshall, Powell, Stevens, Burger, C.J..
Justices concurring specially: White, Blackmun.
Justice dissenting: Rehnquist.

824. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Ohio statute requiring independent candidates for President and Vice-President to file nominating petitions by March 20 in order to qualify for the November ballot is unconstitutional as substantially burdening the associational rights of the candidates and their supporters.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, Burger, C.J..
Justices dissenting: Rehnquist, White, Powell, O'Connor.

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

California statute requiring that a person detained in a valid *Terry* stop provide "credible and reliable" identification is unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: White, Rehnquist.

826. *Pickett v. Brown*, 462 U.S. 1 (1983).

Tennessee's two-year statute of limitations for paternity and child support actions violates the equal protection rights of illegitimates.

827. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

Missouri statute requiring that all abortions performed after the first trimester of pregnancy be performed in a hospital unreasonably infringes upon the right of a woman to have an abortion.

Justices concurring (on this issue only): Powell, Brennan, Marshall, Blackmun, Stevens, Burger, C.J..

Justices dissenting: O'Connor, White, Rehnquist.

828. *Karcher v. Daggett*, 462 U.S. 725 (1983).

New Jersey congressional districting statute creating districts in which the deviation between largest and smallest districts was 0.7%, or 3,674 persons, violates Art. I, § 2's "equal representation" requirement as not resulting from a good-faith effort to achieve population equality.

Justices concurring: Brennan, Marshall, Blackmun, Stevens, O'Connor.
Justices dissenting: White, Powell, Rehnquist, Burger, C.J..

829. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

Indiana statute providing for constructive notice to mortgagee of tax sale of real property violates the Due Process Clause of the Fourteenth Amendment; instead, personal service or notice by mail is required.

Justices concurring: Marshall, Brennan, White, Blackmun, Stevens, Burger, C.J..
Justices dissenting: O'Connor, Powell, Rehnquist.

830. *Healy v. United States Brewers Ass'n*, 464 U.S. 909 (1983).

Appeals court decision invalidating as an undue burden on interstate commerce the beer price "affirmation" provisions of Connecticut's liquor control laws, which restrict out-of-state sales to prices set for in-state sales, is summarily affirmed.

831. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984).

New York corporate franchise tax unconstitutionally discriminates against interstate commerce by allowing an offsetting credit for receipts from products shipped from an in-state place of business.

832. *Wallace v. Jaffree*, 466 U.S. 924 (1984).

Appeals court decision holding invalid under the Establishment Clause an Alabama statute authorizing the recitation in public schools of a government-composed prayer is summarily affirmed.

833. *Bernal v. Fainter*, 467 U.S. 216 (1984).

Texas requirement that a notary public be a United States citizen furthers no compelling state interest and denies equal protection of the laws to resident aliens.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, O'Connor, Burger, C.J..
Justice dissenting: Rehnquist.

834. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).

West Virginia gross receipts tax on businesses selling tangible property at wholesale unconstitutionally discriminates against interstate commerce due to exemption granted local manufacturers.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Burger, C.J..
Justice dissenting: Rehnquist.

835. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Maryland prohibition on charitable organizations paying more than 25% of solicited funds for expenses of fundraising violates the Fourteenth Amendment by creating an unnecessary risk of chilling protected First Amendment activity.

Justices concurring: Blackmun, Brennan, White, Marshall, Stevens.
Justices dissenting: Rehnquist, Powell, O'Connor, Burger, C.J..

836. *Brown v. Brandon*, 467 U.S. 1223 (1984).

Federal district court decision that Ohio congressional districting plan is invalid because population variances were shown to be not unavoidable and were not justified by legitimate state interest is summarily affirmed.

837. *Bacchus Imports v. Dias*, 468 U.S. 263 (1984).

Hawaii excise tax on wholesale liquor sales, exempting sales of specified local products, violates Commerce Clause by discriminating in favor of local commerce.

Justices concurring: White, Marshall, Blackmun, Powell, Burger, C.J..
Justices dissenting: Stevens, Rehnquist, O'Connor.

838. *Deukmejian v. National Meat Ass'n*, 469 U.S. 1100 (1985).

Appeals court holding that California tax on sales by out-of-state beef processors discriminates against interstate commerce in violation of the Commerce Clause, there being no corresponding and comparable tax on in-state processors, is summarily affirmed.

839. *Westhafer v. Worrell Newspapers*, 469 U.S. 1200 (1985).

Appeals court decision holding invalid under the First Amendment an Indiana statute punishing as contempt the publication of the name of an individual against whom a sealed indictment or information has been filed is summarily affirmed.

840. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

Alabama's domestic preference tax, imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies, violates the Equal Protection Clause.

Justices concurring: Powell, White, Blackmun, Stevens, Burger, C.J..
Justices dissenting: O'Connor, Brennan, Marshall, Rehnquist.

841. *Board of Educ. v. National Gay Task Force*, 470 U.S. 903 (1985).

Court of appeals decision holding unconstitutionally overbroad in violation of the First and Fourteenth Amendments an Oklahoma stat-

ute prohibiting advocating, encouraging, or promoting homosexual conduct is affirmed by equally divided vote.

842. *Hunter v. Underwood*, 471 U.S. 222 (1985).

Provision of Alabama Constitution requiring disenfranchisement for crimes involving moral turpitude, adopted in 1901 for the purpose of racial discrimination, violates the Equal Protection Clause.

843. *Williams v. Vermont*, 472 U.S. 14 (1985).

Vermont use tax discriminating between residents and nonresidents in application of a credit for automobile sales taxes paid to another state violates the Equal Protection Clause.

Justices concurring: White, Brennan, Marshall, Stevens, Burger, C.J..
Justices dissenting: Blackmun, Rehnquist, O'Connor.

844. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

Alabama statute authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer" violates the Establishment Clause, the record indicating that the sole legislative purpose in amending the statute to add "or voluntary prayer" was to return voluntary prayer to the public schools.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, Powell.
Justice concurring specially: O'Connor.
Justices dissenting: White, Rehnquist, Burger, C.J..

845. *Jensen v. Quaring*, 472 U.S. 478 (1985).

Appeals court decision holding invalid Nebraska's driver's licensing requirement that applicant be photographed, and that photo be affixed to license, as burdening the free exercise of sincerely held religious beliefs against submitting to being photographed, is affirmed by equally divided vote.

846. *Brockett v. Spokane Arcades*, 472 U.S. 491 (1985).

Washington "moral nuisance" statute is invalid under the First Amendment to the extent that it proscribes exhibition of films or sale of publications inciting "lust," defined as referring to normal sexual desires.

Justices concurring: White, Blackmun, Rehnquist, Stevens, O'Connor, Burger, C.J..
Justices dissenting on other grounds: Brennan, Marshall.

847. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

New Mexico property tax exemption for Vietnam War veterans who became residents before May 8, 1976, violates the Equal Protection Clause as not meeting the rational basis test.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun.
Justices dissenting: Stevens, Rehnquist, O'Connor.

848. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

Connecticut statute requiring employers to honor the Sabbath day of the employee's choice violates the Establishment Clause.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor.
Justice dissenting: Rehnquist.

849. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

Pennsylvania statute incorporating the common law rule that defamatory statements are presumptively false violates the First Amendment as applied to a libel action brought by a private figure against a media defendant; instead, the plaintiff must bear the burden of establishing falsity.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell.
Justices dissenting: Stevens, White, Rehnquist, Burger, C.J..

850. *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

New York affirmation law, having the practical effect of controlling liquor prices in other states, violates the Commerce Clause.

Justices concurring: Marshall, Powell, O'Connor, Burger, C.J..
Justice concurring specially: Blackmun.
Justices dissenting: Stevens, White, Rehnquist.

851. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (subsequently overruled in part).

Pennsylvania statute prescribing a variety of requirements for performance of an abortion, including informed consent, reporting of various information concerning the mother's history and condition, and standard-of-care and second-physician requirements after viability, infringes a woman's *Roe v. Wade* right to have an abortion.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens.
Justices dissenting: Burger, C.J., White, Rehnquist, O'Connor.

852. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

New York Civil Service Law employment preference for New York residents who are honorably discharged veterans and were New York residents when they entered military service violates the Equal Protection Clause.

Justices concurring: Brennan, Marshall, Blackmun, Powell.
Justices concurring specially: White, Burger, C.J..
Justices dissenting: Stevens, O'Connor, Rehnquist.

853. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

Connecticut statute imposing a "closed primary" under which persons not registered with a political party may not vote in its primaries violates the First and Fourteenth Amendments by preventing

political parties from entering into political association with individuals of their own choosing.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell.
Justices dissenting: Stevens, Scalia, O'Connor, Rehnquist, C.J..

854. *Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986).

Appeals court decision invalidating Arizona statute prohibiting grant of public funds to any organization performing abortion-related services is summarily affirmed.

855. *Wilkinson v. Jones*, 480 U.S. 926 (1987).

Appeals court decision holding unconstitutionally vague and overbroad Utah statute barring cable television systems from showing "indecent material" is summarily affirmed.

856. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state violates the First and Fourteenth Amendments as a content-based regulation of the press.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, O'Connor.
Justice concurring specially: Stevens.
Justices dissenting: Scalia, Rehnquist, C.J..

857. *Miller v. Florida*, 482 U.S. 423 (1987).

Florida's revised sentencing guidelines law, under which the presumptive sentence for certain offenses was raised, contravenes the ex post facto clause of Article I as applied to someone who committed those offenses before the revision.

858. *Booth v. Maryland*, 482 U.S. 496 (1987).

Maryland statute requiring preparation of a "victim impact statement" describing the effect of a crime on a victim and his family violates the Eighth Amendment to the extent that it requires introduction of the statement at the sentencing phase of a capital murder trial. *Booth* was overruled in *Payne v. Tennessee*, 501 U.S. 808 (1991).

Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens.
Justices dissenting: White, O'Connor, Scalia, Rehnquist, C.J..

859. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools is an invalid establishment of religion in violation of the First Amendment.

Justices concurring: Brennan, Marshall, Powell, Stevens, O'Connor.
Justice concurring specially: White.
Justices dissenting: Scalia, Rehnquist, C.J..

860. *Sumner v. Shuman*, 483 U.S. 66 (1987).

Nevada statute under which a prison inmate convicted of murder while serving a life sentence without possibility of parole is automatically sentenced to death is invalid under the Eighth Amendment as preventing the sentencing authority from considering as mitigating factors aspects of a defendant's character or record.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens, O'Connor.

Justices dissenting: White, Scalia, Rehnquist, C.J..

861. *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987).

Washington manufacturing tax, applicable to products manufactured in-state and sold out-of-state, but containing an exemption for products manufactured and sold in-state, discriminates against interstate commerce in violation of the Commerce Clause.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun, O'Connor.

Justices dissenting: Scalia, Rehnquist, C.J..

862. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

Pennsylvania statutes imposing lump-sum annual taxes on operation of trucks on state's roads violate the Commerce Clause as discriminating against interstate commerce.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun.

Justices dissenting: O'Connor, Powell, Rehnquist, C.J., Scalia.

863. *Hartigan v. Zbaraz*, 484 U.S. 171 (1987).

Federal appeals court ruling holding unconstitutional a provision of the Illinois Parental Notice Abortion Act requiring that minors wait 24 hours after informing parents before having an abortion is affirmed by equally divided vote.

864. *City of Manassas v. United States*, 485 U.S. 1017 (1988).

Federal appeals court decision invalidating as discriminatory against the United States a Virginia statute that imposes a personal property tax on property leased from the United States, but not on property leased from the Virginia Port Authority or from local transportation districts, is summarily affirmed.

865. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

Ohio statute granting a tax credit for ethanol fuel if the ethanol was produced in Ohio, or if produced in another state which grants a similar credit to Ohio-produced ethanol fuel, discriminates against interstate commerce in violation of the Commerce Clause.

866. *Maynard v. Cartwright*, 486 U.S. 356 (1988).

Oklahoma statutory aggravating circumstances, permitting imposition of capital punishment upon a jury's finding that a murder was "especially heinous, atrocious, or cruel," are unconstitutionally vague in violation of the Eighth Amendment.

867. *Meyer v. Grant*, 486 U.S. 414 (1988).

Colorado law punishing as felony the payment of persons who circulate petitions for ballot initiative abridges the right to engage in political speech, hence violates First and Fourteenth Amendments.

868. *Clark v. Jeter*, 486 U.S. 456 (1988).

Pennsylvania 6-year statute of limitations for paternity actions violates the Equal Protection Clause as insufficiently justified under heightened scrutiny review.

869. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

Kentucky Supreme Court's rule containing categorical prohibition of attorney direct mail advertising targeted at persons known to face particular legal problems violates First and Fourteenth Amendments.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens, Kennedy.
Justices dissenting: O'Connor, Scalia, Rehnquist, C.J..

870. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

Ohio statute tolling its 4-year limitations period for breach of contract and fraud actions brought against out-of-state corporations that do not appoint an agent for service of process within the state--and thereby subject themselves to the general jurisdiction of Ohio courts--violates the Commerce Clause.

Justices concurring:: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, O'Connor.
Justice concurring specially: Scalia.
Justice dissenting: Rehnquist, C.J..

871. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).

Virginia Supreme Court rule imposing residency requirement for admission to the bar on motion, without taking the bar exam, by persons licensed to practice law in other jurisdictions, violates the Privileges and Immunities Clause of Article IV, § 2.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, O'Connor.
Justices dissenting: Rehnquist, C.J., Scalia.

872. *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988).

Three different aspects of North Carolina's Charitable Solicitations Act unconstitutionally infringe freedom of speech. These aspects

are: limitations on reasonable fees that professional fundraisers may charge; a requirement that professional fundraisers disclose to potential donors the percentage of donated funds previously used for charity; and a requirement that professional fundraisers be licensed.

Justices concurring: Brennan, White, Marshall, Blackmun, Scalia, Kennedy.
Justice concurring in part and dissenting in part: Stevens.
Justices dissenting: Rehnquist, C.J., O'Connor.

873. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

Oklahoma statutory scheme, setting no minimum age for capital punishment, and separately providing that juveniles may be tried as adults, violates Eighth Amendment by permitting capital punishment to be imposed for crimes committed before age 16.

Justices concurring: Stevens, Brennan, Marshall, Blackmun.
Justice concurring specially: O'Connor.
Justices dissenting: Scalia, White, Rehnquist, C.J..

874. *Coy v. Iowa*, 487 U.S. 1012 (1988).

Iowa procedure, authorized by statute, placing a one-way screen between defendant and complaining child witnesses in sex abuse cases, thereby sparing witnesses from viewing defendant, violates the Confrontation Clause right to face-to-face confrontation with one's accusers.

Justices concurring: Scalia, Brennan, White, Marshall, Stevens, O'Connor.
Justices dissenting: Blackmun, Rehnquist, C.J..

875. *Allegheny Pittsburgh Coal Co. v. Webster County Comm'n*, 488 U.S. 336 (1989).

West Virginia county's tax assessments denied equal protection to property owners whose assessments, based on recent purchase price, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals.

876. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

A Texas sales tax exemption for publications published or distributed by a religious faith and consisting of teachings of that faith or writings sacred to that faith violates the Establishment Clause of the First Amendment.

Justices concurring: Brennan, Marshall, Stevens.
Justices concurring specially: White, Blackmun, O'Connor.
Justices dissenting: Scalia, Kennedy, Rehnquist, C.J..

877. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989).

Provisions of California Elections Code forbidding the official governing bodies of political parties from endorsing or opposing can-

didates in primary elections, and imposing other requirements on the organization and composition of the governing bodies, are invalid under the First Amendment. The ban on endorsements violates free speech and associational rights; the organizational restrictions violate associational rights.

878. *Barnard v. Thorstenn*, 489 U.S. 546 (1989).

Virgin Islands' rule requiring one year's residency prior to admission to the bar violates the Privileges and Immunities Clause of Art. IV, § 2. Justifications for the rule do not constitute "substantial" reasons for discriminating against nonresidents, nor does the discrimination bear a "substantial relation" to legitimate objectives.

Justices concurring: Kennedy, Brennan, Marshall, Blackmun, Stevens, Scalia.
Justices dissenting: Rehnquist, C.J., White, O'Connor.

879. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

Michigan's income tax law, by providing exemption for retirement benefits of state employees but not for retirement benefits of Federal employees, discriminates against federal employees in violation of 4 U.S.C. § 111 and in violation of the constitutional doctrine of intergovernmental tax immunity.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, O'Connor, Scalia, Rehnquist, C.J..
Justice dissenting: Stevens.

880. *Quinn v. Millsap*, 491 U.S. 95 (1989).

A provision of the Missouri Constitution, interpreted by the Missouri Supreme Court as requiring property ownership as a qualification for appointment to a "board of freeholders" charged with making recommendations for reorganization of St. Louis city and county governments, violates the Equal Protection Clause.

881. *Healy v. Beer Institute*, 491 U.S. 324 (1989).

Connecticut's beer price affirmation law, requiring out-of-state shippers to affirm that prices charged in-state wholesalers are no higher than prices charged contemporaneously in three bordering states, violates the Commerce Clause.

Justices concurring: Blackmun, Brennan, White, Marshall, Kennedy.
Justice concurring specially: Scalia.
Justices dissenting: Rehnquist, C.J., Stevens, O'Connor.

882. *Texas v. Johnson*, 491 U.S. 397 (1989).

Texas' flag desecration statute, prohibiting any physical mistreatment of the American flag that the actor knows would seriously offend other persons, is inconsistent with the First Amendment as applied to an individual who burned an American flag as part of a political protest.

Justices concurring: Brennan, Marshall, Blackmun, Scalia, Kennedy.
Justices dissenting: Rehnquist, C.J., White, O'Connor, Stevens.

883. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

A Florida statute making it unlawful to print the name of a sexual assault victim is invalid under the First Amendment as applied to uphold an award of damages against a newspaper for publishing a sexual assault victim's name when the information was truthful, was lawfully obtained, and was otherwise publicly available as a result of a botched press release from the sheriff's department.

Justices concurring: Marshall, Brennan, Blackmun, Stevens, Kennedy.
Justice concurring specially: Scalia.
Justices dissenting: White, O'Connor, Rehnquist, C.J..

884. *McKoy v. North Carolina*, 494 U.S. 433 (1990).

North Carolina's capital sentencing statute, interpreted to prevent a jury from considering any mitigating factor that the jury does not unanimously find, violates the Eighth Amendment. Instead, each juror must be allowed to consider and give effect to what he or she believes to be established mitigating evidence.

Justices concurring: Marshall, Brennan, White, Blackmun, Stevens.
Justice concurring specially: Kennedy.
Justices dissenting: Scalia, O'Connor, Rehnquist, C.J..

885. *Butterworth v. Smith*, 494 U.S. 624 (1990).

A Florida statute prohibiting the disclosure of grand jury testimony violates the First Amendment insofar as it prohibits a grand jury witness from disclosing, after the term of the grand jury has ended, information covered by his own testimony.

886. *Peel v. Illinois Attorney Disciplinary Comm'n*, 496 U.S. 91 (1990).

An Illinois rule of professional responsibility violates the First Amendment by completely prohibiting an attorney from holding himself out as a civil trial specialist certified by the National Board of Trial Advocacy.

Justices concurring: Stevens, Brennan, Blackmun, Kennedy.
Justice concurring specially: Marshall.
Justices dissenting: White, O'Connor, Scalia, Rehnquist, C.J..

887. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Minnesota's requirement that a woman under 18 years of age notify both her parents before having an abortion is invalid as a denial of due process because "it does not reasonably further any legitimate state interest." However, an alternative judicial bypass system saves the statute as a whole.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, O'Connor.
Justices dissenting: Kennedy, White, Scalia, Rehnquist, C.J..

888. *Connecticut v. Doehr*, 501 U.S. 1 (1991).

A Connecticut statute authorizing a private party to obtain prejudgment attachment of real estate without prior notice to the owner, and without a showing of extraordinary circumstances, violates the Due Process Clause of the Fourteenth Amendment as applied in conjunction with a civil action for assault and battery.

889. *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105 (1991).

New York State's "Son of Sam" law, under which a criminal's income from works describing his crime is placed in escrow and made available to victims of the crime, violates the First Amendment. The law establishes a financial disincentive to create or publish works with a particular content, and is not narrowly tailored to serve the state's compelling interests in ensuring that criminals do not profit from their crimes, and that crime victims are compensated.

Justices concurring: O'Connor, White, Stevens, Scalia, Souter, Rehnquist, C.J..
Justices concurring specially: Blackmun, Kennedy.

890. *Norman v. Reed*, 502 U.S. 279 (1992).

Two provisions of Illinois' election law unconstitutionally infringe on the right of ballot access guaranteed under the First and Fourteenth Amendments. The first provision, as interpreted by the Illinois Supreme Court, prevented a "new political party" in Cook County from using the name of a party already "established" in the city of Chicago. The second required that new political parties qualify for the ballot by submitting petitions signed by 25,000 voters from each voting district to be represented in a multi-district political subdivision.

Justices concurring: Souter, White, Blackmun, Stevens, O'Connor, Kennedy, Rehnquist, C.J..
Justice dissenting: Scalia.

891. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

An Oklahoma statute requiring that all coal-fired Oklahoma utilities burn a mixture containing at least 10% Oklahoma-mined coal discriminates against interstate commerce in violation of the implied "negative" component of the Commerce Clause.

Justices concurring: White, Blackmun, Stevens, O'Connor, Kennedy, Souter.
Justices dissenting: Rehnquist, C.J., Scalia, Thomas.

892. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

A Louisiana statute allowing an insanity acquittee no longer suffering from mental illness to be confined indefinitely in a mental institution until he is able to demonstrate that he is not dangerous to himself or to others violates due process.

Justices concurring: White, Blackmun, Stevens, O'Connor, Souter.
Justices dissenting: Kennedy, Thomas, Scalia, Rehnquist, C.J..

893. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

Application of the State's use tax to mail order sales by an out-of-state company with neither outlets nor sales representatives in the State places an undue burden on interstate commerce in violation of the "negative" or "dormant" Commerce Clause. A physical presence within the taxing state is necessary in order to meet the "substantial nexus" requirement of the Commerce Clause.

894. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992).

Alabama's fee for in-state disposal of hazardous wastes generated out-of-state is invalid as a direct discrimination against interstate commerce. Alabama failed to establish that the discrimination against interstate commerce is justified by any factor other than economic protectionism, and failed to show that its valid interests (e.g., protection of health, safety, and the environment) can not be served by less discriminatory alternatives. The fee is not supportable by analogy to quarantine laws, since the state permits importation of hazardous wastes if the fee is paid.

895. *Fort Gratiot Sanitary Landfill v. Michigan Nat. Res. Dep't*, 504 U.S. 353 (1992).

Waste import restrictions of Michigan's Solid Waste Management Act violate the Commerce Clause. The restrictions, which prohibit landfills from accepting out-of-county waste unless explicitly authorized by the county's solid waste management plan, directly discriminate against interstate commerce and are not justified as serving any valid health and safety purposes that can not be served adequately by nondiscriminatory alternatives.

896. *Kraft Gen. Foods v. Iowa Dep't of Revenue*, 505 U.S. 71 (1992).

An Iowa statute imposing a business tax on corporations facially discriminates against foreign commerce in violation of the Commerce Clause by allowing corporations to take a deduction for dividends received from domestic, but not foreign, subsidiaries.

897. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

One aspect of the Pennsylvania Abortion Control Act of 1982--a requirement for spousal notification--is invalid as an undue interference with a woman's right to an abortion.

898. *Edenfield v. Fane*, 507 U.S. 761 (1993).

A rule of the Florida Board of Accountancy banning "direct, in-person, uninvited solicitation" of business by certified public account-

ants is inconsistent with the free speech guarantees of the First Amendment.

Justices concurring: Kennedy, White, Blackmun, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J..
Justice dissenting: O'Connor.

899. *Oregon Waste Systems v. Oregon Dep't of Environmental Quality*, 511 U.S. 93 (1994).

Oregon's imposition of a surcharge on in-state disposal of solid waste generated in other states--a tax three times greater than the fee charged for disposal of waste that was generated in Oregon--constitutes an invalid burden on interstate commerce. The tax is facially discriminatory against interstate commerce, is not a valid compensatory tax, and is not justified by any other legitimate state interest.

Justices concurring: Thomas, Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg.
Justices dissenting: Rehnquist, C.J., Blackmun.

900. *Associated Industries v. Lohman*, 511 U.S. 641 (1994).

Missouri's uniform, statewide use tax constitutes an invalid discrimination against interstate commerce in those counties in which the use tax is greater than the sales tax imposed as a local option, even though the overall statewide effect of the use tax places a lighter aggregate tax burden on interstate commerce than on intrastate commerce.

901. *Montana Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

Montana's tax on the possession of illegal drugs, to be "collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment, and violates the prohibition, derived from the Double Jeopardy Clause, against successive punishments for the same offense.

Justices concurring: Stevens, Blackmun, Kennedy, Souter, Ginsburg.
Justices dissenting: Rehnquist, C.J., O'Connor, Scalia, Thomas.

902. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

A Massachusetts milk pricing order, imposing an assessment on all milk sold by dealers to Massachusetts retailers, is an unconstitutional discrimination against interstate commerce because the entire assessment is then distributed to Massachusetts dairy farmers in spite of the fact that about two-thirds of the assessed milk is produced out of state. The discrimination imposed by the pricing order is not justified by a valid factor unrelated to economic protectionism.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg.
Justices concurring specially: Scalia, Thomas.
Justices dissenting: Rehnquist, C.J., Blackmun.

903. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

A provision of the Oregon Constitution, prohibiting judicial review of the amount of punitive damages awarded by a jury unless the court can affirmatively say there is no evidence to support the verdict, is invalid under the Due Process Clause of the Fourteenth Amendment. Judicial review of the amount awarded was one of the few procedural safeguards available at common law, yet Oregon has removed that safeguard without providing any substitute procedure, and with no indication that the danger of arbitrary awards has subsided.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter, Thomas.
Justices dissenting: Ginsburg, Rehnquist, C.J..

904. *Board of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994).

A New York State law creating a special school district for an incorporated village composed exclusively of members of one small religious sect violates the Establishment Clause.

Justices concurring: Souter, Blackmun, Stevens, O'Connor, Ginsburg.
Justice concurring specially: Kennedy.
Justices dissenting: Scalia, Thomas, Rehnquist, C.J..

905. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

Ohio's prohibition on the distribution of anonymous campaign literature abridges the freedom of speech. The law, aimed at speech designed to influence voters in an election, is a limitation on political expression subject to exacting scrutiny. Neither of the interests asserted by Ohio justifies the limitation.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer.
Justice concurring specially: Thomas.
Justices dissenting: Scalia, Rehnquist, C.J..

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

An amendment to the Arkansas Constitution denying ballot access to congressional candidates who have already served three terms in the House of Representatives or two terms in the Senate is invalid as conflicting with the qualifications for office set forth in Article I of the U.S. Constitution, (specifying age, duration of U.S. citizenship, and state inhabitancy requirements). Article I sets the exclusive qualifications for a United States Representative or Senator.

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Thomas, O'Connor, Scalia, Rehnquist, C.J..

907. *Hurley v. Irish-American Gay Group*, 515 U.S. 557 (1995).

Application of Massachusetts' public accommodations law to require the private organizers of a St. Patrick's Day parade to allow participation in the parade by a gay and lesbian group wishing to pro-

claim its members' gay and lesbian identity violates the First Amendment because it compels parade organizers to include in the parade a message they wish to exclude.

908. *Miller v. Johnson*, 515 U.S. 900 (1995).

Georgia's congressional districting plan violates the Equal Protection Clause. The district court's finding that race was the predominant factor in drawing the boundaries of the Eleventh District was not clearly erroneous. The State did not meet its burden under strict scrutiny review to demonstrate that its districting was narrowly tailored to achieve a compelling interest.

Justices concurring: Kennedy, O'Connor, Scalia, Thomas, Rehnquist, C.J..
Justices dissenting: Stevens, Ginsburg, Breyer, Souter.

909. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

North Carolina's intangibles tax on a fraction of the value of corporate stock owned by North Carolina residents inversely proportional to the corporation's exposure to the State's income tax, violates the "dormant" Commerce Clause. The tax facially discriminates against interstate commerce, and is not a "compensatory tax" designed to make interstate commerce bear a burden already borne by intrastate commerce.

910. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages abridges freedom of speech protected by the First Amendment, and is not shielded from constitutional scrutiny by the Twenty-first Amendment. There is not a "reasonable fit" between the blanket prohibition and the State's goal of reducing alcohol consumption.

Justices concurring: Stevens, Scalia (in part), Kennedy (in part), Souter (in part), Thomas (in part), Ginsburg (in part).
Justices concurring specially: Scalia, Thomas, O'Connor, Souter, Breyer, Rehnquist, C.J..

911. *Romer v. Evans*, 517 U.S. 620 (1996).

Amendment 2 to the Colorado Constitution, which prohibits all legislative, executive, or judicial action at any level of state or local government if that action is designed to protect homosexuals, violates the Equal Protection Clause of the Fourteenth Amendment. The amendment, adopted by statewide referendum in 1992, does not bear a rational relationship to a legitimate governmental purpose.

Justices concurring: Kennedy, Stevens, O'Connor, Souter, Ginsburg, Breyer..
Justices dissenting:: Scalia, Thomas, Rehnquist, C.J..

912. *Shaw v. Hunt*, 517 U.S. 899 (1996).

North Carolina's congressional districting law, containing the racially gerrymandered 12th Congressional District as well as another majority-black district, violates the Equal Protection Clause because, under strict scrutiny applicable to racial classifications, creation of District 12 was not narrowly tailored to serve a compelling state interest. Creation of District 12 was not necessary to comply with either section 2 or section 5 of the Voting Rights Act, and the lower court found that the redistricting plan was not actually aimed at ameliorating past discrimination.

Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Stevens, Ginsburg, Souter, Breyer.

913. *Bush v. Vera*, 517 U.S. 952 (1996).

Three congressional districts created by Texas law constitute racial gerrymanders that are unconstitutional under the Equal Protection Clause. The district court correctly held that race predominated over legitimate districting considerations, including incumbency, and consequently strict scrutiny applies. None of the three districts is narrowly tailored to serve a compelling state interest.

Justices concurring: O'Connor, Kennedy, Rehnquist, C.J..
Justices concurring specially: O'Connor, Kennedy, Thomas, Scalia.
Justices dissenting: Stevens, Ginsburg, Breyer, Souter.

914. *United States v. Virginia*, 518 U.S. 515 (1996).

Virginia's exclusion of women from the educational opportunities provided by Virginia Military Institute denies to women the equal protection of the laws. A state must demonstrate "exceedingly persuasive justification" for gender discrimination, and Virginia has failed to do so in this case.

Justices concurring: Ginsburg, Stevens, O'Connor, Kennedy, Souter, Breyer..
Justice concurring specially: Rehnquist, C.J..
Justice dissenting: Scalia.

915. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

Mississippi statutes that condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay for preparation of a trial transcript violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Justices concurring: Ginsburg, Stevens, O'Connor, Souter, Breyer.
Justice concurring specially: Kennedy.
Justice dissenting: Rehnquist, C.J., Thomas, Scalia.

916. *Lynce v. Mathis*, 519 U.S. 433 (1997).

A Florida statute canceling early release credits awarded to prisoners as a result of prison overcrowding violates the Ex Post Facto

Clause, Art. I, § 10, cl. 1, as applied to a prisoner who had already been awarded the credits and released from custody.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J..
Justice concurring specially: Thomas, Scalia.

917. *Chandler v. Miller*, 520 U.S. 305 (1997).

A Georgia statute requiring that candidates for state office certify that they have passed a drug test effects a "search" that is plainly not tied to individualized suspicion, and does not fit within the "closely guarded category of constitutionally permissible suspicionless searches," and hence violates the Fourth Amendment. Georgia has failed to establish existence of a "special need, beyond the normal need for law enforcement," that can justify such a search.

Justices concurring: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer.
Justice dissenting: Rehnquist, C.J..

918. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997).

Maine's property tax law, which contains an exemption for charitable institutions but limits that exemption to institutions serving principally Maine residents, is a form of protectionism that violates the "dormant" Commerce Clause as applied to deny exemption status to a nonprofit corporation that operates a summer camp for children, most of whom are not Maine residents.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Breyer.
Justice dissenting: Scalia, Thomas, Ginsburg, Rehnquist, C.J..

919. *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998).

A New York law that effectively denies only nonresident taxpayers an income tax deduction for alimony paid violates the Privileges and Immunities Clause of Art. IV, § 2. New York did not adequately justify its failure to treat resident and nonresident taxpayers with substantial equality.

Justices concurring: O'Connor, Stevens, Scalia, Souter, Thomas, Breyer.
Justice dissenting: Ginsburg, Kennedy, Rehnquist, C.J..

920. *Knowles v. Iowa*, 525 U.S. 113 (1998).

An Iowa statute authorizing law enforcement officers to conduct a full-blown search of an automobile when issuing a traffic citation violates the Fourth Amendment. The rationales that justify a search incident to arrest do not justify a similar search incident to a traffic citation.

921. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999).

Three conditions that Colorado placed on the petition process for ballot initiatives -- that petition circulators be registered voters, that

they wear identification badges, and that initiative sponsors report the names and addresses of circulators and the amounts paid to each -- impermissibly restrict political speech in violation of the First and Fourteenth Amendments.

Justices concurring: Ginsburg, Stevens, Scalia, Kennedy, Souter.
Justice concurring specially: Thomas.
Justice concurring in part and dissenting in part: O'Connor, Souter, Rehnquist, C.J..

922. *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999).

Alabama's franchise tax law discriminates against foreign corporations in violation of the Commerce Clause. The law establishes a domestic corporation's tax base as the par value of its capital stock, a value that the corporation may set at whatever level it chooses. The tax base of a foreign corporation, on the other hand, contains balance sheet items that the corporation cannot so manipulate.

923. *Saenz v. Roe*, 526 U.S. 489 (1999).

A provision of California's Welfare and Institutions Code limiting new residents, for the first year they live in California, to the level of welfare benefits that they would have received in the state of their prior residence abridges the right to travel in violation of the Fourteenth Amendment.

Justices concurring: Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Rehnquist, C.J., C.J., Thomas.

924. *Rice v. Cayetano*, 528 U.S. 495 (2000).

A provision of the Hawaii Constitution restricting the right to vote for trustees of the Office of Hawaiian Affairs to persons who are descendants of people inhabiting the Hawaiian Islands in 1778 is a race-based voting qualification that violates the Fifteenth Amendment. Ancestry can be -- and in this case is -- a proxy for race.

Justices concurring: Kennedy, Rehnquist, C.J., O'Connor, Scalia, Thomas.
Justices concurring specially: Breyer, Souter.
Justices dissenting: Stevens, Ginsburg.

925. *Carmell v. Texas*, 529 U.S. 513 (2000).

A Texas law that eliminated a requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses violates the Ex Post Facto Clause of Art. I, § 10 as applied to a crime committed while the earlier law was in effect. So applied, the law falls into the category of an ex post facto law that requires less evidence in order to convict. Under the old law, the petitioner could have been convicted only if the victim's testimony had been corroborated by two witnesses, while under the amended law the petitioner was convicted on the victim's testimony alone.

Justices concurring: Stevens, Scalia, Souter, Thomas, Breyer.
Justices dissenting: Ginsburg, Rehnquist, C.J., O'Connor, Kennedy.

926. *Troxel v. Granville*, 530 U.S. 57 (2000).

A Washington State law allowing "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child is unconstituitonal as applied to an order requiring a parent to allow her child's grandparents more extensive visitation than the parent wished. Because no deference was accorded to the parent's wishes, the parent's due process liberty interest in making decisions concerning her child's care, custody, and control was violated.

Justices concurring: O'Connor, Rehnquist, C.J., Ginsburg, Breyer.
Justices concurring specially: Souter, Thomas.
Justices dissenting: Stevens, Scalia, Kennedy.

927. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

A New Jersey "hate crime" statute that allows a judge to extend a sentence upon finding by a preponderance of the evidence that the defendant, in committing a crime for which he has been found guilty, acted with a purpose to intimidate because of race, violates the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's requirements of speedy and public trial by an impartial jury. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and established beyond a reasonable doubt.

Justices concurring: Stevens, Scalia, Souter, Thomas, Ginsburg.
Justices concurring specially: Thomas.
Justices dissenting: O'Connor, Rehnquist, C.J., Kennedy, Breyer.

928. *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

California's "blanket primary" law violates the First Amendment associational rights of political parties. The law lists all candidates on one ballot and allows primary voters to choose freely among candidates without regard to party affiliation. The law "adulterate[s]" a party's candidate-selection process by forcing the party to open up that process to persons wholly unaffiliated with the party, and is not narrowly tailored to serve a compelling state interest.

Justices concurring: Scalia, Rehnquist, C.J., O'Connor, Kennedy, Souter, Thomas, Breyer.
Justices dissenting: Stevens, Ginsburg.

929. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

Application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as a member and assistant scout master violates the organization's First Amendment associational rights. The general mission of the Scouts,

to instill values in young people, is expressive activity entitled to First Amendment protection, and requiring the Scouts to admit a gay scout leader would contravene the Scouts' asserted policy disfavoring homosexual conduct.

Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

930. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Nebraska's statute criminalizing the performance of "partial birth abortions" is unconstitutional under principles set forth in *Roe v. Wade* and *Planned Parenthood v. Casey*. The statute lacks an exception for instances in which the banned procedure is necessary to preserve the health of the mother, and, because it applies to the commonplace dilation and evacuation procedure as well as to the dilation and extraction method, imposes an "undue burden" on a woman's right to an abortion.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg.
Justices dissenting: Rehnquist, C.J., Scalia, Kennedy, Thomas.

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

Provisions of the Missouri Constitution requiring identification on primary and general election ballots of congressional candidates who failed to support term limits in the prescribed manner are unconstitutional. States do not have power reserved by the Tenth Amendment to give binding instructions to their congressional representatives, and the "Elections Clause" of Article I, section 4, does not authorize the regulation. The Missouri ballot requirements do not relate to "times" or "places," and are not valid regulations of the "manner" of holding elections.

Justices concurring: Stevens, Scalia, Kennedy, Ginsburg, Breyer.
Justices concurring specially: Rehnquist, C.J., Kennedy, Thomas, O'Connor, Souter.

932. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

A Pennsylvania prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied in this case. The defendants, a talk show host and a community activist, played no part in the illegal interception, and obtained the tapes lawfully. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was "a matter of public concern."

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer..
Justices dissenting: Rehnquist, C.J., Scalia, Thomas..

933. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

Massachusetts' restrictions on outdoor advertising and point-of-sale advertising of smokeless tobacco and cigars violate the

First Amendment. The regulations prohibit outdoor advertising within 1,000 feet of a school, park, or playground, and prohibit "point-of-sale" advertising placed lower than five feet above the floor of retail establishments. These restrictions do not satisfy the fourth step of the *Central Hudson* test for regulation of commercial speech. That step requires a "reasonable fit" between the means and ends of a regulation, yet the regulations are not "narrowly tailored" to achieve such a fit.

Justices concurring: O'Connor, Scalia, Kennedy, Souter, (point-of-sale restrictions only) Thomas..
Justices dissenting: Stevens, Ginsburg, Breyer, Souter. (outdoor advertising only)

934. *Ring v. Arizona*, 122 S. Ct. 2458 (2002)

Arizona's capital sentencing law violates the Sixth Amendment right to jury trial by allowing a sentencing judge to find an aggravating circumstance necessary for imposition of the death penalty. The governing principle was established in Apprendi v. New Jersey, 530 U.S. 466 (2000), holding that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The required finding of an aggravating circumstance exposed the defendant to a greater punishment than that authorized by the jury's guilty verdict.

Justices concurring: Ginsburg, Stevens, Scalia, Kennedy, Souter, Thomas.
Justice concurring specially: Breyer.
Justices dissenting: O'Connor, Rehnquist, C.J..

935. *Atkins v. Virginia*, 122 S. Ct. 2242 (2002)

Virginia's capital punishment law is invalid to the extent that it authorizes execution of the mentally retarded. Execution of a mentally retarded individual constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Circumstances have changed since the Court upheld the practice in Penry v. Lynaugh, 492 U.S. 302 (1989); since that time 16 states have prohibited the practice, none have approved it, and thus "a national consensus" has developed against execution of the mentally retarded. The Court's "independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures" that have created this national consensus.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Rehnquist, C.J., Scalia, Thomas.

II. ORDINANCES HELD UNCONSTITUTIONAL

1. *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829).

City ordinance which levied a tax on stock issued by the United States impaired the federal borrowing power and was void (Art. VI).

Justices concurring: Marshall, C.J., Washington, Duvall, Story.
Justices dissenting: Johnson, Thompson.

2. *Cannon v. City of New Orleans*, 87 U.S. (20 Wall.) 577 (1874).

New Orleans ordinance of 1852, imposing a charge for use of piers measured by tonnage of vessel, levied an invalid tonnage duty.

3. *Murray v. City of Charleston*, 96 U.S. 432 (1878).

Charleston, South Carolina, tax ordinance which withheld from interest payments on municipal bonds a tax levied after issuance of such bonds at a fixed rate of interest impaired the obligation of contract (Art. I, § 10).

Justices concurring: Strong, Waite, C.J., Clifford, Bradley, Swayne, Harlan, Field.
Justices dissenting: Miller, Hunt.

4. *Moran v. City of New Orleans*, 112 U.S. 69 (1884).

Ordinance of New Orleans, so far as it imposed license tax upon persons owning and running towboats to and from the Gulf of Mexico, was an invalid regulation of commerce.

5. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650 (1885).

Municipal ordinance granting to a public utility an exclusive right to supply the city with gas, and state constitutional provision abolishing outstanding monopolistic grants, impaired the obligation of contract when enforced against a previously chartered utility which, through consolidation, had inherited the monopolistic, exclusive privileges of two utility corporations chartered prior to the constitutional proviso and ordinance.

6. *New Orleans Water-Works Co. v. Rivers*, 115 U.S. 674 (1885).

When a utility is chartered with an exclusive privilege of supplying a city with water, a subsequently enacted ordinance authorizing an individual to supply water to a hotel impaired the obligation of contract.

7. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

San Francisco ordinance regulating certain phases of the laundry business, as arbitrarily enforced against Chinese, held to violate the equal protection of the laws.

8. *Leloup v. Port of Mobile*, 127 U.S. 640 (1888).

A Mobile, Alabama, ordinance which levied an occupational license tax on a telegraph company doing an interstate business was void.

9. *McCall v. California*, 136 U.S. 104 (1890).

San Francisco ordinance which imposed a license tax on a soliciting agent for a foreign corporation was void as levying a tax on interstate commerce.

Justices concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford.
Justices dissenting: Fuller, C.J., Gray, Brewer.

10. *Brennan v. City of Titusville*, 153 U.S. 289 (1894).

An ordinance of a Pennsylvania city requiring a license tax of a soliciting agent for a manufacturer in another State was held invalid as imposing a tax upon interstate commerce.

11. *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898).

A Washington city ordinance which authorized construction of a municipal water works impaired the obligation of a contract previously negotiated with a private utility providing the same service.

12. *City of Los Angeles v. Los Angeles City Water Co.*, 177 U.S. 558 (1900).

Ordinance expanding city limits beyond those to be served by a utility leasing a municipality's water works and effecting diminution of the rates stipulated in the original agreement without any equivalent compensation impaired the obligation of contract between the utility and the city.

13. *City of Detroit v. Detroit Citizens' St. Ry.*, 184 U.S. 368 (1902).

City ordinances, which adjusted the rate of fare stipulated in agreements made with a street railway company, held to impair the obligation of contract.

14. *Caldwell v. North Carolina*, 187 U.S. 622 (1903).

Greensboro ordinance imposing a license on photographic business, as applied to an agent of an out-of-state corporation, was held an invalid regulation of commerce.

15. *Postal Telegraph-Cable Co. v. Borough of Taylor*, 192 U.S. 64 (1904)

Ordinance of Taylor, Pennsylvania authorizing an inspection fee on telegraph companies doing an interstate business held to be an unreasonable and invalid regulation of commerce.

Justices concurring: Peckham, Fuller, C.J., Brown, White, McKenna, Holmes, Day.
Justices dissenting: Harlan, Brewer.

16. *City of Cleveland v. Cleveland City Ry.*, 194 U.S. 517 (1904).

Ordinance reducing the rate of fares to be charged by railway companies lower than cited in previous ordinances held to impair the obligation of contract.

17. *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904).

No change in the neighborhood having occurred between passage of two zoning ordinances, the second, which excluded a gas company from erecting a plant within the area authorized by the first ordinance, was held to effect an arbitrary deprivation of property without due process of law.

18. *City of Cleveland v. Cleveland Electric Ry.*, 201 U.S. 529 (1906).

Ordinance according to a consolidated municipal railway an extension of the duration date of franchises issued to its predecessors, in consideration of which substantial sums were expended on improvements, gave rise to a new contract, which was impaired by later attempt on the part of the city to reduce the rate stipulated in the franchises thus extended.

19. *Rearick v. Pennsylvania*, 203 U.S. 507 (1906).

A Sunbury, Pennsylvania ordinance imposing a license fee for the solicitation of orders for the sale of merchandise not of the parties own manufacture imposed an invalid burden on interstate commerce when applied to a Pennsylvania agent of an Ohio company who solicited orders for the latter's products and upon receipt of the latter, consigned to a designated purchaser, consummated the sale by delivering the merchandise to such purchaser and, upon the latter's approval of the parcel delivered, collected the purchase price for transmission to the Ohio employer.

20. *Mayor of Vicksburg v. Vicksburg Waterworks Co.*, 206 U.S. 496 (1907).

Municipal contract with utility fixing the maximum rate to be charged for supplying water to inhabitants was invalidly impaired by subsequent ordinances altering said rates.

21. *Londoner v. City of Denver*, 210 U.S. 373 (1908).

The due process requirements of notice and hearing in connection with the assessment of taxes were violated by a municipal assessment ordinance which afforded the taxpayer the privilege of filing objections but no opportunity to support his objections by argument and proof in open hearing.

Justices concurring: Moody, Harlan, Brewer, White, Peckham, McKenna, Day.

Justices dissenting: Fuller, C.J., Holmes.

22. *City of Minneapolis v. Street Ry.*, 215 U.S. 417 (1910).

Minneapolis ordinance of 1907, directing the sale of six train tickets for 25¢, was void as impairing the contract which arose from passage of the ordinance of 1875 granting to a railway a franchise expiring in 1923 and establishing a fare of not less than 5¢.

23. *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

Municipal ordinance requiring authorities to establish building lines on separate blocks back of the public streets and across private property upon the request of less than all the owners of the property affected invalidly authorized the taking of property, not for public welfare but, for the convenience of other property owners; and therefore was violative of due process.

24. *Williams v. City of Talladega*, 226 U.S. 404 (1912).

A $100 license fee imposed by ordinance of an Alabama city on a foreign telegraph company, part of whose business income was derived from the transmission of messages for the Federal Government was void as a tax on a federal instrumentality (Art. VI).

25. *Grand Trunk Western Ry. v. City of South Bend*, 227 U.S. 544 (1913).

South Bend, Indiana, ordinance of 1901 repealing a portion of an ordinance of 1866 authorizing a railroad to lay double tracks on one of its streets impaired the obligation of contract contrary to Art. I, § 10.

Justices concurring: Lamar, Holmes, White, C.J., Lurton, Van Devanter, McKenna, Day (separately).
Justices dissenting: Hughes, Pitney.

26. *City of Owensboro v. Cumberland Telephone Co.*, 230 U.S. 58 (1913).

An ordinance of a Kentucky muncipality which required a telephone company to remove from the streets poles and wires installed under a prior ordinance granting permission to do so, without restriction as to the duration of such privilege, or, in the alternative, pay a rental not prescribed in the original ordinance impaired an obligation of contract contrary to Art. I,§ 10.

Justices concurring: Lurton, White, C.J., Holmes, Van Devanter, Lamar.
Justices dissenting: Day, McKenna, Hughes, Pitney.

27. *Boise Water Co. v. Boise City*, 230 U.S. 84 (1913).

An ordinance of an Idaho municipality adopted in 1906 which subjected a water company to monthly rental fees for the use of its streets invalidly impaired the obligation of contract arising under an ordinance of 1889 which granted a predecessor company the privilege of laying water pipes under the city streets without payment of any charge for the exercise of such right.

28. *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100 (1913).
An ordinance of a Nebraska municipality adopted in 1908 requiring, without any showing of the necessity therefor, a utility to remove its poles and wires from the city streets invalidly impaired an obligation of contract arising from an ordinance of 1884 granting in perpetuity the privilege of erecting and maintaining poles and wires for the transmission of power.

29. *Adams Express Co. v. City of New York*, 232 U.S. 14 (1914).
New York city ordinances requiring an express company to obtain a local license, exacting license fees for express wagons and drivers, and requiring drivers to be citizens, to the extent that they extended to interstate commerce, imposed invalid burdens on such commerce.
Accord: U.S. Express Co. v. City of New York, 232 U.S. 35 (1914).

30. *City of Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333 (1914).
Michigan city municipal ordinance which compelled operator of a ferry between Canadian and Michigan points to take out a license imposed an invalid burden on the privilege of engaging in foreign commerce.

31. *South Covington Ry. v. City of Covington*, 235 U.S. 537 (1915).
Kentucky municipal ordinance, insofar as it sought to regulate the number of street cars to be run, and the number of passengers allowed in each car, between interstate points imposed an unreasonable burden on interstate commerce. Also, the requirement that temperature in the cars never be permitted to be below 50° was unreasonable and violative of due process.

32. *Gast Realty Co. v. Schneider Granite Co.*, 240 U.S. 55 (1916).
St. Louis ordinance which levied one-fourth of the cost of paving on property fronting on the street and the remaining three-fourths upon all property in the taxing district according to area and without equality as to depth denied equal protection of the laws.

33. *Buchanan v. Warley*, 245 U.S. 60 (1917).
A Louisville, Kentucky, ordinance which forbade "colored" persons to occupy houses in blocks where the majority of the houses were occupied by whites was deemed to prevent sales of lots in such blocks to African Americans and to deprive the latter of property without due process of law.

34. *Accord: Harmon v. Tyler*, 273 U.S. 668 (1927), voiding a similar New Orleans ordinance.

35. *Accord: City of Richmond v. Deans*, 281 U.S. 704 (1930), voiding a similar Richmond, Virginia, ordinance

36. *Northern Ohio Traction & Light Co. v. Ohio ex rel. Pontius*, 245 U.S. 574 (1918).

Resolution of Stark County commissioners in 1912 purporting to revoke an electric railway franchise previously granted in perpetuity by appropriate county authorities in 1892 amounted to state action impairing the obligation of contract.

Justices concurring: McReynolds, White, C.J., McKenna, Holmes, Van Devanter, Pitney.
Justices dissenting: Clarke, Brandeis.

37. *City of Denver v. Denver Union Water Co.*, 246 U.S. 178 (1918).

Rates fixed by a Denver ordinance pertaining to the charges to be collected for services by a water company deprived the latter of its property without due process of law by reason of yielding a return of 4.3% compared with prevailing rates in the city of 6% and higher obtained on secured and unsecured loans.

Justices concurring: Pitney, White, C.J., McReynolds, Day, Van Devanter, McKenna.
Justices dissenting: Holmes, Brandeis, Clarke.

38. *City of Covington v. South Covington St. Ry.*, 246 U.S. 413 (1918).

Kentucky city ordinance of 1913 purporting to grant a 25-year franchise for a street railway over certain streets to the best bidder impaired the obligation of contract of an older street railway accorded a perpetual franchise over the same street.

Justices concurring: Holmes, Pitney, White, C.J., McReynolds, Day, Van Devanter, McKenna.
Justices dissenting: Clark, Brandeis.

39. *Detroit United Ry. v. City of Detroit*, 248 U.S. 429 (1919).

Detroit ordinance which compelled street railway company to carry passengers on continuous trips over franchise lines to and over nonfranchise lines, and vice versa, for a fare no greater than its franchises entitled it to charge upon the former alone impaired the obligation of the franchise contracts; and insofar as its enforcement would result in a deficit, also deprived the company of its property without due process.

Justices concurring: Day, Pitney, White, C.J., McReynolds, Van Devanter, McKenna.
Justices dissenting: Clarke, Holmes, Brandeis.

40. *City of Los Angeles v. Los Angeles Gas Corp.*, 251 U.S. 32 (1919).

Los Angeles ordinance authorizing city to establish lighting system of its own could not effect removal of fixtures of a lighting company occupying streets pursuant to rights granted by a prior franchise without paying compensation required by due process clause.

Justices concurring: McKenna, White, C.J., Holmes, Day, Van Devanter, McReynolds, Brandeis.
Justices dissenting: Pitney, Clarke.

41. *City of Houston v. Southwestern Tel. Co.*, 259 U.S. 318 (1922).
Houston ordinance was void inasmuch as the rates fixed thereunder were confiscatory and deprived the utility of its property without due process of law.

42. *City of Paducah v. Paducah Ry.*, 261 U.S. 267 (1923).
Fares prescribed by ordinance of Kentucky city were confiscatory and deprived the utility of property without due process of law.

43. *Texas Transp. Co. v. City of New Orleans*, 264 U.S. 150 (1924).
New Orleans license tax ordinance could not be validly enforced as to the business of a corporation employed as agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business was a necessary adjunct of said commerce and consisted of the soliciting and engaging of cargo, the nomination of vessels to carry it, arranging for delivery on wharf and for stevedores, payment of ships' disbursements, issuing bills of lading, and collecting freight charges.

Justices concurring: Sutherland, Taft, C.J., Sanford, McReynolds, Butler, McKenna, Van Devanter.
Justices dissenting: Brandeis, Holmes.

44. *Real Silk Mills v. City of Portland*, 268 U.S. 325 (1925).
Portland, Oregon, ordinance which exacted a license fee and a bond for insuring delivery from solicitors who go from place to place taking orders for goods for future delivery and receiving deposits in advance was invalid as unduly burdening interstate commerce when enforced against solicitors taking orders for an out-of-state corporation which confirmed the orders, shipped the merchandise directly to the customers, and permitted the solicitors to retain the deposited portion of the purchase as compensation.

45. *Mayor of Vidalia v. McNeely*, 274 U.S. 676 (1927).
Ordinance of Louisiana municipality which exacted license as a condition precedent for operation of a ferry across boundary waters separating two States imposed an invalid burden on interstate commerce.

46. *Delaware, L. & W.R.R. v. Town of Morristown*, 276 U.S. 182 (1928).
New Jersey municipal ordinance which compelled use of railroad station grounds for a public hackstand without compensation deprived the railroad of property without due process.

Justices concurring: Brandeis, Holmes (separately).

47. *Sprout v. City of South Bend*, 277 U.S. 163 (1928).

Indiana municipal ordinance which exacted from motor bus operators a license fee adjusted to the seating capacity of a bus could not be validly enforced against an interstate carrier, for the fee was not exacted to defray expenses of regulating traffic in the interest of safety, or to defray the cost of road maintenance or as an occupation tax imposed solely on account of intrastate business.

48. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

Massachusetts municipal zoning ordinance which placed owner's land in a residential district with resulting inhibition of use for commercial purposes deprived the owner of property without due process because the requirement did not promote health, safety, morals, or general welfare.

49. *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928).

Municipal (Washington) zoning ordinance which conditioned issuance of a permit to enlarge a home for the aged in a residential area upon the approval of the owners of two-thirds of the property within 400 feet of the proposed building was unconstitutional and violative of due process because the condition bore no relationship to public health, safety, and morals and entailed an improper delegation of legislative power to private citizens.

50. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Griffin, Georgia, ordinance which exacted a permit for the distribution of literature by hand or otherwise was violative of freedom of press as guaranteed by the due process clause of the Fourteenth Amendment by imposing censorship in advance of publication.

51. *Hague v. C.I.O.*, 307 U.S. 496 (1939).

A Jersey City ordinance forbidding distribution of printed matter and the holding, without permits, of public meetings in streets and other public places withheld freedom of speech and assembly contrary to the due process clause of the Fourteenth Amendment.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Stone, Reed, Hughes, C.J. (concurred with opinions of Robert Stone).
Justices dissenting: McReynolds, Butler.

52. *Schneider v. New Jersey*, 308 U.S. 147 (1939).

Irvington, New Jersey ordinance prohibiting solicitation and distribution of circulars by canvassing from house to house, unless licensed by the police, violates the First Amendment as applied to one who delivered religious literature and solicited contributions door to door.

Justices concurring: Hughes, C.J., Butler, Stone, Roberts, Reed, Frankfurter, Douglas, Black.

Justice dissenting: McReynolds.

53. *Accord: Young v. California*, 308 U.S. 147 (1939).
Los Angeles ordinance invalid on same basis.

54. *Accord: Snyder v. City of Milwaukee*, 308 U.S. 147 (1939).
Milwaukee ordinance invalid on same basis.

55. *Accord: Nichols v. Massachusetts*, 308 U.S. 147 (1939).
Worcester, Massachusetts ordinance invalid on same basis.

56. *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).
The New York City sales tax cannot be collected on sales to vessels engaged in foreign commerce of fuel oil manufactured from imported crude petroleum in bond. Thus enforced, the city ordinance is invalid as an infringement of congressional regulations of foreign and interstate commerce (Art. I, § 8, cl. 3).

57. *Carlson v. California*, 310 U.S. 106 (1940).
A Shasta County, California, ordinance making it unlawful for any person to carry or display any sign or badge in the vicinity of any place of business for the purpose of inducing others to refrain from buying or working there, or for any person to loiter or picket in the vicinity of any place of business for such purpose, is unconstitutional and is violative of freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy.
Justice dissenting: McReynolds.

58. *Jamison v. Texas*, 318 U.S. 413 (1943).
A Dallas ordinance made it unlawful to throw any handbills, circulars, cards, newspapers or any advertising material upon any street or sidewalk in the city. As applied, the ordinance prohibited the dissemination of information, a denial of the freedom of the press, and where the handbills contained an invitation to participate in a religious activity, a denial of freedom of religion, in violation of the First and Fourteenth Amendments of the Constitution.

59. *Largent v. Texas*, 318 U.S. 418 (1943).
A Paris City ordinance which made it unlawful for any person to solicit orders or to sell books, wares or merchandise within the residential portion of Paris without a permit is invalid as applied. The ordinance abridges the freedom of religion, speech and press guaranteed by the Fourteenth Amendment of the Constitution in that it forbids the distribution of religious publications without a permit, the issuance of which is in the discretion of a municipal officer.

60. *Jones v. City of Opelika*, 319 U.S. 103 (1943).

An Opelika, Alabama, ordinance imposing licenses and taxes on various businesses cannot constitutionally be applied to the business of selling books and pamphlets on the streets or from house to house. As applied the ordinance infringes liberties of speech and press and religion guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge.
Justices dissenting: Reed, Roberts, Frankfurter, Jackson.

61. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

An ordinance of the City of Jeanette stated that all persons soliciting therein orders for merchandise of any kind, or persons delivering such articles under orders so obtained must procure a license and pay a prescribed fee therefor in an amount measured by the time for which the license is granted. When applied to religious colporteurs engaged in dissemination of their religious beliefs through the sale of books and pamphlets from house to house, the ordinance invades freedom of religion, speech and press contrary to the First and Fourteenth Amendments of the Constitution.

Justices concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge.
Justices dissenting: Roberts, Reed, Frankfurter, Jackson.

62. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

An ordinance of Struthers, Ohio, made it unlawful for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon occupants of any residence to the door for the purpose of receiving such handbills, etc. The ordinance, as applied to one distributing leaflets advertising a religious meeting, interfered with the rights of freedom of speech and press guaranteed by the First Amendment. The ordinance, by failing to distinguish between householders who are willing to receive the literature and those who are not, extended further than was necessary for protection of the community.

Justices concurring: Stone, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge.
Justices dissenting: Roberts, Reed, Jackson.

63. *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

A McCormick, South Carolina, ordinance required agents selling books to pay a license fee of $1.00 per day or $15.00 per year. The constitutional guaranty of religious freedom under the First and Fourteenth Amendments of the Constitution precludes exacting a book agent's license fee from a distributor of religious literature notwithstanding that his activities are confined to his hometown and his

livelihood is derived from contributions requested for the literature distributed.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge.
Justices dissenting: Roberts, Frankfurter, Jackson.

64. *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

Richmond, Va., City Code imposed upon persons "engaged in business as solicitors an annual license tax of $50.00 plus one-half of one per centum of their gross receipts or commissions for the preceding license year in excess of $1,000.00." Permit of Director of Public Safety was required before issuance of the license. The ordinance violated the commerce clause in that it discriminated against out-of-state merchants in favor of local ones and operated as a barrier to the introduction of out-of-state merchandise.

Justices concurring: Stone, C.J., Reed, Frankfurter, Rutledge, Burton.
Justices dissenting: Black, Douglas, Murphy.

65. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947).

A New York City law provided that for the privilege of carrying on within the city any trade, business, or profession, every person shall pay a tax of one-tenth of one per centum upon all receipts received in and/or allocable to the city during the year. The excise tax levied on the gross receipts of a stevedoring corporation is invalid since it would burden interstate and foreign commerce in violation of the commerce clause of the Constitution.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas (dissenting in part), Murphy (dissenting in part), Jackson, Rutledge (dissenting in part), Burton.
Justice dissenting: Black.

66. *Saia v. New York*, 334 U.S. 558 (1948).

A Lockport ordinance forbidding use of sound amplification excepted public dissemination, through loudspeakers, of news, matters of public concern, and athletic activities, provided that the latter be done under permission obtained from the Chief of Police. The ordinance is unconstitutional on its face as a previous restraint on the right of free speech in violation of the First Amendment of the Constitution, made applicable to the States by the Fourteenth Amendment. No standards were prescribed for the excercise of discretion by the Chief of Police.

Justices concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge.
Justices dissenting: Reed, Frankfurter, Jackson, Burton.

67. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

A Chicago ordinance proscribed the making of improper noises or other conduct contributing to a breach of the peace. Petitioner was

convicted of violating said ordinance by reason of the fact that he had addressed a large audience in an auditorium where he had vigorously criticized various political and racial groups as well as the disturbances produced by an angry and turbulent crowd protesting his appearance. At this trial, the judge instructed the jury that any behavior which stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, violates the ordinance. As construed and applied by the trial court the ordinance violates the right of free speech guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment.

Justices concurring: Black, Reed, Douglas, Murphy, Rutledge.
Justices dissenting: Vinson, C.J., Frankfurter, Jackson, Burton.

68. *Kunz v. New York*, 340 U.S. 290 (1951).

Because of prior denunciation of other religious beliefs, appellant's license to conduct religious meetings on New York City streets was revoked. A local ordinance forbade the holding of such meetings without a license but contained no provisions for revocation of such licenses and no standard to guide administrative action in granting or denying permits. Appellant was convicted for holding religious meetings without a permit. The ordinance was held to grant discretionary power to control in advance the right of citizens to speak on religious issues and to impose a prior restraint on the exercise of freedom of speech and religion.

Justices concurring: Vinson, C.J., Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton.
Justices dissenting: Jackson.

69. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

A Madison, Wisconsin, ordinance prohibited the sale of milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the central square of Madison. An Illinois corporation, engaged in gathering and distributing milk from farms in Illinois and Wisconsin was denied a license to sell milk within the City solely because its pasteurization plants were more than five miles away. The ordinance unjustifiably discriminated against interstate commerce in violation of the commerce clause of the Constitution.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark.
Justices dissenting: Black, Douglas, Minton.

70. *Gelling v. Texas*, 343 U.S. 960 (1952).

Marshall City, Texas, motion picture censorship ordinance, as enforced, was unconstitutional as denying freedom of speech and press protected by the due process clause of the Fourteenth Amendment.

71. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

A Pawtucket ordinance read as follows: "No person shall address any political or religious meeting in any public park, but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park." Because services of a Jehovah's Witnesses sect differed from those conducted by other religious groups, in that the former were marked by lectures rather than confined to orthodox rituals, that sect was prevented from holding religious meetings in parks. Thus applied, the ordinance was held to violate the First and Fourteenth Amendments of the Federal Constitution, including the equal protection clause of the latter.

72. *Slochower v. Board of Education*, 350 U.S. 551 (1956).

Section 903 of the New York City Charter provides that whenever a city employee invokes the privilege against self-incrimination to avoid answering inquiries into his official conduct by a legislative committee, his employment shall terminate. The summary dismissal thereunder, without notice and hearing, of a teacher at City College who was entitled to tenure and could be discharged only for cause and after notice, hearing and appeal, violated the due process clause of the Fourteenth Amendment. Invocation of the privilege to justify refusal to answer questions of a congressional committee concerning membership in the Communist Party in 1948-1949 cannot be viewed as the equivalent either to a confession of guilt or a conclusive presumption of perjury.

Justices concurring: Black (concurring specially), Douglas (concurring specially), Warren, C.J., Frankfurter, Clark.
Justices dissenting: Reed, Burton, Minton, Harlan.

73. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955).

Atlanta ordinance which reserved certain public parks and golf courses for white persons only was violative of the equal protection clause of the Fourteenth Amendment.

74. *West Point Grocery Co. v. City of Opelika*, 354 U.S. 390 (1957).

Ordinance of Opelika, Alabama, provided that a wholesale grocery business which delivers groceries in the City from points without the City must pay an annual privilege tax of $250. As applied to a Georgia corporation which solicits orders in the City and consummates purchases by deliveries originating in Georgia, the tax is invalid under the commerce clause of the Constitution.

Justices concurring: Warren, C.J., Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker.
Justice dissenting: Black.

75. *Lambert v. California*, 355 U.S. 225 (1957).

Los Angeles Municipal Code made it unlawful for a person who has been convicted of a crime punishable in California as a felony to remain in the city longer than five days without registering with the Chief of Police. Applied to a person who is not shown to have had actual knowledge of his duty to register, this ordinance violates the due process clause of the Fourteenth Amendment of the Constitution.

Justices concurring: Warren, C.J., Black, Douglas, Clark, Brennan.
Justices dissenting: Frankfurter, Burton, Harlan, Whittaker.

76. *Staub v. City of Baxley*, 355 U.S. 313 (1958).

Baxley, Georgia, made it an offense to "solicit" membership in any "organization, union or society" requiring the payment of "fees [or] dues" without first receiving a permit from the Mayor and Council. Issuance or refusal may occur after the character of the applicant, the nature of the organization in which memberships are to be solicited, and its effect upon the general welfare of the City have been considered. Appellant had been convicted for soliciting memberships in a labor union without a license. The ordinance is void on its face because it makes enjoyment of freedom of speech contingent upon the will of the Mayor and City Council and thereby constitutes a prior restraint upon that freedom contrary to the Fourteenth Amendment of the Constitution.

Justices concurring: Warren, C.J., Douglas, Black, Burton, Harlan, Brennan, Whittaker.
Justices dissenting: Frankfurter, Clark.

77. *Smith v. California*, 361 U.S. 147 (1959).

A Los Angeles City ordinance making it unlawful for any bookseller to possess any obscene publication denies him freedom of press, as guaranteed by the due process clause of the Fourteenth Amendment, when it is judicially construed to make him absolutely liable criminally for mere possession of a book, later adjudged to be obscene, notwithstanding that he had no knowledge of the contents thereof. Such construction would tend to restrict the books he sells to those he has inspected and thereby to limit the public's access to constitutionally protected publications.

Justices concurring: Clark, Warren, C.J., Whittaker, Brennan, Stewart, Black (separately), Frankfurter (separately), Douglas (separately), Harlan (dissenting in part; separately).

78. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

Little Rock and North Little Rock, Arkansas, ordinances which, as a condition of exempting charitable organizations from an annual business license tax, required the disclosure of the identity of the officers and members of said organizations, as enforced against the

N.A.A.C.P., denied members of the latter freedom of association, press, and speech as guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Brennan, Clark, Frankfurter, Stewart, Warren, C.J., Whittaker, Harlan, Black (separately), Douglas (separately).

79. *Talley v. California*, 362 U.S. 60 (1960).

Los Angeles ordinance which forbade distribution under any circumstance of any handbill which did not have printed thereon the name and address of the person who prepared, distributed, or sponsored it was void on its face as abridging freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment. Such ordinance is not limited to identifying those responsible for fraud, false advertising, libel, disorder, or littering.

Justices concurring: Warren, C.J., Stewart, Harlan (separately), Douglas, Black.
Justices dissenting: Clark, Frankfurter, Whittaker.

80. *Schroeder v. City of New York*, 371 U.S. 208 (1962).

New York City Water Supply Act, insofar as it authorized notification of land owners, whose summer resort property would be adversely affected by city's diversion of water, by publication of notices in January in New York City official newspaper and in newspapers in the county where the resort property was located as well as by notices posted on trees and poles along the waterway adjacent to such property, did not afford the quality of notice, i.e., to the owners' permanent home address, required by the due process clause of the Fourteenth Amendment.

81. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

San Francisco ordinance authorizing warrantless entry of residential property to inspect for housing code violations violates Fourth and Fourteenth Amendments.

82. *See v. City of Seattle*, 387 U.S. 541 (1967).

Seattle ordinance authorizing warrantless entry of commercial property to inspect for fire code violations violates Fourth and Fourteenth Amendments.

83. *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

Chicago motion picture censorship ordinance is unconstitutional in several procedural aspects.

84. *Avery v. Midland County*, 390 U.S. 474 (1968).

Enactment of Midland County, Texas commissioners court drawing boundaries for districts of election of members does not comply with required "one-man, one-vote" standard.

Justices concurring: White, Black, Douglas, Brennan, Warren, C.J..
Justices dissenting: Harlan, Fortas, Stewart.

85. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

Dallas ordinance providing for classification of motion pictures as not suitable for viewing by young persons does not provide adequate standards and is void for vagueness.

Justices concurring: Marshall, Black, Douglas, Brennan, Stewart, White, Fortas, Warren, C.J..
Justices dissenting: Harlan.

86. *Hunter v. Erickson*, 393 U.S. 385 (1969).

Amendment to Akron, Ohio city charter providing that any ordinance enacted by council dealing with discrimination in housing was not to be effective until approved by referendum whereas no other enactment had to be so submitted violated equal protection clause.

Justices concurring: White, Douglas, Brennan, Fortas, Marshall, Warren, C.J..
Justices concurring specially: Harlan, Stewart.
Justices dissenting: Black.

87. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Cincinnati ordinance making it unlawful for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by is unconstitutionally vague and violates rights to assembly and association.

Justices concurring: Stewart, Douglas, Harlan, Brennan, Marshall.
Justices concurring specially: Black.
Justices dissenting: White, Blackmun, Burger, C.J..

88. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

Jacksonville, Florida vagrancy ordinance is void for vagueness because it fails to give a person fair notice that his contemplated conduct is forbidden, because it encourages arbitrary and erratic enforcement of the law, because it makes criminal activities which by modern standards are normally innocent, and because it vests unfettered discretion in police.

89. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

Chicago ordinance prohibiting all picketing within certain distance of any school except labor picketing violates equal protection clause by impermissibly distinguishing between types of peaceful picketing.

90. *Cason v. City of Columbus*, 409 U.S. 1053 (1972).

Columbus, Ohio ordinance prohibiting use of abusive language toward another as applied by court below without limitation to fighting words cannot sustain conviction.

91. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

New Orleans ordinance interpreted by state courts to punish the use of opprobrious words to police officer without limitation of offense to uttering of fighting words is invalid.

Justices concurring: Brennan, Douglas, Stewart, White, Marshall.
Justice concurring specially: Powell.
Justices dissenting: Blackmun, Rehnquist, Burger, C.J..

92. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

A Jacksonville, Florida ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall, Blackmun.
Justices dissenting: White, Rehnquist, Burger, C.J..

93. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

Oradell, New Jersey ordinance requiring that advance written notice be given to local police by any person desiring to canvass, solicit, or call from house to house for a charitable or political purpose held void for vagueness.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Blackmun, Powell.
Justice dissenting: Rehnquist.

94. *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977).

Wilingboro, New Jersey ordinance prohibiting posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the township perceived as flight of white homeowners violated the First Amendment.

95. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

East Cleveland zoning ordinance that limited housing occupancy to members of single family and restrictively defined family so as to prevent an extended family, i.e., two grandchildren by different children residing with grandmother, violated due process clause.

Justices concurring: Powell, Brennan, Marshall, Blackmun.
Justice concurring specially: Stevens.
Justices dissenting: Stewart, Rehnquist, White; Burger (on other grounds).

96. *Carter v. Miller*, 434 U.S. 356 (1978).

Lower court's invalidation on equal protection grounds of Chicago ordinance that permanently denies public chauffeur's license to applicants previously convicted of certain crimes while making revocation of previously licensed persons convicted of same offenses discretionary is affirmed by an equally divided Court.

97. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

Schaumburg, Illinois ordinance prohibiting door-to-door or on-the-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes" violates First and Fourteenth Amendment speech protections.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, Burger, C.J..
Justice dissenting: Rehnquist.

98. *Edwards v. Service Machine & Shipbuilding Corp.*, 449 U.S. 913 (1980).

Court of Appeals decision voiding on commerce clause grounds an ordinance of St. Mary Parish, Louisiana requiring non-local job seekers and local workers seeking new jobs to obtain identification card and to provide fingerprints, photograph, and pay fee is summarily affirmed.

99. *Town of Southampton v. Troyer*, 449 U.S. 988 (1980).

Court of Appeals decision invalidating on First Amendment grounds an ordinance of Southampton, New York barring door-to-door solicitation without prior consent of occupant, but excepting canvassers who have lived in the municipality at least six months is affirmed.

100. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

Mount Ephraim, New Jersey zoning ordinance construed to bar the offering of live entertainment within the township violated the First Amendment.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell.
Justice concurring specially: Stevens.
Justices dissenting: Burger, C.J., Rehnquist.

101. *Metromedia v. City of San Diego*, 453 U.S. 490 (1981).

Complex ban on billboard displays within the City of San Diego, excepting certain onsite signs and 12 categories of particular signs, violates First Amendment.

Justices concurring: White, Stewart, Marshall, Powell.
Justices concurring specially: Brennan, Blackmun; Stevens (in part).
Justices dissenting: Burger, C.J., Rehnquist.

102. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

Berkeley, California ordinance limiting to $250 any contributions to committees formed to support or oppose ballot measures submitted to popular vote violates First Amendment.

Justices concurring: Burger, C.J., Brennan, Powell, Rehnquist, Stevens.
Justices concurring specially: Marshall, Blackmun, O'Connor.
Justice dissenting: White.

103. *Rusk v. Espinosa*, 456 U.S. 951 (1982).

Court of Appeals decision holding violative of the First Amendment an Albuquerque, New Mexico ordinance regulating solicitation by charitable organizations but exempting solicitation by religious groups for "evangelical, missionary or religious" but not secular purposes is summarily affirmed.

104. *Giacobbe v. Andrews*, 459 U.S. 801 (1982).

Federal district court decision holding that New York City's plan for apportioning 10 at-large seats for the City Council among the City's five boroughs violates the one person, one vote requirements of the Equal Protection Clause, summarily affirmed by the U.S. Court of Appeals for the Second Circuit, is summarily affirmed.

105. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (subsequently overruled in part).

Akron, Ohio ordinance regulating the circumstances of abortions is unconstitutional in the following respects: by requiring all abortions performed after the first trimester to be performed in a hospital, by requiring parental consent or court order for abortions performed on minors under age 15, by requiring the attending physician to provide detailed information on which "informed consent" may be premised, by requiring a 24-hour waiting period, and by requiring disposal of fetal remains in a "humane and sanitary manner."

Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens, Burger, C.J..

Justices dissenting: O'Connor, White, Rehnquist.

106. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Cleburne, Texas zoning requirement of a special use permit for operation of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses are permitted without such special use permits is a denial of equal protection as applied, the record containing no rational basis for the distinction.

Justices concurring: White, Powell, Rehnquist, Stevens, O'Connor, Burger, C.J..

Justices concurring specially: Marshall, Brennan, Blackmun.

107. *Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986).

Appeals court decision holding invalid under the First Amendment an Indianapolis ordinance prohibiting as pornography "graphic sexually explicit subordination of women" without regard to appeal to prurient interests or offensiveness to community standards is summarily affirmed.

108. *City of Houston v. Hill*, 482 U.S. 451 (1987).

Houston ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty is facially overbroad in violation of the First Amendment.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens.
Justices concurring specially: Powell, O'Connor, Scalia.
Justice dissenting: Rehnquist, C.J..

109. *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

Los Angeles Board of Airport Commissioners resolution banning all "First Amendment activities" at airport is facially overbroad in violation of the First Amendment.

110. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

Lakewood, Ohio ordinance vesting in the mayor unbridled discretion to grant or deny a permit for location of newsracks on public property violates the First Amendment.

Justices concurring: Brennan, Marshall, Blackmun, Scalia.
Justices dissenting: White, Stevens, O'Connor.

111. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

Richmond, Virginia requirement that contractors awarded city construction contracts must subcontract at least 30% of the dollar amount to "minority business enterprises" violates the Equal Protection Clause.

Justices concurring: O'Connor, White, Stevens, Kennedy, Rehnquist, C.J..
Justice concurring specially: Scalia.
Justices dissenting: Marshall, Brennan, Blackmun.

112. *New York City Bd. of Estimate v. Morris*, 489 U.S. 688 (1989).

New York City Charter procedures for electing City's Board of Estimate, consisting of three members elected citywide (the Mayor, the comptroller, and the president of the City Council) and the elected presidents of the city's five boroughs, violate the one-person, one-vote requirements derived from the Equal Protection Clause.

Justices concurring: White, Marshall, O'Connor, Scalia, Kennedy, Rehnquist, C.J..
Justices concurring specially: Blackmun, Brennan, Stevens.

113. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Dallas licensing scheme for "sexually oriented" businesses, as applied to businesses that engage in protected First Amendment activity, constitutes an invalid prior restraint on protected activity. The ordinance fails to place a time limit within which the licensing authority must act, and fails to provide a prompt avenue for judicial review.

Justices concurring: O'Connor, Stevens, Kennedy.
Justices concurring specially: Brennan, Marshall, Blackmun.

Justices dissenting: White, Scalia, Rehnquist, C.J..

114. *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992).

St. Paul, Minnesota's Bias-Motivated Crime Ordinance, which punishes the display of a symbol which one knows will arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender, is facially invalid under the First Amendment because it discriminates solely on the basis of the subjects that speech addresses.

Justices concurring: Scalia, Kennedy, Souter, Thomas, Rehnquist, C.J..
Justices concurring specially: White, Blackmun, O'Connor, Stevens.

115. *Lee v. Weisman*, 505 U.S. 577 (1992).

Providence, Rhode Island's use of members of the clergy to offer prayers at official public secondary school graduation ceremonies violates the First Amendment's Establishment Clause. The involvement of public school officials with religious activity was "pervasive," to the point of creating a state-sponsored and state-directed religious exercise in a public school; officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers.

Justices concurring: Kennedy, Blackmun, Stevens, O'Connor, Souter.
Justices dissenting: Scalia, White, Thomas, Rehnquist, C.J..

116. *Lee v. International Soc'y for Krishna Consciousness*, 505 U.S. 830 (1992).

A regulation of the Port Authority of New York and New Jersey banning leafletting ("the sale or distribution of . . . printed or written material" to passers-by) within the airport terminals operated by the facility is invalid under the First Amendment.

Justices concurring (per curiam): Blackmun, Stevens, O'Connor, Kennedy, Souter.
Justices dissenting: Rehnquist, C.J., White, Scalia, Thomas.

117. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Cincinnati's refusal, pursuant to an ordinance prohibiting distribution of commercial handbills on public property, to allow the distribution of commercial publications through freestanding newsracks located on public property, while at the same time allowing similar distribution of newspapers and other noncommercial publications, violates the First Amendment.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter.
Justices dissenting: Rehnquist, C.J., White, Thomas.

118. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

Hialeah, Florida's ordinances banning the killing of animals in a ritual sacrifice are unconstitutional as infringing the free exercise of religion by members of the Santeria religion.

Justices concurring: Kennedy, White, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J..
Justices concurring specially: Blackmun, O'Connor.

119. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

Clarkstown, New York's "flow control" ordinance, which requires all solid waste within the town to be processed at a designated transfer station before leaving the municipality, discriminates against interstate commerce and is invalid under the Commerce Clause.

Justices concurring: Kennedy, Stevens, Scalia, Thomas, Ginsburg.
Justice concurring specially: O'Connor.
Justices dissenting: Souter, Blackmun, Rehnquist, C.J..

120. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

Ladue, Missouri's ordinance, which prohibits all signs but makes exceptions for several narrow categories, violates the First Amendment by prohibiting a resident from placing in the window of her home a sign containing a political message. By prohibiting residential signs that carry political, religious, or personal messages, the ordinance forecloses "a venerable means of communication that is both unique and important."

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

Chicago's Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place after being ordered by a police officer to disperse, violates the Due Process Clause of the Fourteenth Amendment. The ordinance violates the requirement that a legislature establish minimal guidelines for law enforcement.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Scalia, Thomas, Rehnquist, C.J..

122. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 122 S. Ct. 2080 (2002)

The Ohio village's ordinance making it a misdemeanor offense to engage in door-to-door advocacy without first registering with the mayor and receiving a permit, required to be shown to an officer or resident who so requests, violates the First Amendment. The free and unhampered distribution of pamphlets is "an age-old form of missionary evangelism," and is also important for the dissemination of ideas unrelated to religion. The ordinance is not narrowly tailored to serve the village's "important," interests in preventing crime, preventing fraud, and protecting privacy.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer.
Justices concurring specially: Scalia, Thomas.
Justice dissenging: Rehnquist, C.J..

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

1. *Society for the Propagation of the Gospel v. New Haven*, 21 U.S. (8 Wheat.) 464 (1823).

   The property of a charitable corporation chartered by the Crown, being specifically protected by the treaty of peace of 1783, an act of Vermont adopted in 1794 and purporting to convey such property to local subdivisions was void.

2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

   By reason of conflict with the federal licensing act of 1793 authorizing vessels to navigate coastal waters, a New York statute granting to certain persons an exclusive right to navigate New York waters was void.

3. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

   A Georgia law which imposed penalties on white persons who, without first obtaining a license therefor, established a residence within the limits of the Cherokee Nation, was unenforceable by reason of conflict with treaties negotiated by the United States with such Indian tribes and by virtue of extending to an area beyond the jurisdiction of the State.

4. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

   A Pennsylvania statute (1826) which penalized an owner's recovery of a runaway slave was violative of Art. IV, § 2, cl. 3, and federal legislation implementing the latter provision.

   Justices concurring: Story, Catron, McKinley, Taney, C.J. (separately), Thompson (separately), Baldwin (separately), Wayne (separately), Daniel (separately), McLean (separately).

5. *Searight v. Stokes*, 44 U.S. (3 How.) 151 (1845).

   Inasmuch as under federal acts ceding to Pennsylvania that part of the Cumberland Road within its limits, and Pennsylvania laws accepting the same, the carriage of mail over said road was to be free from toll, later Pennsylvania law imposing tolls on coaches transporting passengers could not extend to the mail carried therein.

   Justices concurring: Taney, C.J., Story, Wayne, Catron, McKinley, Nelson.
   Justices dissenting: McLean, Daniel.

6. *Neil, Moore & Co. v. Ohio*, 44 U.S. (3 How.) 720 (1845).

   Ohio toll levied on passengers transported on mail coaches traversing Cumberland Road in that State, but which exempted passengers traveling on other coaches, was void by reason of conflict with

the terms of federal and Ohio acts adopted in relation to transfer and acceptance of said part of the road by Ohio.

Justices concurring: Taney, C.J., Story, McLean, Wayne, Catron, McKinley, Nelson.
Justice dissenting: Daniel.

7. *Sinnot v. Davenport*, 63 U.S. (22 How.) 227 (1860).

An Alabama statute requiring owners of steamboats navigating the waters of that State to register under the penalty of a $500 fine for each offense was in conflict with the act of Congress providing for the enrollment and license of vessels engaged in the coastwise trade and therefore inoperative.

Accord: Foster v. Davenport, 63 U.S. (22 How.) 244 (1860), which held that this statute also was inoperative when applied to a lighter and a towboat assisting the movement wholly within Alabama territorial waters of vessels engaged in foreign and interstate commerce.

8. *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866).

A New York law authorizing localities to tax as personal property national bank stock held by residents, but which imposed no comparable tax on shares of state banks, was violative of federal legislation authorizing state taxation of national bank stock at rates no higher than those imposed on state bank shares. Taxation of the capital of state banks did not provide such equality, for that part of the capital of state banks invested in federal securities was exempt.

Justices concurring: Grier, Davis, Nelson, Clifford, Miller, Field.
Justices dissenting: Chase, C.J., Wayne, Swayne.

9. *Accord: Bradley v. Illinois*, 71 U.S. (4 Wall.) 459 (1867), voiding a similar Illinois tax law on the ground that a tax on the capital of state banks was not the equivalent of the state tax on shares of national banks and accordingly the tax on the latter was in conflict with federal law consenting to taxation of national bank shares at rates not in excess of those imposed on shares of state banks.

10. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867).

A California statute vesting state courts with in rem jurisdiction over vessels for causes of action cognizable in admiralty invalidly infringed the admiralty jurisdiction exclusively conferred upon federal courts by § 9 of the Judiciary Act.

11. *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867).

Iowa statute providing an *in rem* remedy in state courts for maritime causes of action was void by reason of conflict with § 9 of the Judiciary Act of 1789, which vested admiralty jurisdiction exclusively in the federal courts.

12. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867).

When a treaty with Indian tribes exempted their lands from levy, sale, and forefeiture, Kansas could not validly collect its tax on lands held in severalty by members of such tribes under patents issued them pursuant to such treaty. Tribal Indians thus recognized by the National Government are exempt from the jurisdiction of the State.

13. *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867).

A New York statute imposing a tax on lands reserved to an Indian tribe by treaty was void, notwithstanding provision therein that sale of land for nonpayment of the tax would not affect the right of occupancy by the Indians.

14. *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26 (1868).

New York tax could not be collected on United States notes expressly exempted from state taxation by federal law authorizing their issuance as legal tender.

15. *The Belfast*, 74 U.S. (7 Wall.) 624 (1869).

Inasmuch as a shipper's lien under a contract of carriage between ports within the same State is a maritime lien enforceable by *in rem* proceedings exclusively within the admiralty jurisdiction of federal court, an Alabama law creating a maritime lien enforceable by *in rem* proceedings in its own courts was void.

16. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1 (1878).

Florida legislative grant of a telegraphic monopoly held "inoperative" as in conflict with a congressional act dealing with the construction of telegraph lines and based on its commerce and postal power.

Justices concurring: Waite, C.J., Clifford, Strong, Bradley, Swayne, Miller.
Justices dissenting: Field, Hunt.

17. *Sprague v. Thompson*, 118 U.S. 90 (1886).

Georgia law requiring out-of-state coastal vessels, subject to certain discriminating exemptions, to take on a pilot upon entering Georgia ports, was void by reason of conflict with federal pilotage law.

18. *Western Union Tel. Co. v. Massachusetts*, 125 U.S. 530 (1888).

Massachusetts law, authorizing an injunction to restrain tax delinquents from doing business until payments are made, could not be validly invoked to restrain a telegraph company operating lines over United States military and post roads pursuant to federal authorization.

19. *Harman v. City of Chicago*, 147 U.S. 396 (1893).

A Chicago ordinance imposing a license tax on tug boats licensed under federal authority and engaged in interstate commerce held invalid.

20. *Gulf, C. & S. F. Ry. v. Hefley*, 158 U.S. 98 (1895).

Texas statute regulating railroad rates, when applied to interstate freight transportation, was held to conflict with Interstate Commerce Act.

21. *Ohio v. Thomas*, 173 U.S. 276 (1899).

Ohio statute which regulated the use of oleomargarine in the State held void as applied to a soldiers' home in Ohio created by Congress and administered as a federal institution.

22. *Home Savings Bank v. City of Des Moines*, 205 U.S. 503 (1907).

An Iowa law levying a tax on a state bank, assessed on its shares measured by the value of its capital, surplus, and individual earnings, was void insofar as the assessment embraced federal bonds owned by the bank and was in conflict with a federal enactment exempting such bonds from state taxes.

Justices concurring: Moody, Brewer, White, McKenna, Holmes, Day.
Justices dissenting: Fuller, C.J., Harlan, Peckham.

23. *Northern Pacific Ry. v. Washington*, 222 U.S. 370 (1912).

Consistent with doctrine of national supremacy and preemption, state laws, including one of the State of Washington, regulating hours of service embracing employees of interstate carriers, became inoperative immediately upon the adoption of the Federal Hours of Service Law notwithstanding that the latter did not go into effect until a year after its passage.

24. *Southern Ry. v. Reid*, 222 U.S. 424 (1912).

A North Carolina statute requiring carriers to transport interstate freight as soon as it was received was unenforceable due to conflict with § 2 of the Hepburn Act of 1906 (34 Stat. 584), forbidding interstate railway carriers to make shipments until rates had been fixed and published by the Interstate Commerce Commission, which had not yet acted on this matter.

Justices concurring: McKenna, Holmes, Hughes, Van Devanter, Lamar, White, C.J..
Justice dissenting: Lurton.

Accord: Southern Ry. v. Reid & Beam, 222 U.S. 444 (1912).

Accord: Southern Ry. v. Burlington Lumber Co., 225 U.S. 99 (1912).

25. *Chicago, R. I. & P. Ry. v. Hardwick Elevator Co.*, 226 U.S. 426 (1913).

Congress, by enactment of the Hepburn Act (34 Stat. 584 (1906)) having preempted the field of regulation pertaining to the duty of carriers to deliver cars in interstate commerce, a Minnesota Reciprocal Demurrage Law imposing like regulations was void.

26. *Accord: St. Louis, I. Mt. & S. Ry. v. Edwards*, 227 U.S. 265 (1913).
Arkansas Demurrage Law of 1907 penalizing carriers for failure to notify consignees of arrival of shipments was similarly held void.

27. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913).
A Kentucky law which precluded an interstate carrier from contracting to limit its liability to an agreed or declared value was void as conflicting with the Carmack Amendment, which preempted the field of regulation pertaining to the liability of interstate carriers for loss and damage to interstate shipments,.

28. *Accord: Chicago, B. & Q. Ry. v. Miller*, 226 U.S. 513 (1913).
An Iowa law and a provision of the Nebraska Constitution were held to have been superseded by the Carmack Amendment.

29. *Accord: Chicago, St. P., M. & O. Ry. v. Latta*, 226 U.S. 519 (1913).
Nebraska constitutional provision was held to have been superseded by the Carmack Amendment.

30. *McDermott v. Wisconsin*, 228 U.S. 115 (1913).
Wisconsin food labeling law was invalid insofar as it exacted labelling requirements as to articles in interstate commerce which were in conflict with those required under the Federal Pure Food and Drug Act. imposed an invalid burden on interstate commerce.

31. *Missouri, K. & T. Ry. v. Harriman Bros.*, 227 U.S. 657 (1913).
Inasmuch as the federal Carmack Amendment preempted the field of regulation pertaining to determination of an interstate railroad's liability for loss or damages to goods in transit, Texas law outlawing contractual stipulations specifying a period of limitations for filing of claims by a shipper which was briefer than that sanctioned by the federal law was unenforceable.

Justices concurring: Lurton, McKenna, Holmes, Hughes (separately), Day, Van Devanter, Lamar, White, C.J..
Justice dissenting: Pitney.

32. *St. Louis, S. F. & T. Ry. v. Seale*, 229 U.S. 156 (1913).
When the Federal Employers' Liability Act was applicable, by reason that the injured employee was engaged in interstate commerce, a Texas law affording a remedy for said injuries was superseded by reason of the supremacy of the former.

Justices concurring: Van Devanter, McKenna, Holmes, Day, Lurton, Hughes, Pitney, White, C.J..
Justice dissenting: Lamar.

33. *New York Central R.R. v. Hudson County*, 227 U.S. 248 (1913).
Congress having expressly included ferries used in connection with interstate railroads in its legislation regulating interstate com-

merce, two New Jersey municipal ordinances fixing passenger rates for travel on ferries between New Jersey and New York points were superseded and therefore invalid.

34. *Chicago, B. & Q. R.R. v. Hall*, 229 U.S. 511 (1913).
Iowa law pertaining to attachment of wages of a railroad worker adjudicated bankrupt within less than four months thereafter was in conflict with federal bankruptcy law nullifying liens obtained within four months prior to the filing of a petition in bankruptcy and hence was not entitled to full faith and credit in Nebraska courts.

35. *Erie R.R. v. New York*, 233 U.S. 671 (1914).
Congress having completely preempted the field by its Hours of Service Act of 1907, notwithstanding that it did not take effect until 1908, a New York labor law of 1907 regulating hours of service of railroad telegraph operators engaged in interstate commerce was invalid.

36. *Globe Bank v. Martin*, 236 U.S. 288 (1915).
Attachments and liens on real estate of a bankrupt, acquired pursuant to Kentucky laws within four months prior to the filing of a petition in bankruptcy under federal law, were null and void, and distribution of the proceeds from the sale of such real estate was governed by federal rather than by state law.

37. *Southern Ry. v. Railroad Comm'n*, 236 U.S. 439 (1915).
An Indiana statute requiring railway companies to place grab-irons and hand-holds on the sides and ends of every car having been superseded by the Federal Safety Appliance Act, penalties imposed under the former could not be recovered as to cars operated on interstate railroads, although engaged only in intrastate traffic.

38. *Kirmeyer v. Kansas*, 236 U.S. 568 (1915).
Kansas prohibition law could not be validly enforced to prevent Kansas dealer from accepting orders for alcoholic beverages which were to be completed by interstate delivery to Kansas purchasers from a point in Missouri; under the federal Wilson Act the interstate transportation did not end until delivery to the consignee was completed.

39. *Charleston & W. C. Ry. v. Varnville Co.*, 237 U.S. 597 (1915).
South Carolina law which imposed a penalty on carriers for their failure to adjust claims within 40 days imposed an invalid burden on interstate commerce and also was in conflict with the federal Carmack Amendment.

40. *Rossi v. Pennsylvania*, 238 U.S. 62 (1915).
Pennsylvania liquor law could not be enforced against one who solicited orders for the delivery of alcoholic beverages to be shipped

to the consignee from another State; under the federal Wilson Act of 1890 liquor shipped in interstate commerce did not become subject to State regulation until after delivery to the consignee.

41. *New York Central R.R. v. Winfield*, 244 U.S. 147 (1917).

Congress, by enactment of the Federal Employees' Liability Act, having preempted the field as to determination of the liability of interstate railroad carriers to compensate employees for injuries sustained while engaged in interstate commerce, award under New York Workmen's Compensation Act for injuries sustained in interstate commerce by railway employee could not be upheld.

Justices concurring: Van Devanter, Holmes, Pitney, McReynolds, Day, McKenna, White, C.J..
Justices dissenting: Brandeis, Clarke.

42. *Accord: Erie R.R. v. Winfield*, 244 U.S. 170 (1917).

For the same reason, a New Jersey Workmen's Compensation Act was held inapplicable to a railway worker injured while engaged in interstate commerce.

Justices concurring: Van Devanter, Holmes, Day, Pitney, McKenna, McReynolds, White, C.J..
Justices dissenting: Brandeis, Clarke.

43. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

New York Workmen's Compensation Act was unconstitutional as applied to employees engaged in maritime work, for it afforded a remedy unknown to common law, and hence was not among the common law remedies saved to suitors from exclusive federal admiralty jurisdiction by the Judiciary Act of 1789.

Justices concurring: McReynolds, Day, Van Devanter, McKenna, White, C.J..
Justices dissenting: Holmes (separately), Pitney (separately), Brandeis, Clarke.

Accord: Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917).

Justices concurring: McReynolds, Day, Van Devanter, McKenna, White, C.J..
Justices dissenting: Holmes, Pitney, Brandeis, Clarke.

44. *Accord: Steamship Bowdoin Co. v. Industrial Accident Comm'n of California*, 246 U.S. 648 (1918), as to the inoperative effect of a California Workmen's Compensation Act.

45. *American Express Company v. Caldwell*, 244 U.S. 617 (1917).

Consistent with national supremacy, a South Dakota law regulating advance of interstate rates could not be applied to changes in intrastate rates which a carrier put into effect pursuant to an order of the Interstate Commerce Commission to abate discrimination against interstate traffic.

Justices concurring: Brandeis, Holmes, Pitney, McReynolds, Day, Clarke, Van Devanter, White, C.J..
Justice dissenting: McKenna.

46. *New Orleans & N.E.R.R. v. Scarlet*, 249 U.S. 528 (1919).

Mississippi "Prima Facie" act, relieving plaintiff of burden of proof to establish negligence, could not constitutionally be applied by a state court in suits under the Federal Employees' Liability Act.

Accord: Yazoo & M.V.R.R. v. Mullins, 249 U.S. 531 (1919).

47. *Pennsylvania R.R. v. Public Service Comm'n*, 250 U.S. 566 (1919).

Pennsylvania law, as applied to an interstate train terminated by a mail car, forbidding operation of any train consisting of United States mail, or express, cars without rear end of car being equipped with a platform with guard rails and steps was inoperative by reason of conflict with federal legislation and regulations which preempted the field.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Pitney, McReynolds, Brandeis, White, C.J..
Justice dissenting: Clarke.

48. *Postal Telegraph-Cable Co. v. Warren-Godwin Co.*, 251 U.S. 27 (1919).

By virtue of federal legislation preempting the field, Mississippi law could not be applied to determine validity of a contract by a telegraph company limiting its responsibility when its lower rate is paid for unrepeated interstate messages.

Justices concurring: Holmes, McKenna, Day, Van Devanter, McReynolds, Brandeis, Clarke, White, C.J..
Justice dissenting: Pitney.

49. *Western Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920).

Federal legislation having preempted the field, Indiana law no longer was operative to subject a telegraph company to a penalty for failure to deliver promptly in Indiana a message sent from a point in Illinois.

50. *Merchant's Nat'l Bank v. Richmond*, 256 U.S. 635 (1921).

Richmond, Virginia, ordinance and Virginia statute which, as construed, levied a tax on state and national bank shares at the aggregate rate of $1.75 per $100 of valuation and upon intangibles at the aggregate rate of 85 per $100 valuation, a substantial proportion of which property was in the hands of individual taxpayers, were void as in conflict with federal law prohibiting discriminatory taxation of national bank shares for the reason that the tax was imposed on the national bank stocks to the aggregate value of more than $8,000,000 whereas the value of state bank stocks taxed was only $6,000,000.

51. *First Nat'l Bank v. California*, 262 U.S. 366 (1923).

California law which escheated to a state bank deposits unclaimed for 20 years, notwithstanding that no notice of residence has been filed with the bank by the depositor or any claimant, was invalid as applied to deposits in national banks by reason of conflict with applicable federal law.

52. *Bunch v. Cole*, 263 U.S. 250 (1923).

When lease of an Indian allotment, made by the allottee in excess of the powers of alienation granted by federal law, is declared null and void by federal law, Oklahoma statute, as judicially applied, which gave the lease the effect of a tenancy at will and as controlling the amount of compensation which the allottee may recover for use and occupation by the lessees also was void, consistently with the principle of national supremacy.

53. *Sperry Oil Co. v. Chisholm*, 264 U.S. 488 (1924).

Oklahoma law which required that the execution of a lease on the family homestead also must be executed by the wife was inoperative, consistently with the principle of national supremacy, to the extent that under federal law Congress had empowered a Cherokee Indian to make an oil or gas lease on his restricted "homestead" allotment subject only to the approval of the Secretary of the Interior.

54. *Missouri ex rel. Burnes Nat'l Bank v. Duncan*, 265 U.S. 17 (1924).

Because the Federal Reserve Act authorizes national banks to act as executors, a Missouri law was ineffective, under the principle of national supremacy, to withhold such powers from such banks.

Justices concurring: Holmes, Sanford, Brandeis, McKenna, Van Devanter, Butler, Taft, C.J..
Justices dissenting: Sutherland, McReynolds.

55. *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

A Seattle ordinance which limited the pawnbroking business to citizens was void as applied to a Japanese alien lawfully admitted into the United States and protected by a treaty with Japan according to nationals of the latter country the right to carry on a "trade."

56. *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404 (1925).

When carrier had two routes by which freight might move between two points in a State, the second of which was partly interstate, a suit against the carrier for discrimination in the furnishing of cars which arose out of use of the interstate route in conformity with the carrier's practice was governed by the Interstate Commerce Act, and the Missouri law governing such discrimination was superseded and inapplicable (Art. VI).

57. *Lancaster v. McCarty*, 267 U.S. 427 (1925).

Federal law (39 Stat. 441 (1916)) which authorized carriers to limit liability upon property received for transportation to value declared by shipper, where the rates were based on such value pursuant to authority of Interstate Commerce Commission, superseded Texas law in respect to a claim for damage to goods shipped intrastate between Texas points for the reason that the tariff and classification had been adopted by the carrier pursuant to an order of the Commission requiring it to remove discrimination against interstate commerce which had resulted from lower Texas intrastate rates.

58. *Davis v. Cohen*, 268 U.S. 638 (1925).

When the Federal Transportation Act of 1920 provided that suits on claims arising out of federal wartime control of the railroads might be brought against a federal agent, if instituted within two years after federal control had ended, Massachusetts law allowing amendments of proceedings prior to judgment, could not be invoked to substitute the Agent as defendant more than two years after federal control had ended; the suit in which the substitution was attempted had erroneously been filed against the railroad rather than against the Federal Director General during the period of federal control, and since the substitution amounted to filing a new action, invocation of the Massachusetts law was repugnant to the Federal Transportation Act's provisions as to limitations.

59. *First Nat'l Bank v. Anderson*, 269 U.S. 341 (1926).

As applied to national banks, Iowa tax law providing for a levy on shares of such banks at rates less favorable than the rates applied to moneyed capital invested in competition with such banks was repugnant to federal law prohibiting such discrimination (Art. VI).

60. *Oregon-Washington Co. v. Washington*, 270 U.S. 87 (1926).

Federal legislation having preempted the field, a Washington law which established a quarantine against importation of hay and alfalfa meal, except in sealed containers, coming from areas in other States harboring the alfalfa weevil, was inoperative.

Justices concurring: Taft, C.J., Holmes, Van Devanter, Brandeis, Butler, Sanford, Stone.

Justices dissenting: McReynolds, Sutherland.

61. *Napier v. Atlantic Coast Line Ry.*, 272 U.S. 605 (1926).

The Federal Boiler Inspection Act having occupied the field of regulation pertaining to locomotive equipment on interstate highways, a Georgia law requiring cab curtains and automatic fire box doors was preempted.

62. *Missouri Pacific R.R. v. Porter*, 273 U.S. 341 (1927).

Congress having occupied the field by its own legislation, an Arkansas law which prohibited carriers from incorporating into their bills of lading stipulations exempting the carriers from liability for loss of shipments by fire not due to the carriers' negligence was preempted.

63. *First Nat'l Bank v. Hartford*, 273 U.S. 548 (1927).

Wisconsin tax law, as imposed on shares of a national bank, was in conflict with federal law prohibiting state taxation of such shares at rates in excess of those levied on moneyed capital employed in competition with the business of such banks and was therefore inoperative as to the shares of said banks.

64. *Accord: Minnesota v. First Nat'l Bank*, 273 U.S. 561 (1927), holding inoperative for the same reason a Minnesota law taxing national bank shares.

65. *Accord: Commercial Nat'l Bank v. Custer County*, 275 U.S. 502 (1927), holding inoperative a similar Montana tax law.

66. *Accord: Keating v. Public Nat'l Bank*, 284 U.S. 587 (1932), holding inoperative for the same reason a New York tax law.

67. *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 479 (1928).

Montana law which levied tax on national bank shares was inconsistent with federal law prohibiting levy on such shares as rates higher than those assessed on moneyed capital in hands of individual citizens.

68. *Hunt v. United States*, 278 U.S. 96 (1928).

Arizona game laws were not enforceable in a national game preserve and could not be invoked to prevent the killing of wild deer therein as ordered by federal officers acting under authority conferred by federal law.

69. *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929).

Arkansas insolvency law was superseded by the Federal Bankruptcy Act to the extent that a creditor of one who invoked the state laws was entitled to have his claim paid by the state receiver in conformity with the order of distribution sanctioned by the federal law.

Justices concurring: Butler, Holmes, Stone, Sanford, Van Devanter, Taft, C.J..

Justices dissenting: McReynolds, Brandeis, Sutherland.

70. *Nielsen v. Johnson*, 279 U.S. 47 (1929).

Iowa inheritance tax law discriminating against nonresident alien heirs was violative of a treaty with Denmark.

71. *Carpenter v. Shaw*, 280 U.S. 363 (1930).

Oklahoma law which imposed a 3% tax on the gross value of royalties from oil and gas was void as a tax on the right reserved to Indians as owners and lessors of the fee when applied to Indians who had received allotments exempted under the Atoka agreement and leased by them for production of oil and gas (Art. VI).

72. *Lindgren v. United States*, 281 U.S. 38 (1930).

The right of action given under the Federal Merchant Marine Act to the personal representative to recover damages on behalf of beneficiaries for the death of a seaman resulting from negligence was exclusive and precluded a right of recovery by reason of unseaworthiness predicated upon the death statute of Virginia, where the injury was sustained.

73. *Baizley Iron Works v. Span*, 281 U.S. 222 (1930).

Pennsylvania Workmen's Compensation Act could not be invoked to obtain recovery for injuries sustained by a workman while painting angle irons in the engine room of a ship tied to a pier in navigable waters; recovery was controlled exclusively by federal maritime law.

Justices concurring: McReynolds, Sutherland, Butler, Van Devanter.
Justices dissenting: Stone, Holmes, Brandeis.

74. *Accord: Employers' Liability Assurance Co. v. Cook*, 281 U.S. 233 (1930).

Texas workman's compensation law inapplicable for the same reason.

Justices concurring: McReynolds, Butler, Sutherland, Van Devanter, Stone (separately), Holmes (separately), Brandeis (separately).

75. *Santovincenzo v. Egan*, 284 U.S. 30 (1931).

New York law pertaining to the descent of property of an alien decedent was inoperative as to the property of an alien by reason of the conflicting provisions of a treaty negotiated with the nation to which the decedent owed allegiance.

76. *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931).

Federal bankruptcy courts are empowered to sell the real estate of bankrupts free from liens for state taxes; lien laws of Ohio stipulating that the liens were to attach to the property were ineffective to prevent the federal court from transferring the liens from the property to the proceeds of the sale.

77. *Henkel v. Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932).

Minnesota statute fixing amounts to be paid as compensation or in fees to expert witnesses could not be applied to determine costs in a federal court proceeding inasmuch as the statute was superseded by a federal enactment determining the fees to be paid witnesses.

78. *Murray v. Gerrick & Co.*, 291 U.S. 315 (1934).

Washington Workman's Compensation Act, adopted after the United States had acquired exclusive jurisdiction over a tract which became Puget Sound Navy Yard, could not be invoked by the widow and child of a worker fatally injured while working for a contractor in said Yard for the reason that Congress by law had consented only to the institution of suits by a personal representative under the Washington Wrongful Death Statute.

79. *Jennings v. United States Fidelity & Guaranty Co.*, 294 U.S. 216 (1935).

Section of Indiana Bank Collection Code which purported to make the owners of paper which a bank had collected, but which it had not satisfied, preferred claimants in the event of the bank's failure, regardless of whether the funds representing such paper could be traced or identified as part of the bank's assets or intermingled with or converted into other assets of the bank, was inoperative as to a national bank by reason of conflict with applicable federal law.

80. *Accord: Old Company's Lehigh v. Meeker Co.*, 294 U.S. 227 (1935), embracing a comparable New York statutory provision.

81. *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935).

Pennsylvania law which levied a tax on trust companies was in conflict with provisions of federal law proscribing discriminatory taxation of national bank shares by virtue of deductions allowed trust company for amounts represented by shares owned in Pennsylvania corporations already taxed or exempted, without any corresponding deduction on account of nontaxable federal securities owned or on account of national bank shares already taxed.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Butler, McReynolds, Sutherland.

Justices dissenting: Cardozo, Brandeis, Stone.

82. *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936).

Oklahoma law which levied a tax on the gross production of oil, as applied to oil produced by lessees of lands of Indian tribes, was not authorized by a federal law consenting to levy of a different tax, and hence was inoperative as a tax on a federal instrumentality.

83. *Lawrence v. Shaw*, 300 U.S. 345 (1937).

North Carolina property tax law could not be enforced so as to levy a tax on bank deposits made by petitioner as guardian of an incompetent veteran of World War I; by the terms of applicable federal law bank deposits which resulted from the receipt of federal veterans benefits payments were exempted from local taxation.

84. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

A Pennsylvania alien registration statute, imposing requirements at variance with those set forth in the Federal Alien Registration Act of 1940 containing a comprehensive scheme for the regulation of aliens, is rendered unenforceable by reason of conflict with federal legislative and treaty-making powers.

Justices concurring: Roberts, Black, Reed, Frankfurter, Douglas, Murphy.
Justices dissenting: Stone, Hughes, C.J., McReynolds.

85. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941).

Inasmuch as the Federal Farm Loan Act exempts federal land banks from state taxes, other than those on property acquired in the course of dealings, the North Dakota sales tax cannot validly be collected on the sale of materials to a federal land bank to be used in improving real estate (Art. VI, cl. 2).

86. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942).

Consistently with the national supremacy clause, federal laws and regulations relating to the entire process of manufacture of renovated butter supersede state laws whereunder Alabama officials inspected and seized packing stock butter acquired by a manufacturer of renovated butter for interstate commerce.

Justices concurring: Roberts, Black, Reed, Douglas, Jackson.
Justices dissenting: Stone, C.J., Frankfurter, Murphy, Byrnes.

87. *Tulee v. Washington*, 315 U.S. 681 (1942).

Being repugnant to the terms of a treaty concluded with the Yakima Indians reserving to the members of the tribe the right to take fish at all usual places in common with the citizens of Washington Territory, a Washington law requiring such Indians to pay license fees for the exercise of such privilege cannot be enforced.

88. *Pollock v. Williams*, 322 U.S. 4 (1944).

Florida Statute of 1941, sec. 817.09 and sec. 817.10, made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained prima facie evidence of intent to defraud. The statute is violative of the Thirteenth Amendment and the Federal Antipeonage Act for it cannot be said that a plea of guilty is uninfluenced by the statute's threat to convict by its prima facie evidence section.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge.
Justices dissenting: Stone, C.J., Reed.

89. *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945).

A Florida law providing that no one shall be licensed as a "business agent" of a labor union without meeting certain specified standards and that all labor unions in the State must file annual reports disclosing certain information and pay an annual fee circumscribes the "full freedom" to choose collective bargaining agents secured to employees by the National Labor Relations Act.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge.
Justices dissenting: Roberts, Frankfurter.

90. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).

An Iowa statute requiring a permit for construction of a dam in navigable waters is preempted to the extent that it purports to authorize a state veto of a hydro-electric project licensed by the Federal Power Commission pursuant to the Federal Power Act. While the Federal Power Act authorizes the Commission to require a licensee to comply with requirements of state law that are not inconsistent with federal purposes, these federal purposes may not be subordinated to state control through operation of the state permitting requirement.

Justices concurring: Burton, Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge.
Justice dissenting: Frankfurter.

91. *Bethlehem Steel Co. v. New York Employment Relations Bd.*, 330 U.S. 767 (1947).

Where the National Labor Relations Board had asserted general jurisdiction over unions of foreman employed by industries subject to the National Labor Relations Act but had refused to certify such unions as collective bargaining representatives on the ground that to do so at the time would obstruct rather than further effectuation of the purposes of the Act, certification of such unions by the New York Employment Relations Board under a state act is invalid as in conflict with the National Labor Relations Act and the commerce clause of the Constitution.

92. *Accord: Plankington Packing Co. v. WERB*, 338 U.S. 953 (1950).

A decision of the Wisconsin Supreme Court upholding a similar action by the Wisconsin Employment Relations Board is summarily reversed.

93. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947).

By amendments of the United States Warehouse Act, Congress terminated the dual system of regulation and substituted an exclusive system of federal regulations of warehouses licensed under the federal act. Such warehouses therefore no longer need to obtain Illinois licenses or comply with Illinois laws regulating those phases of the

warehouse business which have been regulated under the federal act. Compliance with Illinois law is limited to those phases of the business which the federal act expressly subjects to state law.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Murphy, Jackson, Burton.
Justices dissenting: Frankfurter, Rutledge.

94. *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948).

A South Carolina law providing that any railroad line within the State must be owned and operated only by state-created corporations may not be applied to prevent a Virginia corporation, so authorized by the Interstate Commerce Commission under § 5 of the Interstate Commerce Act, from owning and operating an entire railway system with mileage in South Carolina.

95. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

California's requirement that every person bringing fish ashore in the State for sale obtain a commercial fishing license, but denying such a license to any person ineligible for citizenship, precluded a resident Japanese alien from earning his living as a commercial fisherman in the ocean waters off the State and was invalid both under the equal protection clause of the Fourteenth Amendment and under federal statutory law (42 U.S.C. § 1981).

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge, Burton.
Justices dissenting: Reed, Jackson.

96. *La Crosse Tel. Corp. v. WERB*, 336 U.S. 18 (1949).

Certification by the state employment relations board under a Wisconsin labor relations act of a union as the collective bargaining representative of employees engaged in interstate commerce is invalid as in conflict with the National Labor Relations Act; the employer is onenvalid as applied to deny utility employees the right to strike. As applied, the law conflicts with the National Labor Relations Act.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark.
Justices dissenting: Frankfurter, Burton, Minton.

97. *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949).

Denial of a license under the New York Agricultural and Market Law violated the commerce clause of the Constitution and the Federal Agricultural Marketing Act where the denial was based on grounds that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.

Justices concurring: Vinson, C.J., Reed, Douglas, Jackson, Burton.
Justices dissenting: Black, Frankfurter, Murphy, Rutledge.

98. *Wissner v. Wissner*, 338 U.S. 655 (1950).

The California community property law could not be invoked to sustain an award to a deceased soldier's widow of one-half of the proceeds of an insurance policy issued under the National Life Insurance Act; the federal law accords the insured soldier the right to designate his beneficiary, in this instance, his mother, and his widow, not having been designated, is expressly precluded from acquiring a vested right to these proceeds.

99. *New Jersey Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950).

Collection by a New Jersey taxing district of a tax on intangible property of a stock insurance company, computed without deducting the principal amount of certain United States bonds and accrued interest thereon was invalid by reason of conflict with federal law exempting federal obligations from state and local taxation.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton.
Justice dissenting: Black.

100. *United Automobile Workers v. O'Brien*, 339 U.S. 454 (1950).

The strike vote provision of the Michigan Mediation Law, which prohibits the calling of a strike unless a state-prescribed procedure for mediation is followed and unless a majority of the employees in a state-defined bargaining unit authorizes the strike, conflicts with the National Labor Relations Act and is invalid.

101. *Bus Employees v. WERB*, 340 U.S. 383 (1951).

The Wisconsin Public Utility Anti-Strike Law, which substituted arbitration upon order of the Wisconsin Employment Relations Board for collective bargaining whenever an impasse is reached in the bargaining process, is invalid as applied to deny utility employees the right to strike. As applied, the law conflicts with the National Labor Relations Act.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark.
Justices dissenting: Frankfurter, Burton, Minton.

102. *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952).

Tennessee Retailers' Sales Tax Act could not be enforced as to sales of commodities to a contractor employed by the Atomic Energy Commission; the contractor's activities were those of the Commission and exempt under federal law.

103. *Accord: General Electric Co. v. Washington*, 347 U.S. 909 (1954), embracing exemption of a similar contractor from Washington business and occupation tax law.

104. *Dameron v. Brodhead*, 345 U.S. 322 (1953).

Where a serviceman domiciled in one State is assigned to military duty in another State, the latter state (here Colorado) is barred by § 514 of the Soldiers and Sailor's Civil Relief Act of 1940 from imposing a tax on his tangible personal property temporarily located within its borders, even when the State of his domicile has not taxed such property.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton.
Justices dissenting: Black, Douglas.

105. *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954).

Insofar as the New York Banking Law forbids national banks to use the word "saving" or "savings in their business or advertising," it conflicts with federal laws expressly authorizing national banks to receive deposits and to exercise incidental powers and is void.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Jackson, Burton, Clark, Minton.
Justice dissenting: Reed.

106. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954).

An Illinois law providing for a 90-day suspension of a motor carrier upon a finding of 10 or more violations of regulations calling for a balanced distribution of freight loads in relation to the truck's axles cannot be applied to an interstate motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act. A State may not suspend the carrier's rights to use the State's highways in its interstate operations. The Illinois law, as applied to such carrier, also violates the commerce clause.

107. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

The Smith Act, as amended, 18 U.S.C. § 2385, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act, which proscribes the same conduct. The scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the States to supplement it--enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Clark, Harlan.
Justices dissenting: Reed, Burton, Minton.

108. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

A "right to work" provision of the Nebraska Constitution cannot be invoked to invalidate a "union shop" agreement between an inter-

state railroad and unions of its employees for the reason that such "union shop" agreement is expressly authorized by § 2(11) of the Railway Labor Act.

109. *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

An Arkansas statute requiring licensing of contractors cannot be applied to a federal contractor operating pursuant to a contract issued under authority of the Armed Services Procurement Act of 1947.

110. *Guss v. Utah Labor Bd.*, 353 U.S. 1 (1957).

The Utah Labor Board, acting pursuant to Utah law, may not exercise jurisdiction over a labor dispute involving an employer engaged in interstate commerce if the NLRB declined to exercise jurisdiction and had not ceded jurisdiction to the state board pursuant to § 10(a) of the National Labor Relations Act.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Harlan, Brennan.
Justices dissenting: Burton, Clark.

111. *Public Util. Comm'n v. United States*, 355 U.S. 534 (1958).

A California statute making contingent upon prior approval by its Public Utilities Commission of the Federal Government's practice, sanctioned by federal procurement law, of negotiating special rates with carriers for the transportation of federal property in California is void as conflicting with the federal practices.

Justices concurring: Black, Frankfurter, Douglas, Clark, Brennan, Whittaker.
Justices dissenting: Warren, C.J., Burton, Harlan.

112. *City of Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958).

As applied to a newly organized motor carrier hired by interstate railroads operating in and out of Chicago to transfer interstate passengers and their baggage between different railway terminals in that City, the provision in the Chicago Municipal Code requiring any new transfer service to obtain a certificate of convenience and necessity plus approval of the City Council is unconstitutional. Chicago has no power to decide whether the new motor carrier can operate a service which is an integral part of interstate railway transportation subject to regulations under the Federal Interstate Commerce Act.

Justices concurring: Warren, C.J., Black, Douglas, Clark, Brennan, Whittaker.
Justices dissenting: Frankfurter, Burton, Harlan.

113. *Teamsters Union v. Oliver*, 358 U.S. 283 (1959).

An Ohio antitrust law cannot be invoked to prohibit enforcement of a collective bargaining agreement between a group of interstate motor carriers and local labor unions, which agreement stipulates

that truck drivers owning and driving their own vehicles shall be paid the prescribed wages plus at least a prescribed minimum rental for the use of their vehicles. The state antitrust law, insofar as it is applied to prevent contracting parties from enforcing agreement upon a subject matter as to which the National Labor Relations Act directs them to bargain, is invalid.

Justices concurring: Black, Douglas, Clark, Harlan, Brennan.
Justice dissenting: Whittaker.

114. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The failure of the NLRB to assume jurisdiction does not leave California free to apply its laws defining torts and regulating labor relations for purposes of awarding damages to an employer for economic injuries resulting from the picketing of his plant by labor unions not selected by his employees as their bargaining agent. Since the employer is engaged in interstate commerce, California laws cannot be applied to matters falling within the compass of the National Labor Relations Act.

Justices concurring: Harlan, Clark, Whittaker, Stewart (separately).

115. *Accord: DeVries v. Baumgartner's Electric Co.*, 359 U.S. 498 (1959), as to a South Dakota law.

Justices concurring: Frankfurter, Brennan, Warren, C.J., Black, Douglas.
Justices dissenting: Clark, Harlan, Whittaker, Stewart.

116. *Accord: Superior Court v. Washington ex rel. Yellow Cab*, 361 U.S. 373 (1960), as to a Washington law.

117. *Accord: Bogle v. Jakes Foundry Co.*, 362 U.S. 401 (1960), as to a Tennessee law.

118. *Accord: McMahon v. Milam Mfg. Co.*, 368 U.S. 7 (1961), as to a Mississippi law.

119. *Accord: Marine Engineers v. Interlake Co.*, 370 U.S. 173 (1962), as to a Minnesota law.

120. *Accord: Waxman v. Virginia*, 371 U.S. 4 (1962), as to a Virginia law prohibiting picketing by non-employees.

121. *Accord: Construction Laborers v. Curry*, 371 U.S. 542 (1963), involving enjoinder of picketing as violating Georgia right-to-work law.

Justice concurring: Harlan (separately).

122. *Accord: Journeymen Plumbers' Union v. Borden*, 373 U.S. 690 (1962), as to a Texas law.

Justices concurring: Harlan, Warren, C.J., Brennan, Black, Stewart, White.
Justices dissenting: Douglas, Clark.

123. *Accord: Iron Workers v. Perko*, 373 U.S. 701 (1963), as to an Ohio law.

Justices concurring: Harlan, Warren, C.J., White, Brennan, Stewart, Black.
Justices dissenting: Douglas, Clark.

124. *Boynton v. Virginia*, 364 U.S. 454 (1960).

A Virginia statute making it a misdemeanor for any person to remain on the premises of another after having been forbidden to do so could not be enforced against a Negro for refusing to leave the section reserved for white people in a restaurant in a bus terminal by reason of conflict with provision of Interstate Commerce Act forbidding interstate motor vehicle bus carriers from subjecting persons to unjust discrimination.

Justices concurring: Black, Douglas, Warren, C.J., Brennan, Stewart, Frankfurter, Harlan.
Justices dissenting: Whittaker, Clark.

125. *United States v. Oregon*, 366 U.S. 643 (1961).

Oregon escheat law could not be applied to support State's claim to property of a resident who died without a will or heirs in a Veterans' Hospital in Oregon; the United States has asserted title thereto under a superseding federal law.

Justices concurring: Black, Warren, C.J., Brennan, Stewart, Frankfurter, Harlan, Clark.
Justices dissenting: Douglas, Whittaker.

126. *United States v. Shimer*, 367 U.S. 374 (1961).

Pennsylvania Deficiency Judgment Act had been displaced by applicable provisions of the Federal Servicemen's Readjustment Act of 1944, and regulations issued thereunder, and could not be invoked to bar suit by the Veterans' Administration against a veteran to recover the indemnity for a defaulted home loan which it had guaranteed and which had been foreclosed by the lender.

Justices concurring: Harlan, Brennan, Stewart, Warren, C.J., Clark, Whittaker, Frankfurter.
Justices dissenting: Black, Douglas.

127. *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961).

A Kansas statute declaring that oil and gas leases and the royalties derived therefrom were taxable as personal property could not be applied to subject to local taxation an oil and gas lease and income therefrom derived by a Federal Land Bank from property acquired in satisfaction of a debt; under supervening federal law such Land Banks were exempted from all taxes "except taxes on real estate."

Justice concurring specially: Black.

128. *United States v. Union Central Life Ins. Co.*, 368 U.S. 291 (1961).

Michigan law regulating the manner in which a federal tax lien must be recorded was in conflict with applicable provisions of the Internal Revenue Code and therefore was ineffective for purposes of withholding priority to the Government's lien.

Justices concurring: Black, Frankfurter, Brennan, Warren, C.J., Clark, Stewart, Whittaker, Harlan.
Justice dissenting: Douglas.

129. *Campbell v. Hussey*, 368 U.S. 297 (1961).

Congress having preempted the field by enactment of the Federal Tobacco Inspection Act establishing uniform standards for classification of tobacco, a Georgia law which required Type 14 tobacco grown in Georgia to be identified with a white tag could not be enforced.

Justices concurring: Douglas, Whittaker (separately), Warren, C.J., Brennan, Stewart, Clark.
Justices dissenting: Black, Frankfurter, Harlan.

130. *Free v. Bland*, 369 U.S. 663 (1962).

Treasury regulations creating a right of survivorship in United States Savings Bonds preempted application of conflicting provisions of Texas Community Property Law which prohibited a married couple from taking advantage of such survivorship regulations whenever the purchase price of said bonds was paid out of community property.

131. *State Bd. of Ins. v. Todd Shipyards*, 370 U.S. 451 (1962).

A Texas law imposing a premium tax on insured parties who purchased insurance from insurers not licensed to sell insurance in Texas could not be collected, consistently with the Federal McCarran-Ferguson Act, on insurance contracts purchased in New York from a London insurer by the terms of which premiums thereon and claims thereunder were payable in New York.

Justices concurring: Douglas, Brennan, Warren, C.J., Stewart, Harlan, Clark.
Justice dissenting: Black.

132. *Lassiter v. United States*, 371 U.S. 10 (1962).

Louisiana laws which segregated passengers in terminal facilities of common carriers were unconstitutional by reason of conflict with federal law and the equal protection clause.

133. *United States v. Buffalo Savings Bank*, 371 U.S. 228 (1963).

A New York law which provided that payments out of proceeds of a foreclosure of property to discharge state tax liens should be deemed "expenses" of the mortgage foreclosure sale was ineffective to defeat priority accorded by federal law to federal tax liens antedating liens for state and local real property taxes and assessments.

Justices concurring: Warren, C.J., Black, Brennan, Stewart, Goldberg, Harlan, Clark, White.
Justice dissenting: Douglas.

134. *Paul v. United States*, 371 U.S. 245 (1963).

A California statute which authorized the fixing of minimum wholesale and retail prices for milk could not be enforced as to purchases of milk for military consumption or for resale at commissaries at federal military installations in California; conflicting federal statutes and regulations governing procurement with appropriated funds of goods for the Armed Forces required competitive bidding or negotiation reflecting active competition which would be nullified by minimum prices determined by factors not specified in federal law.

Justices concurring: Douglas, Black, Warren, C.J., White, Brennan, Clark.
Justices dissenting: Stewart, Harlan, Goldberg.

135. *Michigan Nat'l Bank v. Robertson*, 372 U.S. 591 (1963).

Suability of an out-of-state national bank in courts of Nebraska is determined by applicable provisions of the federal banking laws and not by recourse to a Nebraska statute defining the venue of local actions involving liability under the Nebraska Installment Loan Act.

Justices concurring: Black (separately), Douglas (separately).

136. *Accord: Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963), as to venue in Texas.

Justices concurring: White, Stewart, Brennan, Warren, C.J., Goldberg.
Justices dissenting: Harlan, Douglas, Black.

137. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

A Florida law regulating admission to the Bar could not be enforced, consistently with the principle of national supremacy, to prevent a person admitted to practice before the United States Patent Office as a Patent Attorney from serving clients in the latter capacity in Florida.

138. *Bus Employees v. Missouri*, 374 U.S. 74 (1963).

Missouri's King-Thompson Act, which authorized the governor to seize and operate a public utility when the public welfare was jeopardized by a strike threat, was inconsistent with 29 U.S.C. § 157 of the National Labor Relations Act defining the rights of employees as to collective bargaining and, consistently with national supremacy, could not be enforced.

139. *Corbett v. Stergios*, 381 U.S. 124 (1965).

Iowa's reciprocal inheritance law conditioning the right of nonresident aliens to take Iowa real property by intestate succession upon existence of a reciprocal right of United States citizens to take

real property upon same terms and conditions in alien's country could not under United States-Greece treaty and supremacy clause bar Greek national from inheriting property.

140. *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967).

Florida unemployment compensation law disqualifying for benefits any person unemployed as a result of a labor dispute when applied to disqualify a person who has filed an unfair labor practice charge against her employer because of her discharge conflicts with federal labor law and is void under supremacy clause.

141. *Rosado v. Wyman*, 397 U.S. 397 (1970).

A New York statute changing levels of benefits and deleting items to be included in levels of benefit which reduced moneys to recipients conflicted with federal law which required States to adjust upward in terms of increases costs of living amounts deemed necessary for subsistence.

Justices concurring: Harlan, Douglas, Brennan, Stewart, White, Marshall.
Justices dissenting: Black, Burger, C.J..

142. *Lewis v. Martin*, 397 U.S. 552 (1970).

A California statute reducing the amount of dependent children funds going to any household by the amount of funds imputed to presence of a "man-in-the-house" who was not legally obligated to support the child or children conflicts with federal law as interpreted by valid HEW regulations.

Justices concurring: Douglas, Harlan, Brennan, Stewart, White, Marshall.
Justices dissenting: Burger, C.J., Black.

143. *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971).

A California statute providing for suspension of unemployment compensation if the former employer appeals an eligibility decision of a departmental examiner, the suspension to last until decision of the appeal, conflicts with the federal act's requirement that compensation must be paid when due.

144. *Perez v. Campbell*, 402 U.S. 637 (1971).

An Arizona statute providing that a discharge in bankruptcy shall not operate to relieve a judgment creditor under the Motor Vehicle Safety Responsibility Act of any obligation under the Act conflicts with the provision of the federal bankruptcy law which discharges a debtor of all but specified judgments.

145. *Townsend v. Swank*, 404 U.S. 282 (1971).

An Illinois statute and implementing regulations which made needy dependent children 18 through 20 years old eligible for welfare

benefits if they were attending high school or vocational training school but not if they were attending college or university conflicts with federal social security law.

146. *Sterrett v. Mothers' & Children's Rights Org.*, 409 U.S. 809 (1972).

A district court decision holding invalid as in conflict with the federal Social Security Act an Indiana statute denying benefits to persons aged 16 to 18 who are eligible but for the fact that they are not regularly attending school is summarily affirmed.

147. *Philpott v. Welfare Board*, 409 U.S. 413 (1973).

A New Jersey statute providing for recovery by the State of reimbursement for financial assistance when the recipient subsequently obtains funds cannot be applied to obtain reimbursement out of federal disability insurance benefits inasmuch as federal law bars subjecting such funds to any legal process.

148. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

A Burbank, California ordinance placing an 11 p.m. to 7 a.m. curfew on jet take-offs from its local airport is invalid as in conflict with the regulatory scheme of federal statutory control.

Justices concurring: Douglas, Brennan, Blackmun, Powell, Burger, C.J..
Justices dissenting: Rehnquist, Stewart, White, Marshall.

149. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973).

A Washington State statute construed to prohibit net fishing by members of the Tribe conflicts with the Tribe's treaty rights and is invalid.

150. *Beasley v. Food Fair*, 416 U.S. 653 (1974).

North Carolina's right-to-work law giving employees discharged by reason of union membership a cause of action against their employer cannot be applied to supervisors in view of 29 U.S.C. § 164(a), which provides that no law should compel an employer to treat a supervisor as an employee.

151. *Letter Carriers v. Austin*, 418 U.S. 264 (1974).

Virginia statute creating cause of action for "insulting words" as construed to permit recovery for use in labor dispute of words "scab" and similar words is preempted by federal labor law.

Justices concurring: Marshall, Brennan, Stewart, White, Blackmun.
Justice concurring specially: Douglas.
Justices dissenting: Powell, Rehnquist, Burger, C.J..

152. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

Montana laws imposing personal property taxes, vendor license fees, and a cigarette sales tax may not constitutionally be applied to reservation Indians under supremacy clause because federal statutory law precludes such application.

153. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

A New Mexico law providing for the roundup and sale by a state agency of "estrays" cannot under the supremacy clause be constitutionally applied to unbranded and unclaimed horses and burros on public lands of the United States that are protected by federal law.

154. *Machinists & Aerospace Workers v. WERC*, 427 U.S. 132 (1976).

A Wisconsin statute proscribing concerted efforts by employees to interfere with production, except through actual strikes, cannot under the supremacy clause be constitutionally applied to union members' concerted refusal to work overtime during negotiations for renewal of an expired contract since such conduct was intended by Congress to be regulable by neither the States nor the NLRB.

Justices concurring: Brennan, White, Marshall, Blackmun, Power, Burger, C.J..
Justices dissenting: Stevens, Stewart, Rehnquist.

155. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

California's statutory imposition of weight requirements in packaging for sale of bacon and flour which did not allow for loss of weight resulting from moisture loss during distribution while the applicable federal law does is invalid (1) as to bacon because of express federal law and (2) as to flour because adherence to state law would defeat a purpose of the federal law.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, Burger, C.J..
Justices dissenting: Rehnquist, Stewart as to flour.

156. *Douglas v. Seacoast Products*, 431 U.S. 265 (1977).

A Virginia statute prohibiting nonresidents from fishing within certain state waters is preempted by federal enrollment and licensing laws that grant an affirmative right to fish in coastal waters.

157. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

Alabama statutory height and weight requirements for prison guards have an impermissible discriminatory effect upon women, and under the supremacy clause must yield to the federal fair employment law.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, Burger, C.J..
Justice dissenting: White.

158. *Maher v. Buckner*, 434 U.S. 898 (1977).

A Connecticut statutory rule rendering ineligible for welfare benefits individuals who have transferred assets within seven years of applying for benefits unless they can prove the transfer was made for "reasonable consideration" is inconsistent with the Social Security Act and therefore void.

159. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Certain provisions of a Washington statute imposing design or safety standards on oil tankers using state waters and banning operation in those waters of tankers exceeding certain weights, as well as certain pilotage requirements, are invalid as conflicting with federal law.

Justices concurring: Ginsburg, Kennedy, Souter, Breyer, Rehnquist, C.J..
Justices concurring specially: O'Connor, Thomas.
Justice dissenting: Stevens.

160. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

California community property statute, under which property acquired during the marriage by either spouse belongs to both, may not be applied to award a divorced spouse an interest in the other spouse's pension benefits under the Railroad Retirement Act, because the Act precludes subjecting benefits to any legal process to deprive recipients.

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, Stevens, Burger, C.J..
Justices dissenting: Stewart, Rehnquist.

161. *Miller v. Youakim*, 440 U.S. 125 (1979).

An Illinois law differentiating between children who reside in foster homes with relatives and those who do not reside with relatives and giving the latter greater benefits than the former conflicts with federal law, which requires the same benefits be provided regardless of whether the foster home is operated by a relative.

162. *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979).

Arizona's imposition of tax upon electricity produced in State and sold outside the State, which is not offset against other taxes as is the case with electricity sold within State, violates federal statute prohibiting any State from taxing the generation or transmission of electricity in a manner that discriminates against out-of-state consumers, and thus is unenforceable.

163. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

A California statute requiring all wine producers and wholesalers to file fair trade contracts or price schedules with the State and to follow the price lists is a resale price maintenance scheme that violates the Sherman Act.

164. *Ventura County v. Gulf Oil Corp.*, 445 U.S. 947 (1980).

Ventura County, California zoning ordinances governing oil exploration and extraction activities cannot be applied to a company which holds a lease from the United States Government because federal law preempts the field.

165. *Washington v. Confederated Tribes*, 447 U.S. 134 (1980).

Imposition of a Washington state motor vehicle excise tax and mobile home, camper, and trailer taxes on vehicles owned by the Tribe or its members and used both on and off the reservation violates federal law and cannot stand under the supremacy clause.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Stevens, Burger, C.J..

Justices dissenting: Stewart, Rehnquist.

166. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Imposition of Arizona's motor carrier license tax and use fuel tax on a non-Indian enterprise authorized to do business in Arizona but operating entirely on reservation conflicts with federal law and cannot stand under the supremacy clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Burger, C.J..

Justices dissenting: Stevens, Stewart, Rehnquist.

167. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

Arizona's imposition of tax upon on-reservation sale of farm machinery to Indian tribe by non-Indian, off-reservation enterprise conflicts with federal law and is invalid under the supremacy clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Burger, C.J..

Justices dissenting: Stewart, Powell, Rehnquist, Stevens.

168. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

An Iowa statute subjecting to damages a common carrier who abandons service and thereby injures shippers is preempted by the Interstate Commerce Act, which empowers the ICC to approve cessation of service on branch lines upon carrier petitions.

169. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

A New Jersey workmen's compensation provision denying employers the right to reduce retiree's pension benefits by the amount of a compensation award under the act is preempted by federal pension regulation law.

170. *Maryland v. Louisiana*, 451 U.S. 725 (1981).

Louisiana's "first-use tax" statute which, because of exceptions and credits, imposes a tax only on natural gas moving out-of-state, impermissibly discriminates against interstate commerce, and another provision that required pipeline companies to allocate cost of the tax to the ultimate consumer is preempted by federal law.

171. *McCarty v. McCarty*, 453 U.S. 210 (1981).

California community property statute, to the extent it treated retired pay of Army officers as property divisible between spouses on divorce, is preempted by federal law.

Justices concurring: Blackmun, White, Marshall, Powell, Stevens, Burger, C.J..

Justices dissenting: Rehnquist, Brennan, Stewart.

172. *Agsalud v. Standard Oil Co.*, 454 U.S. 801 (1981).

A court of appeals decision holding preempted by federal pension law Hawaii law requiring employers to provide their employees with a comprehensive prepaid health care plan is summarily affirmed.

173. *Blum v. Bacon*, 457 U.S. 132 (1982).

A provision of New York's emergency assistance program precluding assistance to persons receiving AFDC to replace a lost or stolen AFDC grant is contrary to valid federal regulations proscribing inequitable treatment under the emergency assistance program.

174. *Fidelity Fed. S. & L. v. De la Cuesta*, 458 U.S. 141 (1982).

California's prohibition on unreasonable restraints on alienation, construed to prohibit "due-on-sale" clauses in mortgage contracts, is preempted by Federal Home Loan Bank Board regulations permitting federal savings and loan associations to include such clauses in their contracts.

Justices concurring: Blackmun, Brennan, White, Marshall, O'Connor, Burger, C.J..

Justices dissenting: Rehnquist, Stevens.

175. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982).

A New Mexico tax imposed on the gross receipts that a non-Indian construction company received from a tribal school board for construction of a school for Indian children on reservation is preempted by federal law.

Justices concurring: Marshall, Brennan, Blackmun, Powell, O'Connor, Burger, C.J..

Justices dissenting: Rehnquist, White, Stevens.

176. *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983).

A Tennessee tax on the net earnings of banks, applied to interest earned on obligations of the United States, is void as conflicting with 31 U.S.C. § 3124.

177. *Busbee v. Georgia*, 459 U.S. 1166 (1983).

A federal district court decision that Georgia's congressional redistricting plan is invalid as having a racially discriminatory purpose in conflict with the Voting Rights Act is summarily affirmed.

178. *Pennsylvania Public Utility Comm'n v. CONRAIL*, 461 U.S. 912 (1983).
A federal district court decision holding that federal statutes (the Federal Railroad Safety Act and the locomotive boiler inspection laws) preempt a Pennsylvania law requiring locomotives to maintain speed records and indicators, summarily affirmed by an appeals court, is summarily affirmed.

179. *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983).
Prohibition on pass-through to consumers of an increase in Alabama's oil and gas severance tax is invalid as conflicting with the Natural Gas Act to the extent that it applies to sales of gas in interstate commerce.

180. *Philco Aviation v. Shacket*, 462 U.S. 406 (1983).
An Illinois statute recognizing the validity of an unrecorded, oral sale of an aircraft is preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid.

181. *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).
The New York Human Rights Law is preempted by ERISA to the extent that it prohibits practices that are lawful under the federal law.

182. *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983).
A Texas property tax on bank shares, computed on the basis of a bank's net assets without any deduction for the value of United States obligations held by the bank, is invalid as conflicting with Rev. Stat. § 3701 (31 U.S.C. § 3124).

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, Burger, C.J..
Justices dissenting: Rehnquist, Stevens.

183. *Arcudi v. Stone & Webster Engineering*, 463 U.S. 1220 (1983).
An appeals court holding that a Connecticut statute requiring employers to provide health and life insurance to former employees is preempted by ERISA as related to an employee benefit plan, is summarily affirmed.

184. *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983).
A Hawaii "property tax" on the gross income of airlines operating within the State is preempted by a federal prohibition on state taxes on carriage of air passengers "or on the gross receipts derived therefrom."

185. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).
California's franchise law, requiring judicial resolution of certain claims, is preempted by the United States Arbitration Act, which precludes judicial resolution in state or federal courts of claims that contracting parties agree to submit to arbitration.

Justices concurring: Burger, C.J., Brennan, Marshall, Blackmun, Powell.
Justice concurring in part and dissenting in part: Stevens.
Justices dissenting: O'Connor, Rehnquist.

186. *Texas v. KVUE-TV*, 465 U.S. 1092 (1984).

An appeals court holding that a Texas statute regulating the broadcast of political advertisements is preempted by the Federal Election Campaign Act of 1971 to the extent that it imposes sponsorship identification requirements on advertising for candidates for federal office, and to the extent that it conflicts with federal regulation of political advertising rates, is summarily affirmed.

187. *Michigan Canners & Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461 (1984).

A Michigan statute making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by non-member producers is preempted as conflicting with federal policy of the Agricultural Fair Practices Act of 1967, protecting the right of farmers to join or not join such associations.

188. *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984).

The Oklahoma Constitution's general ban on advertising of alcoholic beverages, as applied to out-of-state cable television signals carried by in-state operators, is preempted by federal regulations implementing the Communications Act.

189. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

A South Dakota statute requiring local governments to distribute federal payments in lieu of taxes in the same manner that they distribute general tax revenues conflicts with the Payment in Lieu of Taxes Act, which provides that the recipient local government may use the payment for any governmental purpose.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, O'Connor, Burger, C.J..
Justices dissenting: Rehnquist, Stevens.

190. *Gerace v. Grocery Mfrs. of America*, 474 U.S. 801 (1985).

An appeals court decision holding that federal laws (the Food, Drug, and Cosmetic Act; the Meat Inspection Act; and the Poultry Products Act) preempt a New York requirement that cheese alternatives be labeled "imitation" is summarily affirmed.

191. *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282 (1986).

A Wisconsin statute debarring from doing business with the state persons or firms guilty of repeat violations of the National Labor Relations Act is preempted by that Act.

192. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

A New Jersey statute creating an oil spill compensation fund is preempted by the Comprehensive Environmental Response, Compensation, and Liability Act to the extent that the state fund is used to finance cleanup activities at sites listed in the National Contingency Plan.

Justices concurring: Marshall, Brennan, White, Blackmun, Rehnquist, O'Connor, Burger, C.J..
Justice dissenting: Stevens.

193. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986).

A North Dakota statute disclaiming jurisdiction over actions brought by tribal Indians suing non-Indians in state courts over claims arising in Indian country is preempted by federal Indian law (Pub. L. 280).

Justices concurring: O'Connor, White, Marshall, Blackmun, Powell, Burger, C.J..
Justices dissenting: Rehnquist, Brennan, Stevens.

194. *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986).

Louisiana's wrongful death statute is preempted by the Death on the High Seas Act as applied to a helicopter crash 35 miles off shore.

Justices concurring: O'Connor, White, Blackmun, Rehnquist, Burger, C.J..
Justices dissenting: Powell, Brennan, Marshall, Stevens.

195. *Roberts v. Burlington Industries*, 477 U.S. 901 (1986).

An appeals court holding that New York severance pay requirements were preempted by ERISA is summarily affirmed.

196. *Brooks v. Burlington Industries*, 477 U.S. 901 (1986).

An appeals court holding that North Carolina severance pay requirements were preempted by ERISA is summarily affirmed.

197. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

North Carolina's legislative redistricting plan, creating multimember districts having the effect of impairing the opportunity of black voters to participate in the political process, is invalid under § 2 of the Voting Rights Act.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens.
Justices concurring specially: O'Connor, Powell, Rehnquist, Burger.
Justices concurring in part and dissenting in part: Stevens, Marshall, Blackmun.

198. *Rose v. Arkansas State Police*, 479 U.S. 1 (1986).

A provision of Arkansas' workers' compensation act requiring that death benefits be reduced by the amount of any federal benefits paid is preempted by a federal requirement that federal benefits be

"in addition to any other benefit due"; a contrary ruling by an Arizona appeals court is summarily reversed.

199. *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

A section of New York's alcoholic beverage control law establishing retail price maintenance violates section 1 of the Sherman Act, and is not saved by the Twenty First Amendment.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun, Stevens, Scalia.
Justices dissenting: O'Connor, Rehnquist, C.J..

200. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

A California statute governing the operation of bingo games is preempted as applied to Indian tribes conducting on-reservation games.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Rehnquist, C.J..
Justices dissenting: Stevens, O'Connor, Scalia.

201. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

A Riverside County, California ordinance regulating the operation of bingo and various card games is preempted as applied to Indian tribes conducting on-reservation games.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Rehnquist, C.J..
Justices dissenting: Stevens, O'Connor, Scalia.

202. *Perry v. Thomas*, 482 U.S. 483 (1987).

The Federal Arbitration Act preempts a section of California Labor Code providing that actions for collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate."

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Scalia, Rehnquist, C.J..
Justices dissenting: Stevens, O'Connor.

203. *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988).

A federal appeals court decision that Montana's coal severance and gross proceeds taxes, as applied to Indian-owned coal produced by non-Indians, are preempted by federal Indian policies underlying the Mineral Leasing Act of 1938, is summarily affirmed.

204. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

A Michigan statute requiring approval of the Michigan Public Service Commission before a natural gas company may issue long-term securities is preempted as applied to companies subject to FERC regulation under the Natural Gas Act.

205. *Bennett v. Arkansas*, 485 U.S. 395 (1988).

An Arkansas statute authorizing seizure of prisoners' property in order to defray costs of incarceration is invalid as applied to Social Security benefits, exempted from legal process by 42 U.S.C. § 407(a).

206. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988).

A Georgia statute barring garnishment of funds or benefits of employee benefit plans subject to ERISA is preempted by ERISA § 514(a) as a state law that "relates to" covered plans.

Justices concurring: White, Brennan, Marshall, Stevens, Rehnquist, C.J..
Justices dissenting: Kennedy, Blackmun, O'Connor, Scalia.

207. *Felder v. Casey*, 487 U.S. 131 (1988).

Wisconsin's notice-of-claim statute, requiring that persons suing state or local governments or officials in state court must give notice and then refrain from filing suit for an additional period, is preempted as applied to civil rights actions brought in state court under 42 U.S.C. § 1983.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens, Scalia, Kennedy.
Justices dissenting: O'Connor, Rehnquist, C.J..

208. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

Virginia tort law governing product design defects is preempted by federal common law as applied to suits against government contractors for damages resulting from design defects in military equipment if the equipment conformed to reasonably precise specifications and if the contractor warned the government of known dangers.

Justices concurring: Scalia, White, O'Connor, Kennedy, Rehnquist, C.J..
Justices dissenting: Brennan, Marshall, Blackmun, Stevens.

209. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

A Florida statute prohibiting the use of the direct molding process to duplicate unpatented boat hulls, and creating a cause of action in favor of the original manufacturer, is preempted by federal patent law as conflicting with the balance Congress has struck between patent protection and free trade in industrial design.

210. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

Michigan's income tax law, by providing exemption for retirement benefits of state employees but not for retirement benefits of Federal employees, discriminates against federal employees in violation of 4 U.S.C. § 111 and in violation of the constitutional doctrine of intergovernmental tax immunity.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, O'Connor, Scalia, Rehnquist, C.J..

Justice dissenting: Stevens.

211. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

A provision of Pennsylvania's motor vehicle financial responsibility law prohibiting subrogation and reimbursement from a claimant's tort recovery for benefits received from a self-insured health care plan is preempted by ERISA as "relat[ing] to [an] employee benefit plan."

Justices concurring: O'Connor, White, Marshall, Blackmun, Scalia, Kennedy, Rehnquist, C.J..
Justice dissenting: Stevens.

212. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

A Texas common law claim that an employee was wrongfully discharged to prevent his attainment of benefits under a plan covered by ERISA is preempted as a "State law" that "relates to" a covered benefit plan. The state cause of action also "conflicts directly" with an exclusive ERISA cause of action.

213. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992).

The County of Yakima, Washington's excise tax on sales of allotted Indian land does not constitute permissible "taxation of land" within the meaning of § 6 of the General Allotment Act, and is invalid.

214. *Barker v. Kansas*, 503 U.S. 594 (1992).

A Kansas tax on military retirement benefits is inconsistent with 4 U.S.C. § 111, which allows states to tax federal employees' compensation if the tax does not discriminate "because of the source" of the compensation. No similar tax is applied to state and local government retirees, and there are no significant differences between the two classes of taxpayers that justify the different tax treatment.

215. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992).

Illinois' "dual impact" laws designed to protect both employees and the general public by requiring training and licensing of hazardous waste equipment operators are preempted by § 18(b) of the Occupational Safety and Health Act, 29 U.S.C. § 667(b), which requires states to obtain federal approval before enforcing occupational safety and health standards relating to issues governed by federal standards.

216. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Two claims, based on New Jersey law and brought against cigarette companies for damages for lung cancer allegedly resulting from smoking, are preempted under the Federal Cigarette Labeling and Advertising Act: failure-to-warn claims requiring a showing that the tobacco companies' post-1969 advertising should have included addi-

tional warnings, and fraudulent misrepresentation claims predicated on state law restrictions on advertising.

217. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).

Oklahoma may not impose income taxes or motor vehicle taxes on members of the Sac and Fox Nation who live in "Indian country," whether the land is within reservation boundaries, on allotted lands, or in dependent communities. Such tax jurisdiction is considered to be preempted unless Congress has expressly provided to the contrary.

218. *Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

An Ohio statute setting priority of claims against insolvent insurance companies is preempted by the federal priority statute, 31 U.S.C. § 3713, which accords first priority to the United States, to the extent that the Ohio law protects the claims of creditors who are not policyholders. Insofar as it protects the claims of policyholders, the law is saved from preemption by section 2(b) of the McCarran-Ferguson Act.

Justices concurring: Blackmun, White, Stevens, O'Connor, Rehnquist, C.J..
Justices dissenting: Kennedy, Scalia, Souter, Thomas.

219. *American Airlines v. Wolens*, 513 U.S. 213 (1995).

The Illinois Consumer Fraud Act, to the extent that it authorizes actions in state court challenging as "unfair or deceptive" marketing practices an airline company's changes in its frequent flyer program, is preempted by the Airline Deregulation Act, which prohibits states from "enact[ing] or enforc[ing] any law . . . relating to [air carrier] rates, routes, or services."

Justices concurring: Ginsburg, Kennedy, Souter, Breyer, Rehnquist, C.J..
Justices concurring specially: O'Connor, Thomas.
Justice dissenting: Stevens.

220. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

Oklahoma may not impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land. The legal incidence of the motor fuels tax falls on the retailer, located within Indian country, and the petitioner did not properly raise the issue of whether Congress had authorized such taxation in the Hayden-Cartwright Act.

221. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996).

A federal law empowering national banks in small towns to sell insurance (12 U.S.C. § 92) preempts a Florida law prohibiting banks from dealing in insurance. The federal law contains no explicit statement of preemption, but preemption is implicit because the state law stands as an obstacle to the accomplishment of one of the federal law's purposes.

222. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

A Montana law declaring an arbitration clause unenforceable unless notice that the contract is subject to arbitration appears in underlined capital letters on the first page of the contract is preempted by the Federal Arbitration Act.

Concurring Justices: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Breyer, Rehnquist, C.J..
Justice dissenting: Thomas.

223. *Foster v. Love*, 522 U.S. 67 (1997).

A Louisiana statute that provides for an "open primary" in October for election of Members of Congress and that provides that any candidate receiving a majority of the vote in that primary ″is elected,″ conflicts with the federal law, 2 U.S.C. §§ 1 and 7, that provides for a uniform federal election day in November, and is void to the extent of conflict. "[A] contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day . . . clearly violates § 7."

224. *United States v. Locke*, 529 U.S. 89 (2000).

Four Washington State regulations governing oil tanker operations and manning are preempted. Primarily through Title II of the Ports and Waterways Safety Act of 1972, Congress has occupied the field of regulation of general seaworthiness of tankers and their crews, and there is no room for these state regulations imposing training and English language proficiency requirements on crews and imposing staffing requirements for navigation watch. State reporting requirements applicable to certain marine incidents are also preempted.

SUPREME COURT DECISIONS
OVERRULED BY SUBSEQUENT DECISION

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

While the Supreme Court sometimes expressly overrules a prior decision, in other instances the overruling must be deduced from the principles of related cases. Obviously, there is a chance here for a difference of opinion and this will be reflected in any listing.

The present compilation was initially based primarily upon the following sources:

Justice Brandeis dissenting in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406–409 nn.1–4 (1932).

Emmet E. Wilson, "Stare Decisis, Quo Vadis?" 33 Geo. L.J. 251, 254 n.17, 265 (1945);

William O. Douglas, "Stare Decisis", 49 Colum. L. Rev. 735–43, 756–58 (1949);

Albert R. Blaustein and Andrew H. Field, "Overruling Opinions in the Supreme Court", 57 Mich. L. Rev. 151, 184–94 (1958).

Asterisks (*) identify cases expressly overruled.

	Overruling Case	*Overruled Case*
*	1. Hudson v. Guestier 10 U.S. (6 Cr.) 281, 285 (1810)	Rose v. Himley 8 U.S. (4 Cr.) 241 (1808)
	2. Gordon v. Ogden 28 U.S. (3 Pet.) 33, 34 (1830)	Wilson v. Daniel 3 U.S. (3 Dall.) 401 (1798)
	3. Greene v. Lessee of Neal 31 U.S. (6 Pet.) 291 (1832)	Patton v. Easton 14 U.S. (1 Wheat.) 476 (1816) Powell's Lessee v. Harmon 27 U.S. (2 Pet.) 241 (1829)
	4. Louisville R.R. v. Letson 43 U.S. (2 How.) 497, 554–556 (1844)	Commercial and Railroad Bank v. Slocomb 39 U.S. (14 Pet.) 60 (1840) Strawbridge v. Curtiss 7 U.S. (3 Cr.) 267 (1806); and qualifying, Bank of the United States v. Deveaux 9 U.S. (5 Cr.) 61 (1809)
*	5. The Genessee Chief 53 U.S. (12 How.) 443, 456 (1851)	The Thomas Jefferson 23 U.S. (10 Wheat.) 428 (1825); The Orleans v. Phoebus 36 U.S. (11 Pet.) 175 (1837)
*	6. Gazzam v. Phillip's Lessee 61 U.S. (20 How.) 372, 377–378 (1858)	Brown's Lessee v. Clements 44 U.S. (3 How.) 650 (1845)
	7. Suydam v. Williamson 65 U.S. (24 How.) 427 (1861)	Williamson v. Berry 49 U.S. (8 How.) 495 (1850); Williamson v. Irish Presbyterian Congregation 49 U.S. (8 How.) 565 (1850); Williamson v. Ball 49 U.S. (8 How.) 566 (1850)
*	8. Mason v. Eldred 73 U.S. (6 Wall.) 231, 238 (1868)	Sheehy v. Mandeville 10 U.S. (6 Cr.) 253 (1810)
	9. The Belfast 74 U.S. (7 Wall.) 624, 641 (1869)	Allen v. Newberry 62 U.S. (21 How.) 244 (1858) (in part)
	10. Knox v. Lee (Legal Tender Cases) 79 U.S. (12 Wall.) 457, 553 (1871)	Hepburn v. Griswold 75 U.S. (8 Wall.) 603 (1870)

	Overruling Case	*Overruled Case*
	11. Trebilcock v. Wilson 79 U.S. (12 Wall.) 687 (1871)	Roosevelt v. Meyer 68 U.S. (1 Wall.) 512 (1863)
*	12. Hornbuckle v. Toombs 85 U.S. (18 Wall.) 648, 652–653 (1874)	Noonan v. Lee 67 U.S. (2 Black) 499 (1863); Orchard v. Hughes 68 U.S. (1 Wall.) 73, 77 (1864); Dunphy v. Kleinsmith 78 U.S. (11 Wall.) 610 (1871)
*	13. Union Pac. Ry. v. McShane 89 U.S. (22 Wall.) 444 (1874)	Kansas Pac. Ry. v. Prescott 83 U.S. (16 Wall.) 603 (1873) (in part)
*	14. County of Cass v. Johnston 95 U.S. 360 (1877)	Harshman v. Bates County 92 U.S. 569 (1875)
*	15. Fairfield v. County of Gallatin 100 U.S. 47 (1879)	Town of Concord v. Savings-Bank 92 U.S. 625 (1875)
*	16. Tilghman v. Proctor 102 U.S. 707 (1880)	Mitchell v. Tilghman 86 U.S. (19 Wall.) 287 (1873)
	17. Kilbourn v. Thompson 103 U.S. 168, 192–200 (1881)	Anderson v. Dunn 19 U.S. (6 Wheat.) 204 (1821)
*	18. United States v. Phelps 107 U.S. 320, 323 (1883)	Shelton v. The Collector 72 U.S. (5 Wall.) 113, 118 (1867)
*	19. Kountze v. Omaha Hotel Co. 107 U.S. 378, 387 (1883)	Stafford v. The Union Bank of Louisiana 57 U.S. (16 How.) 135 (1853)
*	20. Morgan v. United States 113 U.S. 476, 496 (1885)	Texas v. White 74 U.S. (7 Wall.) 700 (1869)
	21. Wabash St.L. & P. Ry. v. Illinois, 118 U.S. 557 (1886)	Peik v. Chicago & N.W. Ry. 94 U.S. 164 (1877) ("substantially though not expressly overruled")
	22. Philadelphia Steamship Co. v. Pennsylvania 122 U.S. 326 (1887)	State Tax on Railway Gross Receipts 82 U.S. (15 Wall.) 284 (1873) ("basic grounds of decision repudiated")
	23. In re Ayers 123 U.S. 443 (1887)	Osborn v. Bank of the United States 22 U.S. (9 Wheat.) 738 (1824)
*	24. Leloup v. Port of Mobile 127 U.S. 640, 647 (1888)	Osborne v. Mobile 83 U.S. (16 Wall.) 479 (1873)
*	25. Leisy v. Hardin 135 U.S. 100, 118 (1890)	Pierce v. New Hampshire 46 U.S. (5 How.) 504 (1847)
*	26. Brenham v. German-American Bank 144 U.S. 173, 187 (1892)	Rogers v. Burlington 10 U.S. (3 Wall.) 654 (1866); Mitchell v. Burlington 71 U.S. (4 Wall.) 270 (1867)
*	27. Roberts v. Lewis 153 U.S. 367, 377 (1894)	Giles v. Little 104 U.S. 291 (1881)
	28. Pollock v. Farmers' Loan & Trust Co. 158 U.S. 601 (1895)	Hylton v. United States 3 U.S. (3 Dall.) 171 (1796)
*	29. Garland v. Washington 232 U.S. 642, 646 (1914)	Crain v. United States 162 U.S. 625 (1896)
*	30. United States v. Nice 241 U.S. 591, 601 (1916)	Matter of Heff 197 U.S. 488 (1905)
	31. Pennsylvania R.R. v. Towers 245 U.S. 6, 17 (1917)	Lake Shore & Mich. So. Ry. v. Smith 173 U.S. 684 (1899) (in part)
*	32. Rosen v. United States 245 U.S. 467, 470 (1918)	United States v. Reid 53 U.S. (12 How.) 361 (1851)

	Overruling Case	*Overruled Case*
*	33. Boston Store v. American Graphophone Co. 246 U.S. 8, 25 (1918); and Motion Picture Co. v. Universal Film Co. 243 U.S. 502, 518 (1917)	Henry v. Dick Co. 224 U.S. 1 (1912)
*	34. Terrel v. Burke Constr. Co. 257 U.S. 529, 533 (1922)	Doyle v. Continental Ins. Co. 94 U.S. 535 (1877); Security Mut. Life Ins. Co. v. Prewitt 202 U.S. 246 (1906)
*	35. Lee v. Chesapeake & Ohio Ry. 260 U.S. 653, 659 (1923)	Ex parte Wisner 203 U.S. 449 (1906); and qualifying, In re Moore 209 U.S. 490 (1908)
*	36. Alpha Cement Co. v. Massachusetts 268 U.S. 203, 218 (1925)	Baltic Mining Co. v. Massachusetts 231 U.S. 68 (1913)
	37. Chesapeake & Ohio Ry. v. Leitch 276 U.S. 429 (1928) (rehearing)	Chesapeake & Ohio Ry. v. Leitch 275 U.S. 507 (1927)
*	38. Gleason v. Seaboard Ry. 278 U.S. 349, 357 (1929)	Friedlander v. Texas & Pac. Ry. 130 U.S. 416 (1889) (in part)
*	39. Farmers Loan Co. v. Minnesota 280 U.S. 204, 209 (1930)	Blackstone v. Miller 188 U.S. 189 (1903)
*	40. East Ohio Gas Co. v. Tax Comm'n 283 U.S. 465, 472 (1931)	Pennsylvania Gas Co. v. Public Serv. Comm'n 252 U.S. 23 (1920)
*	41. Chicago & E.I.R.R. v. Industrial Comm'n 284 U.S. 296 (1932)	Erie R.R. v. Collins 253 U.S. 77 (1920); Erie R.R. v. Szary 253 U.S. 86 (1920)
	42. Fox Film Corp. v. Doyal 286 U.S. 123 (1932)	Long v. Rockwood 277 U.S. 142 (1928)
	43. New York ex rel. Northern Finance Corp. v. Lynch 290 U.S. 601 (1933) *See also:* United States v. City of Detroit 355 U.S. 466, 472 n.2 (1958)	Macallen Co. v. Massachusetts 279 U.S. 620 (1929)
*	44. Funk v. United States 290 U.S. 371, 373, 386 (1933); *See also:* Hawkins v. United States 358 U.S. 74, 76 (1958)	* Stein v. Bowman 38 U.S. (13 Pet.) 209 (1839) (in part); * Hendrix v. United States 219 U.S. 79 (1911); Logan v. United States 144 U.S. 263 (1892); * Jin Fuey Moy v. United States 254 U.S. 189 (1920)
*	45. West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937)	Adkins v. Children's Hospital 261 U.S. 525 (1923) Morehead v. New York ex rel. Tipaldo 298 U.S. 587 (1936)
	46. Railroad Comm'n v. Pacific Gas Co. 302 U.S. 388 (1938) (rehearing)	Railroad Comm'n v. Pacific Gas Co. 301 U.S. 669 (1937)
*	47. Helvering v. Producers Corp. 303 U.S. 376 (1938)	Gillespie v. Oklahoma 257 U.S. 501 (1922); Burnet v. Coronado Oil & Gas Co. 285 U.S. 393 (1932)
*	48. Erie R.R. v. Tompkins 304 U.S. 64, 69, 79 (1938)	Swift v. Tyson 41 U.S. (16 Pet.) 1 (1842)

	Overruling Case	*Overruled Case*
*	49. Graves v. New York ex rel. O'Keefe 306 U.S. 466 (1939)	Dobbins v. Commissioners of Erie County 41 U.S. (16 Pet.) 435 (1842); Collector v. Day 78 U.S. (11 Wall.) 113 (1871); New York ex rel. Rogers v. Graves 299 U.S. 401 (1937); Brush v. Commissioners 300 U.S. 352 (1937)
	50. Rochester Tel. Corp. v. United States 307 U.S. 125 (1939)	Procter & Gamble v. United States 225 U.S. 282 (1912)
*	51. O'Malley v. Woodrough 307 U.S. 277 (1939)	Evans v. Gore 253 U.S. 245 (1920) Miles v. Graham 268 U.S. 501 (1925)
*	52. Madden v. Kentucky 309 U.S. 83 (1940)	Colgate v. Harvey 296 U.S. 404 (1935)
*	53. Helvering v. Hallock 309 U.S. 106 (1940)	Helvering v. St. Louis Trust Co. 296 U.S. 39 (1935); Becker v. St. Louis Trust Co. 296 U.S. 48 (1935)
	54. Tigner v. Texas 310 U.S. 141 (1940)	Connolly v. Union Sewer Pipe Co. 184 U.S. 540 (1902)
*	55. United States v. Darby 312 U.S. 100 (1941)	Hammer v. Dagenhart 247 U.S. 251 (1918); Carter v. Carter Coal Co. 298 U.S. 238 (1936) (limited)
*	56. United States v. Chicago M. St. P. & P.R.R. 312 U.S. 592 (1941)	United States v. Lynah 188 U.S. 445 (1903) (in part); United States v. Heyward 250 U.S. 633 (1919)
*	57. Nye v. United States 313 U.S. 33 (1941)	Toledo Newspaper Co. v. United States 247 U.S. 402 (1918)
*	58. California v. Thompson 313 U.S. 109 (1941)	Di Santo v. Pennsylvania 273 U.S. 34 (1927)
	59. United States v. Classic 313 U.S. 299 (1941)	Newberry v. United States 256 U.S. 232 (1921)
*	60. Olsen v. Nebraska 313 U.S. 236 (1941)	Ribnik v. McBride 277 U.S. 350 (1928)
*	61. Alabama v. King & Boozer 314 U.S. 1 (1941)	Panhandle Oil Co. v. Knox 277 U.S. 218 (1928); Graves v. Texas Company 298 U.S. 393 (1936)
	62. Toucey v. N.Y. Life Ins. Co. 314 U.S. 118 (1941)	Supreme Tribe of Ben-Hur v. Cauble 255 U.S. 356 (1921)
	63. Edwards v. California 314 U.S. 160 (1941)	City of New York v. Miln 36 U.S. (11 Pet.) 102 (1837)
*	64. State Tax Comm'n v. Aldrich 316 U.S. 174 (1942)	First Nat'l Bank v. Maine 284 U.S. 312 (1932)
*	65. Williams v. North Carolina 317 U.S. 287 (1942)	Haddock v. Haddock 201 U.S. 562 (1906)
*	66. Brady v. Roosevelt S.S. Co. 317 U.S. 575 (1943)	Johnson v. Fleet Corp. 280 U.S. 320 (1930)
*	67. Jones v. Opelika 319 U.S. 103 (1943) (re-argument); Murdock v. Pennsylvania 319 U.S. 105 (1943)	Jones v. Opelika 316 U.S. 584 (1942)

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	68. Oklahoma Tax Comm'n v. United States 319 U.S. 598 (1943)	Childers v. Beaver 270 U.S. 555 (1926)
*	69. West Virginia Bd. of Educ. v. Barnette 319 U.S. 624 (1943)	Minersville School Dist. v. Gobitis 310 U.S. 586 (1940)
	70. FPC v. Hope Gas Co. 320 U.S. 591 (1944)	United Railways v. West 280 U.S. 234 (1930) (in part)
	71. Mercoid Corp. v. Mid-Continent Co. 320 U.S. 661 (1944)	Leeds & Catlin Co. v. Victor Talk. Mach. (No. 2) 213 U.S. 325 (1909) (limited)
	72. Mahnich v. Southern S.S. Co. 321 U.S. 96 (1944)	Plamals v. Pinar Del Rio 277 U.S. 151 (1928) (in part)
*	73. Smith v. Allwright 321 U.S. 649 (1944)	Grovey v. Townsend 295 U.S. 45 (1935)
	74. United States v. South-Eastern Underwriters' Ass'n 322 U.S. 533 (1944)	Paul v. Virginia 75 U.S. (8 Wall.) 168 (1869)
*	75. Girouard v. United States 328 U.S. 61 (1946)	United States v. Schwimmer 279 U.S. 644 (1929); United States v. MacIntosh 283 U.S. 605 (1931); United States v. Bland 283 U.S. 636 (1931)
	76. Halliburton Co. v. Walker 329 U.S. 1 (1946) (rehearing)	Halliburton Co. v. Walker 326 U.S. 696 (1946)
	77. MacGregor v. Westinghouse Co. 329 U.S. 402 (1947) (rehearing)	MacGregor v. Westinghouse Co. 327 U.S. 758 (1946)
*	78. Angel v. Bullington 330 U.S. 183 (1947)	David Lupton's Sons v. Auto. Club of Am. 225 U.S. 489 (1912) (rendered obsolete by prior change in law)
	79. Zap v. United States 330 U.S. 800 (1947) (rehearing)	Zap v. United States 328 U.S. 624 (1946)
	80. Thibaut v. Car and General Ins. Corp. 332 U.S. 828 (1947) (on rehearing)	Thibaut v. Car and General Ins. Corp. 332 U.S. 751 (1947)
	81. Sherrer v. Sherrer 334 U.S. 343 (1948)	Andrews v. Andrews 188 U.S. 14 (1903) (in part)
	82. Lincoln Fed. Labor Union v. Northwestern 335 U.S. 525 (1949) *See also:* Phelps Dodge Corp. v. NLRB 313 U.S. 177 (1941)	Adair v. United States 208 U.S. 161 (1908) Coppage v. Kansas 236 U.S. 1 (1915)
*	83. Commissioner v. Estate of Church 335 U.S. 632, 637 (1949)	May v. Heiner 281 U.S. 238 (1930)
	84. Ott v. Mississippi Barge Line 336 U.S. 169 (1949)	St. Louis v. Ferry Company 78 U.S. (11 Wall.) 423 (1870); Old Dominion S.S. Co. v. Virginia 198 U.S. 299 (1905); Ayer & Lord Co. v. Kentucky 202 U.S. 409 (1906)
*	85. Oklahoma Tax Comm'n v. Texas Co. 336 U.S. 342 (1949)	Choctaw O. & G. R.R. v. Harrison 235 U.S. 292 (1914); Indian Oil Co. v. Oklahoma 240 U.S. 522 (1916);

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		Howard v. Gipsy Oil Co. 247 U.S. 503 (1918); Large Oil Co. v. Howard 248 U.S. 549 (1919); Oklahoma v. Barnsdall Corp. 296 U.S. 521 (1936)
*	86. Cosmopolitan Co. v. McAllister 337 U.S. 783 (1949)	Hust v. Moore-McCormack Lines 328 U.S. 707 (1946)
*	87. United States v. Rabinowitz 339 U.S. 56, 66, 85 (1950)	Trupiano v. United States 334 U.S. 699 (1948); McDonald v. United States 335 U.S. 451 (1948)
*	88. Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 502 (1952)	Mutual Film Corp. v. Ohio Indus. Comm'n 236 U.S. 230 (1915)
*	89. Brown v. Board of Education 347 U.S. 483, 491, 494–495 (1954)	Cumming v. Richmond County Bd. of Educ. 175 U.S. 528 (1899); Gong Lum v. Rice 275 U.S. 78 (1927)
	90. In re Isserman 348 U.S. 1 (1954) (on rehearing)	In re Isserman 345 U.S. 286 (1953)
	91. Gayle v. Browder 352 U.S. 903 (1956)	Plessy v. Ferguson 163 U.S. 537 (1896)
*	92. Reid v. Covert 354 U.S. 1 (1957)	Kinsella v. Krueger 351 U.S. 470 (1956); Reid v. Covert 351 U.S. 487 (1956)
*	93. Vanderbilt v. Vanderbilt 354 U.S. 416, 419 (1957); *See also:* Armstrong v. Armstrong 350 U.S. 568, 581 (1956)	Thompson v. Thompson 226 U.S. 551 (1913)
*	94. Ladner v. United States 358 U.S. 169 (1958) (on rehearing)	Ladner v. United States 355 U.S. 282 (1958)
*	95. United States v. Raines 362 U.S. 17, 27 (1960)	United States v. Reese 92 U.S. 214, 220–221 (1876)
*	96. Elkins v. United States 364 U.S. 206, 210, 212–213, 283 (1960); Rios v. United States 364 U.S. 253 (1960)	Weeks v. United States 232 U.S. 383, 398 (1914) (in part); Center v. United States 267 U.S. 575 (1925); Byars v. United States 273 U.S. 28, 33 (1927) (in part); Feldman v. United States 322 U.S. 487, 492 (1944) (in part)
*	97. James v. United States 366 U.S. 213, 215, 221, 223, 241 (1961)	Commissioner v. Wilcox 327 U.S. 404 (1946)
*	98. Mapp v. Ohio 367 U.S. 643, 653–655 (1961); *See also:* Ker v. California 374 U.S. 23, 45, 53, 59 (1963)	Wolf v. Colorado 338 U.S. 25 (1949) (in part) Irvine v. California 347 U.S. 128 (1954) (in part)
*	99. Baker v. Carr 369 U.S. 186, 277, 280 (1962)	Colegrove v. Green 328 U.S. 549 (1946) (in part);
*	100. Wesberry v. Sanders 376 U.S. 1 (1964)	Colegrove v. Barrett 330 U.S. 804 (1947)

	Overruling Case	*Overruled Case*
*	101. Smith v. Evening News Ass'n 371 U.S. 195, 199 (1962); *See also:* Truck Drivers Union v. Riss & Co. 372 U.S. 517, 520 (1963)	Westinghouse Employees v. Westinghouse Corp. 348 U.S. 437 (1955) (in part)
*	102. Construction Laborers v. Curry 371 U.S. 542, 552, 554 (1963)	Building Union v. Ledbetter Co. 344 U.S. 178 (1952) (in part)
*	103. Gideon v. Wainwright 372 U.S. 335 (1963)	Betts v. Brady 316 U.S. 455 (1942)
*	104. Gray v. Sanders 372 U.S. 368, 383 (1963)	Cook v. Fortson 329 U.S. 675 (1946) Turman v. Duckworth 329 U.S. 675 (1946); South v. Peters 339 U.S. 276 (1950); Cox v. Peters 342 U.S. 936 (1952); Hartsfield v. Sloan 357 U.S. 916 (1958)
*	105. Fay v. Noia 372 U.S. 391, 435 (1963)	Darr v. Burford 339 U.S. 200 (1950) (in part)
*	106. Ferguson v. Skrupa 372 U.S. 726, 731 (1963)	Adams v. Tanner 244 U.S. 590 (1917)
	107. Schneider v. Rusk 377 U.S. 163 (1964)	Mackenzie v. Hare 239 U.S. 299 (1915)
*	108. Malloy v. Hogan 378 U.S. 1, 6 (1964)	Twining v. New Jersey 211 U.S. 78 (1908) Adamson v. California 332 U.S. 46 (1947)
*	109. Murphy v. Waterfront Comm'n 378 U.S. 52, 57, 77 (1964)	Jack v. Kansas 199 U.S. 372 (1905); United States v. Murdock 284 U.S. 141 (1931); Feldman v. United States 322 U.S. 487 (1944); Knapp v. Schweitzer 357 U.S. 371 (1958); Mills v. Louisiana 360 U.S. 230 (1959)
*	110. Jackson v. Denno 378 U.S. 368, 391 (1964)	Stein v. New York 346 U.S. 156 (1953)
	111. Escobedo v. Illinois 378 U.S. 478, 491–492 (1964)	Crooker v. California 357 U.S. 433 (1958); Cicenia v. LaGay 357 U.S. 504 (1958)
*	112. Pointer v. Texas 380 U.S. 400, 406 (1965)	West v. Louisiana 194 U.S. 258 (1904)
	113. Gold v. DiCarlo 380 U.S. 520 (1965)	Tyson & Bro. v. Banton 273 U.S. 418 (1927)
*	114. Swift & Co. v. Wickham 382 U.S. 111 (1965)	Kesler v. Department of Pub. Safety 369 U.S. 153 (1962) (in part)
*	115. Harris v. United States 382 U.S. 162 (1965)	Brown v. United States 359 U.S. 41 (1959)
*	116. Harper v. Virginia Bd. of Elections 383 U.S. 663 (1966)	Breedlove v. Suttles 302 U.S. 277 (1937) Butler v. Thompson 341 U.S. 937 (1951)
*	117. Spevack v. Klein 385 U.S. 511 (1967)	Cohen v. Hurley 366 U.S. 117 (1961)
	118. Keyishian v. Board of Regents 385 U.S. 589 (1967)	Adler v. Board of Education 342 U.S. 485 (1952)

	Overruling Case	*Overruled Case*
*	119. Afroyim v. Rusk 387 U.S. 253 (1967)	Perez v. Brownell 356 U.S. 44 (1958)
*	120. Warden v. Hayden 387 U.S. 294 (1967)	Gouled v. United States 255 U.S. 298 (1921)
*	121. Camara v. Municipal Court 387 U.S. 523 (1967)	Frank v. Maryland 359 U.S. 360 (1959)
	122. Berger v. New York 388 U.S. 41 (1967)	Olmstead v. United States 277 U.S. 438 (1928) (in part)
*	123. Katz v. United States 389 U.S. 347 (1967)	Olmstead v. United States 277 U.S. 438 (1928); Goldman v. United States 316 U.S. 129 (1942)
*	124. Peyton v. Rowe 391 U.S. 54 (1968)	McNally v. Hill 293 U.S. 131 (1934)
*	125. Bruton v. United States 391 U.S. 123 (1968)	Delli Paoli v. United States 352 U.S. 232 (1957)
	126. Duncan v. Louisiana 391 U.S. 145 (1968)	Maxwell v. Dow 176 U.S. 581 (1900)
*	127. Carafas v. LaVallee 391 U.S. 234 (1968)	Parker v. Ellis 362 U.S. 574 (1960)
*	128. Lee v. Florida 392 U.S. 378 (1968)	Schwartz v. Texas 344 U.S. 199 (1952)
*	129. Jones v. Alfred H. Mayer Co. 392 U.S. 409, 441–443 (1968)	Hodges v. United States 203 U.S. 1 (1906)
*	130. Moore v. Ogilvie 394 U.S. 814 (1969)	MacDougall v. Green 335 U.S. 281 (1948)
*	131. Brandenburg v. Ohio 395 U.S. 444 (1969)	Whitney v. California 274 U.S. 357 (1927)
*	132. Chimel v. California 395 U.S. 752 (1969)	Harris v. United States 331 U.S. 145 (1947); United States v. Rabinowitz 339 U.S. 56 (1950)
*	133. Benton v. Maryland 395 U.S. 784 (1969)	Palko v. Connecticut 302 U.S. 319 (1937)
	134. Ashe v. Swenson 397 U.S. 436 (1970)	Hoag v. New Jersey 356 U.S. 464 (1958)
*	135. Boys Markets v. Retail Clerks Union 398 U.S. 235 (1970)	Sinclair Refining Co. v. Atkinson 370 U.S. 195 (1962)
*	136. Price v. Georgia 398 U.S. 323, 329–330 (1970)	Brantley v. Georgia 217 U.S. 284 (1910)
*	137. Moragne v. States Marine Lines 398 U.S. 375 (1970)	The Harrisburg 119 U.S. 199 (1886)
*	138. Williams v. Florida 399 U.S. 78 (1970)	Thompson v. Utah 170 U.S. 343 (1898) (in part); Rassmussen v. United States 197 U.S. 516 (1905) (in part)
*	139. Blonder-Tongue Labs v. University of Ill. Found. 402 U.S. 313 (1971)	Triplett v. Lowell 297 U.S. 638 (1936)
*	140. Perez v. Campbell 402 U.S. 637 (1971)	Kesler v. Department of Pub. Safety 369 U.S. 153 (1962); Reitz v. Mealey 314 U.S. 33 (1941)
*	141. Griffin v. Breckenridge 403 U.S. 88 (1971)	Collins v. Hardyman 341 U.S. 651 (1951) (in part)

	Overruling Case	*Overruled Case*
*	142. Dunn v. Blumstein 405 U.S. 330 (1972)	Pope v. Williams 193 U.S. 621 (1904)
*	143. Andrews v. Louisville & Nashville R.R. 406 U.S. 320 (1972)	Moore v. Illinois Cent. R.R. 312 U.S. 630 (1941)
*	144. Lehnhausen v. Lake Shore Auto Parts Co. 410 U.S. 356 (1973)	Quaker City Cab Co. v. Pennsylvania 277 U.S. 389 (1928)
*	145. Braden v. 30th Judicial Circuit Court 410 U.S. 484 (1973)	Ahrens v. Clark 335 U.S. 188 (1948)
*	146. Miller v. California 413 U.S. 15 (1973)	A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General 83 U.S. 413 (1966)
*	147. North Dakota Pharmacy Bd. v. Snyder's Drug Stores 414 U.S. 156 (1973)	Liggett Co. v. Baldridge 278 U.S. 105 (1928)
*	148. Edelman v. Jordan 415 U.S. 651 (1974)	Shapiro v. Thompson 394 U.S. 618 (1969) (in part); State Dep't of Health & Rehab. Servs. v. Zarate 407 U.S. 918 (1972) Sterrett v. Mothers' & Children's Rights Organization 409 U.S. 809 (1973); Wyman v. Bowens 397 U.S. 49 (1970)
*	149. Mitchell v. W. T. Grant Co. 416 U.S. 600 (1974)	Fuentes v. Shevin 407 U.S. 67 (1972) (in part)
*	150. Taylor v. Louisiana 419 U.S. 522 (1975)	Hoyt v. Florida 368 U.S. 57 (1961) (in effect)
*	151. United States v. Reliable Transfer Co. 421 U.S. 397 (1975)	The Schooner Catherine v. Dickinson 58 U.S. (17 How.) 170 (1854)
*	152. Michelin Tire Corp. v. Wages 423 U.S. 276 (1976)	Low v. Austin 80 U.S. (13 Wall.) 29 (1872)
*	153. Dove v. United States 423 U.S. 325 (1976)	Durham v. United States 401 U.S. 481 (1971)
*	154. Hudgens v. NLRB 424 U.S. 507 (1976)	Amalgamated Food Employees Union v. Logan Valley Plaza 391 U.S. 308 (1968)
*	155. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council 425 U.S. 748 (1976)	Valentine v. Chrestensen 316 U.S. 52 (1942)
*	156. National League of Cities v. Usery 426 U.S. 833 (1976)	Maryland v. Wirtz 392 U.S. 183 (1968)
*	157. Machinists & Aerospace Workers v. WERC 427 U.S. 132 (1976)	UAW v. WERB 336 U.S. 245 (1949)
*	158. City of New Orleans v. Dukes 427 U.S. 297 (1976)	Morey v. Doud 354 U.S. 457 (1957)
*	159. Gregg v. Georgia 428 U.S. 153, 195 n.47 (1976)	McGautha v. California 402 U.S. 183 (1971)
*	160. Craig v. Boren 429 U.S. 190, 210 n.23 (1976)	Goesaert v. Cleary 335 U.S. 464 (1948)
*	161. Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co. 429 U.S. 363 (1977)	Bonelli Cattle Co. v. Arizona 414 U.S. 313 (1973)
*	162. Complete Auto Transit v. Brady 430 U.S. 274 (1977)	Spector Motor Service v. O'Connor 340 U.S. 602 (1951)
*	163. Continental T. V. v. GTE Sylvania 433 U.S. 36 (1977)	United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967)

	Overruling Case	*Overruled Case*
*	164. Shaffer v. Heitner 433 U.S. 186 (1977)	Pennoyer v. Neff 95 U.S. 714 (1878)
*	165. Department of Revenue v. Washington Stevedoring Cos. 435 U.S. 734 (1978)	Puget Sound Stevedoring Co. v. State Tax Comm'n 302 U.S. 90 (1937); Joseph v. Carter & Weekes Stevedoring Co. 330 U.S. 422 (1947)
*	166. Monell v. New York City Dep't of Social Services 436 U.S. 658 (1978)	Monroe v. Pape 365 U.S. 167 (1961) (in part); City of Kenosha v. Bruno 412 U.S. 507 (1973) (in part); Moor v. County of Alameda 411 U.S. 693 (1973) (in part); Aldinger v. Howard 427 U.S. 1 (1976)
*	167. Burks v. United States 437 U.S. 1 (1978)	Bryan v. United States 338 U.S. 552 (1950) (in part); Sapir v. United States 348 U.S. 373 (1955) (in part); Yates v. United States 354 U.S. 298 (1957) (in part); Forman v. United States 361 U.S. 416 (1960) (in part)
*	168. United States v. Scott 437 U.S. 82 (1978)	United States v. Jenkins 420 U.S. 358 (1975)
	169. Duren v. Missouri 439 U.S. 357 (1978)	Hoyt v. Florida 368 U.S. 57 (1961)
	170. Hughes v. Oklahoma 441 U.S. 322 (1979)	Geer v. Connecticut 161 U.S. 519 (1896)
	171. Trammel v. United States 445 U.S. 40 (1980)	Hawkins v. United States 358 U.S. 74 (1958)
*	172. United States v. Salvucci 448 U.S. 83 (1980)	Jones v. United States 362 U.S. 257 (1960)
	173. Commonwealth Edison Co. v. Montana 453 U.S. 609 (1981)	Heisler v. Thomas Colliery Co. 260 U.S. 245 (1922)
*	174. United States v. Ross 456 U.S. 798 (1982)	Robbins v. California 453 U.S. 420 (1981)
*	175. Sporhase v. Nebraska ex rel. Douglas 458 U.S. 941 (1982)	Hudson County Water Co. v. McCarter 209 U.S. 349 (1908)
*	176. Illinois v. Gates 462 U.S. 213 (1983).	Aguilar v. Texas 378 U.S. 108 (1964); Spinelli v. United States 393 U.S. 410 (1969).
	177. Pennhurst State School & Hosp. v. Halderman 465 U.S. 89 (1984).	Rolston v. Missouri Fund Comm'rs 120 U.S. 390 (1887) (in part); Siler v. Louisville & Nashville R.R. 213 U.S. 175 (1909) (in part); Atchison T. & S.F. Ry. v. O'Connor 223 U.S. 280 (1912) (in part); Greene v. Louisville & Interurban R.R. 244 U.S. 499 (1917) (in part);

	Overruling Case	*Overruled Case*
		Johnson v. Lankford 245 U.S. 541 (1918) (in part); Numerous other cases fall more or less under the Pennhurst doctrine. See 465 U.S. 109–111 nn.17–21, 117–121 (maj.op.), and id. at 130–37, 159–163, 165–166 nn.50 & 52 (dissent) (listing 28 cases).
*	178. United States v. One Assortment of 89 Firearms 465 U.S. 354 (1984).	Coffey v. United States 116 U.S. 436 (1886).
*	179. Limbach v. Hooven & Allison Co. 466 U.S. 353 (1984).	Hooven & Allison Co. v. Evatt 324 U.S. 652 (1945).
	180. Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752 (1984).	United States v. Yellow Cab Co. 332 U.S. 218 (1947); Kiefer-Stewart Co. v. Jos. E. Seagram & Sons 340 U.S. 211 (1951).
*	181. Garcia v. San Antonio Metro. Transit Auth. 469 U.S. 528 (1985).	National League of Cities v. Usery 426 U.S. 833 (1976).
*	182. United States v. Miller 471 U.S. 130 (1985).	Ex parte Bain 121 U.S. 1 (1887) (in part).
*	183. Daniels v. Williams 474 U.S. 327 (1986).	Parratt v. Taylor 451 U.S. 527 (1981) (in part).
	184. United States v. Lane 474 U. S. 438 (1986).	McElroy v. United States 164 U.S. 76 (1896).
*	185. Batson v. Kentucky 476 U.S. 79 (1986).	Swain v. Alabama 380 U.S. 202 (1965) (in part).
*	186. Puerto Rico v. Branstad 483 U.S. 219 (1987).	Kentucky v. Dennison 65 U.S. (24 How.) 66 (1861).
*	187. Solorio v. United States 483 U.S. 435 (1987).	O'Callahan v. Parker 395 U.S. 258 (1969).
*	188. Welch v. Texas Dep't of Highways and Transp. 483 U.S. 468 (1987).	Parden v. Terminal Ry. 377 U.S. 184 (1964) (in part).
*	189. Gulfstream Aerospace Corp. v. Mayacamas Corp. 485 U.S. 271 (1988).	Enelow v. New York Life Ins. Co. 293 U.S. 379 (1935); Ettelson v. Metropolitan Life Ins. Co. 317 U.S. 188 (1942).
*	190. South Carolina v. Baker 485 U.S. 505 (1988).	Pollock v. Farmers' Loan & Trust Co. 157 U.S. 429 (1895).
*	191. Thornburgh v. Abbott 490 U.S. 401 (1989).	Procunier v. Martinez 416 U.S. 396 (1974) (in part).
*	192. Rodriguez de Quijas v. Shearson/American Express 490 U.S. 477 (1989).	Wilko v. Swann 346 U.S. 427 (1953).
*	193. Alabama v. Smith 490 U.S. 794 (1989).	Simpson v. Rice 395 U.S. 711 (1969).
*	194. Healy v. Beer Institute 491 U.S. 324 (1989).	Joseph E. Seagram & Sons v. Hostetter 384 U.S. 35 (1966).
	195. W.S. Kirkpatrick & Co. v. Environmental Tectronics Corp. 493 U.S. 400 (1990).	American Banana Co. v. United Fruit Co. 213 U.S. 347 (1909).
*	196. Collins v. Youngblood 497 U.S. 37 (1990).	Kring v. Missouri 107 U.S. 221 (1883);

	Overruling Case	*Overruled Case*
		Thompson v. Utah 170 U.S. 343 (1898).
	197. Arizona v. Fulminante 499 U.S. 279 (1991)	Chapman v. California 386 U.S. 18 (1967) (in part).
*	198. California v. Acevedo 500 U.S. 565 (1991)	Arkansas v. Sanders 442 U.S. 743 (1979).
*	199. Exxon Corp. v. Central Gulf Lines Inc. 500 U.S. 603 (1991).	Minturn v. Maynard 58 U.S. (17 How.) 476 (1855).
	200. Coleman v. Thompson 501 U.S. 722 (1991).	Fay v. Noia 372 U.S. 391 (1963).
*	201. Payne v. Tennessee 501 U.S. 808 (1991).	Booth v. Maryland 482 U.S. 496 (1987); South Carolina v. Gathers 490 U.S. 805 (1989).
*	202. Keeney v. Tamayo-Reyes 504 U.S. 1 (1992).	Townsend v. Sain 372 U.S. 293 (1963) (in part).
*	203. Quill Corp. v. North Dakota 504 U.S. 298 (1992).	National Bellas Hess Inc. v. Department of Revenue, 386 U.S. 753 (1967) (in part).
*	204. Planned Parenthood of S.E. Pennsylvania v. Casey 505 U.S. 833 (1992).	City of Akron v. Akron Center for Reproductive Health 462 U.S. 416 (1983) (in part); Thornburgh v. American College of Obstetricians and Gynecologists 476 U.S. 747 (1986) (in part).
*	205. United States v. Dixon 509 U.S. 688 (1993).	Grady v. Corbin 495 U.S. 508 (1990).
*	206. Nichols v. United States 511 U.S. 738 (1994).	Baldasar v. Illinois 446 U.S. 222 (1980).
*	207. Hubbard v. United States 514 U.S. 695 (1995).	United States v. Bramblett 348 U.S. 503 (1955).
*	208. Adarand Constructors Inc. v. Pena 515 U.S. 200 (1995).	Metro Broadcasting Inc. v. FCC 497 U.S. 547 (1990); Fullilove v. Klutznick 448 U.S. 448 (1990) (in part).
*	209. United States v. Gaudin 515 U.S. 506 (1995).	Sinclair v. United States 279 U.S. 263 (1929).
*	210. Fulton Corp. v. Faulkner 516 U.S. 325 (1996).	Darnell v. Indiana 226 U.S. 390 (1912).
*	211. Seminole Tribe of Florida v. Florida 517 U.S. 44 (1996).	Pennsylvania v. Union Gas Co. 491 U.S. 1 (1989).
*	212. 44 Liquormart Inc. v. Rhode Island 517 U.S. 484 (1996).	California v. LaRue 409 U.S. 109 (1972) (in part); New York State Liquor Auth. v. Bellanca 452 U.S. 714 (1981) (in part); City of Newport v. Iacobucci 479 U.S. 92 (1986) (in part).
*	213. Agostini v. Felton 521 U.S. 203 (1997).	Aguilar v. Felton 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball 473 U.S. 373 (1985) (in part).
*	214. State Oil Co. v. Khan 522 U.S. 3 (1997).	Albrecht v. Herald Co. 390 U.S. 145 (1968).
*	215. Hudson v. United States 522 U.S. 93 (1997).	United States v. Halper 490 U.S. 435 (1989).

	Overruling Case	*Overruled Case*
*	216. Hohn v. United States 524 U.S. 236 (1998).	House v. Mayo 324 U.S. 42 (1945).
*	217. Minnesota v. Mille Lacs Band of Chippewa Indians 526 U.S. 172 (1999).	Ward v. Race Horse 163 U.S. 504 (1896) (in part).
*	218. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. 527 U.S. 666 (1999).	Parden v. Terminal Ry. 377 U.S. 184 (1964) (in part).
*	219. Mitchell v. Helms 530 U.S. 793 (2000).	* Meek v. Pittinger 421 U.S. 349 (1975); Wolman v. Walter 433 U.S. 229 (1977).
*	220. United States v. Hatter 532 U.S. 557 (2001).	Evans v. Gore 253 U.S. 245 (1920).

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108TH CONGRESS, *2d Session* | SENATE | DOCUMENT No. 108–19

THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2004 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 2004

PREPARED BY THE
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ARTICLE I

Article I, § 8, cl. 1. Power to Tax and Spend

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

[Add new paragraph at end of section:]

As with its other powers, Congress may enact legislation "necessary and proper" to effectuate its purposes in taxing and spending. In upholding a law making it a crime to bribe state and local officials who administer programs that receive federal funds, the Court declared that Congress has authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." [1] Congress' failure to require proof of a direct connection between the bribery and the federal funds was permissible, the Court concluded, because "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value." [2]

—Conditional Grants in Aid

[P. 165, add to n.603:]

This is not to say that Congress may police the effectiveness of its spending only by means of attaching conditions to grants; Congress may also rely on criminal sanctions to penalize graft and corruption that may impede its purposes in spending programs. Sabri v. United States, 124 S. Ct. 1941 (2004).

Article I, § 8, cl. 3. Commerce Power

POWER TO REGULATE COMMERCE

The Commerce Clause as a Source of National Police Power

—Is There an Intrastate Barrier to Congress' Commerce Power?

[P. 212, substitute for second paragraph of section:]

Congress' commerce power has been characterized as having three, or sometimes four, very interrelated principles of decision, some old, some of recent vintage. The Court in 1995 described

[1] Sabri v. United States, 124 S. Ct. 1941, 1946 (2004).
[2] 124 S. Ct. at 1946.

"three broad categories of activities that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[3]

[P. 217, add to n.883:]

Lopez did not "purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

The Commerce Clause as a Restraint on State Powers

—Congressional Authorization of Impermissible State Action

[P. 231, add to n.957 after initial cite:]

See also Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws).

State Taxation and Regulation: The Modern Law

—Regulation

[P. 249, add to n.1051:]

But cf. Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644 (2003) (state prescription drug program providing rebates to participating companies does not regulate prices of out-of-state transactions and does not favor in-state over out-of-state companies).

Foreign Commerce and State Powers

[P. 256, substitute for last two sentences of first full paragraph:]

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.[4] The result

[3] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted). Illustrative of the power to legislate to protect the channels and instrumentalities of interstate commerce is Pierce County v. Guillen, 537 U.S. 129, 147 (2003), in which the Court upheld a prohibition on the use in state or federal court proceedings of highway data required to be collected by states on the basis 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."

[4] Reliance could not be placed on Executive statements, the Court explained, since "the Constitution expressly grants Congress, not the President, the power to

of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[5]

Concurrent Federal and State Jurisdiction

—The Standards Applied

[P. 262, add to end of n.1109:]

Aetna Health, Inc. v. Davila, 124 S. Ct. 2488 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted).

[P. 265, add to n.1118:]

But cf. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (interpreting preemption language and saving clause in Federal Boat Safety Act as not precluding a state common law tort action).

COMMERCE WITH INDIAN TRIBES

[P. 278, add to end of n.1189:]

United States v. Lara, 124 S. Ct. 1628, 1633 (2004).

[P. 281, add to end of n.1206:]

Congress may also remove restrictions on tribal sovereignty. The Court has held that, absent authority from federal statute or treaty, tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court also held, in Duro v. Reina, 495 U.S. 676 (1990), that a tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reservation; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction. Congress, however, quickly enacted a statute recognizing inherent authority of tribal governments to exercise criminal jurisdiction over nonmember Indians, and the Court upheld congressional authority to do so in United States v. Lara, 124 S. Ct. 1628 (2004).

'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.

[5] *The Supreme Court, Leading Cases, 1993 Term,* 108 HARV. L. REV. 139, 139–49 (1993).

Clause 8. Copyrights and Patents

COPYRIGHTS AND PATENTS

Origins and Scope of the Power

[P. 312, delete sentence ending with n.1421 and substitute the following:]

These English statutes curtailed the royal prerogative in the creation and bestowal of monopolistic privileges, and the Copyright and Patent Clause similarly curtails congressional power with regard both to subject matter and to the purpose and duration of the rights granted.[6]

[P. 313, delete final sentence of paragraph]

[P. 313, add new paragraph to end of section:]

The constitutional limits, however, do not prevent the Court from being highly deferential to congressional exercise of its power. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," the Court has said.[7] "Satisfied" in *Eldred v. Ashcroft* that the Copyright Term Extension Act did not violate the "limited times" prescription, the Court saw the only remaining question as whether the enactment was "a rational exercise of the legislative authority conferred by the Copyright Clause."[8] The Act, the Court concluded, "reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain." Moreover, the limitation on the duration of copyrights and patents is largely unenforceable. The protection period may extend well beyond the life of the author or inventor.[9] Congress may extend the duration of existing copyrights and patents, and in so doing may protect the rights of purchasers and assignees.[10]

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[6] Graham v. John Deere Co., 383 U.S. 1, 5, 9 (1966).

[7] Eldred v. Ashcroft, 537 U.S. 186, 205 (2003) (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984)).

[8] 537 U.S. at 204.

[9] The Court in *Eldred* upheld extension of the term of existing copyrights from life of the author plus 50 years to life of the author plus 70 years. While the more general issue was not raised, the Court opined that this length of time, extendable by Congress, was "clearly" not a regime of "perpetual" copyrights. The only two dissenting Justices, Stevens and Breyer, challenged this assertion.

[10] Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).

Clause 18. Necessary and Proper Clause

NECESSARY AND PROPER CLAUSE

Scope of Incidental Powers

[P. 357, substitute for first sentence of section:]

The Necessary and Proper Clause, sometimes called the "coefficient" or "elastic" clause, is an enlargement, not a constriction, of the powers expressly granted to Congress. Chief Justice Marshall's classic opinion in McCulloch v. Maryland[11] set the standard in words that reverberate to this day.

Operation of Clause

[P. 358, add to n.1734:]

Congress may also legislate to protect its spending power. Sabri v. United States, 124 S. Ct. 1941 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

—Courts and Judicial Proceedings

[P. 361, add clause following n.1759:]

may require the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court,[12]

Section 10—Powers Denied to States

Clause 1.

EX POST FACTO LAWS

—Scope of the Provision

[P. 382, add to text following n.1912:]

Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe*[13] upholding application of Alaska's "Megan's Law" to sex offenders who were convicted before the law's enactment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords "considerable deference" to legislative intent; if the legislature's purpose was to enact a civil regulatory scheme, then the law can be ex post facto only if there

[11] 17 U.S. (4 Wheat.) 316 (1819).
[12] Jinks v. Richland County, 538 U.S. 456 (2003).
[13] 538 U.S. 84 (2003).

is "the clearest proof" of punitive effect.[14] Here, the Court determined, the legislative intent was civil and non-punitive—to promote public safety by "protecting the public from sex offenders." The Court then identified several "useful guideposts" to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment." [15] The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.[16] Nor is the act "excessive" in relation to its regulatory purpose.[17] Rather, "the means chosen are 'reasonable' in light of the [state's] non-punitive objective" of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.[18]

—Changes in Punishment

[P. 383, add as substitute for first sentence of section:]

Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of *ex post facto* laws, two of which related to punishment. One such category was laws that inflict punishment "where the party was not, by law, liable to any punishment"; the other was laws that inflict greater punishment than was authorized when the crime was committed.[19]

Illustrative of the first of these punishment categories is "a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecu-

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[14] 538 U.S. at 92.

[15] The law's requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan's Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. 538 U.S. at 98.

[16] 538 U.S. at 102.

[17] Excessiveness was alleged to stem both from the law's duration (15 years of notification by those convicted of less serious offenses; lifetime registration by serious offenders) and in terms of the widespread (Internet) distribution of the information.

[18] 538 U.S. at 105. Unlike involuntary civil commitment, where the "magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness. Id. at 103.

[19] 3 U.S. (3 Dall.) 386, 389 (1798).

tion." Such a law, the Court ruled in *Stogner v. California*,[20] is prohibited as *ex post facto*. Courts that had upheld extension of *unexpired* statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person "effective amnesty" as being "unfair" in the sense addressed by the Ex Post Facto Clause.

Illustrative of the second punishment category are statutes that changed an indeterminate sentence law to require a judge to impose the maximum sentence,[21] that required solitary confinement for prisoners previously sentenced to death,[22] and that allowed a warden to fix, within limits of one week, and keep secret the time of execution.[23]

[20] 539 U.S. 607, 632–33 (2003) (invalidating application of California's law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

[21] Lindsey v. Washington, 301 U.S. 397 (1937). But note the limitation of *Lindsey* in Dobbert v. Florida, 432 U.S. 282, 298–301 (1977).

[22] Holden v. Minnesota, 137 U.S. 483, 491 (1890).

[23] Medley, Petitioner, 134 U.S. 160, 171 (1890).

ARTICLE II

Section 2. Powers and Duties of the President

Clause 1. Commander-in-Chiefship; Presidential Advisers; Pardons

COMMANDER-IN-CHIEF

[P. 483, add new section following "Articles of War: World War II Crimes":]

—Articles of War: Response to the Attacks of September 11, 2001

In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the Authorization for Use of Military Force,[1] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a miliary action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statutory grounds.[2] However, the Court did find that the Government may not detain the petitioner indefinitely for purposes of interrogation, without giving him the opportunity to offer evidence that he is not an enemy combatant.[3]

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[1] Pub. L. 107–40, 115 Stat. 224 (2001).

[2] Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). There was no opinion of the Court. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II. Justice Souter, joined by Justice Ginsberg, rejected the argument that the Congress had authorized such detentions, while Justice Scalia, joined with Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus.

[3] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney. 124 S. Ct. at 2648, 2652 (2004).

In *Rasul v. Bush,*[4] the Court rejected an Executive Branch argument that foreign prisoners being held at Guantanamo Bay, Cuba were outside of federal court jurisdiction. The Court distinguished earlier case law arising during World War II which denied habeas corpus petitions from German citizens who had been captured and tried overseas by United States military tribunals.[5] In *Rasul,* the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[6] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised exclusive jurisdiction and control.[7] In addition, the Court found that statutory grounds existed for the extension of habeas corpus to these prisoners.[8]

Clause 2. Treaties and Appointment of Officers

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The Domestic Obligation of Executive Agreements

[P. 527, substitute for first sentence of first full paragraph on page:]

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[9] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying on the Constitution's vesting of foreign relations power in the national government.

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[4] 124 S. Ct. 2686 (2004).

[5] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[6] The petitioners were Australians and Kuwaitis.

[7] 124 S. Ct. at 2983 (2004).

[8] The Court found that 28 U.S.C. § 2241, which had previously been construed to require the presence of a petitioner in a district court's jurisdiction, was now satisfied by the presence of a jailor-custodian. *See* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's habeas jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld was not sufficient to satisfy the presence requirement under 28 U.S.C. § 2241).

[9] E.g., United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. WILLOUGHBY, supra, at 589. The State Department held the same view. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 426 (1944).

[P. 529, substitute for last paragraph of section:]

Belmont and *Pink* were reinforced in *American Insurance Association v. Garamendi.*[10] In holding that California's Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government's conduct of foreign relations, as expressed in executive agreements, the Court reiterated that "valid executive agreements are fit to preempt state law, just as treaties are."[11] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[12] Because there was a "clear conflict" between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being "well within the Executive's responsibility for foreign affairs"), the state law was preempted.[13]

[P. 529, add new section following "The Domestic Obligation of Executive Agreements":]

State Laws Affecting Foreign Relations—Dormant Federal Power and Preemption

If the foreign relations power is truly an exclusive federal power, with no role for the states, a logical consequence is that some state laws impinging on foreign relations are invalid even in the absence of already-established federal policy. The Supreme Court has so stated and so held. There is, in effect, a "dormant" foreign relations power. The scope of this power remains undefined, however, and its constitutional basis is debated by scholars.

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."[14] A hundred

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[10] 539 U.S. 396 (2003). The Court's opinion in Dames & Moore v. Regan, 453 U.S. 654 (1981), was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

[11] 539 U.S. at 416.

[12] 539 U.S. at 413.

[13] 539 U.S. at 420.

[14] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we

years later the Court remained emphatic about federal exclusivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." [15]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation's foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller,*[16] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confiscation." [17] Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state probate courts in denying payments to persons from Communist countries.[18] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government." [19]

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power

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are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

[15] United States v. Pink, 315 U.S. 203, 233–34 (1942). Chief Justice Stone and Justice Roberts dissented.

[16] 389 U.S. 429 (1968).

[17] In Clark v. Allen, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

[18] 389 U.S. at 440.

[19] 389 U.S. at 440, 441.

to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign governments or to curtail trade with out-of-favor countries.[20] In 1999 the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[21] Similarly, in 2003 the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although it discussed *Zschernig* at some length, saw no need to resolve issues relating to its scope.[22]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[23] and grants of power.[24] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court in *Garamendi*, field preemption may be appropriate if a state legislates "simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional re-

[20] *See, e.g.,* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism,* 75 NOTRE DAME L. REV. 341 (1999); Carlos Manuel Vazquez, *Whither* Zschernig? 46 VILL. L. REV. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism,* 83 VA. L. REV. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism,* 70 U. COLO. L. REV. 1223 (1999). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 149–69 (2d ed. 1996).

[21] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (1999). For the appeals court's application of *Zschernig, see* National Foreign Trade Council v. Natsios, 181 F.3d 38, 49–61 (1st Cir. 1999).

[22] American Insurance Association v. Garamendi, 539 U.S. at 419 & n.11 (2003).

[23] It is contended, for example, that Article I, § 10's specific prohibitions against states engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, supra n.20.

[24] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.

sponsibility, "but in a way that affects foreign relations."[25] We must await further litigation to see whether the Court employs this distinction.[26]

THE EXECUTIVE ESTABLISHMENT

The Presidential Aegis: Demands for Papers

—Prosecutorial and Grand Jury Access to Presidential Documents

[P. 559, add new paragraph at end of section:]

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.[27] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon,*[28] and, in instructing the appeals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[29]

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[25] 539 U.S. at 419 n.11.

[26] Justice Ginsburg's dissent in *Garamendi*, joined by the other three dissenters, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting HENKIN, supra n.20, at 164). But Justice Ginsburg also voiced more general misgivings with judges becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, supra n.20, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[27] Cheney v. United States District Court, 124 S. Ct. 2576 (2004).

[28] While the information sought in *Nixon* was important to "the constitutional need for production of evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 124 S. Ct. at 2580, 2589.

[29] The Court recognized "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 124 S. Ct. at 2580. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

ARTICLE III

Section 1. Judicial Power, Courts, Judges

ANCILLARY POWERS OF FEDERAL COURTS

Power to Issue Writs: the Act of 1789

—Habeas Corpus: Congressional and Judicial Control

[P. 669, substitute for first sentence of section:]

The writ of habeas corpus [text n.241] has a special status because its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2. The writ also has a venerable common law tradition, long antedating its recognition in the Judiciary Act of 1789,[1] as a means of "reliev[ing] detention by executive authorities without judicial trial."[2] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts.

—Habeas Corpus: The Process of the Writ

[P. 671, add to text following n.254:]

The writ acts upon the custodian, not the prisoner, so the issue under the jurisdictional statute is whether the custodian is within the district court's jurisdiction.[3]

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[1] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.

[2] INS v. St. Cyr, 533 U.S. 289, 301 (2001), *as quoted in* Rasul v. Bush, 124 S. Ct. 2686, 2692 (2004).

[3] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494–95 (1973) (issue is whether "the custodian can be reached by service of process"). *See also* Rasul v. Bush, 124 S. Ct. 2686 (federal district court for District of Columbia had jurisdiction of habeas petitions from prisoners held at U.S. Naval base at Guantanamo Bay, Cuba); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (federal district court in New York lacks jurisdiction over prisoner being held in a naval brig in Charleston, South Carolina; the commander of the brig, not the Secretary of Defense, is the immediate custodian and proper respondent).

Section 2. Judicial Power and Jurisdiction

Clause 1. Cases and Controversies; Grants of Jurisdiction

CASES AND CONTROVERSIES

The Requirement of a Real Interest

—Retroactivity Versus Prospectivity

[P. 722, add to n.534:]

For recent application of the principles, see Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (requirement that aggravating factors justifying death penalty be found by the jury was a new procedural rule that does not apply retroactively).

Political Questions

—The Doctrine Reappears

[P. 734, add to n.605:]

But see Vieth v. Jubelirer, 124 S. Ct. 1769 (2004) (no workable standard has been found for measuring burdens on representational rights imposed by political gerrymandering).

ARTICLE IV

Section 1. Full Faith and Credit

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

[P. 896, replace text of entire section with the following:]

Although the language of section one suggests that the same respect should be accorded to "public acts" that is accorded to "judicial proceedings" ("full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"), and the Court has occasionally relied on this parity of treatment,[1] the Court has usually differentiated "the credit owed to laws (legislative measures and common law) and to judgments."[2] The current understanding is that the Full Faith and Credit Clause is "exacting" with respect to final judgments of courts, but "is less demanding with respect to choice of laws."[3]

The Court has explained that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each State to subordinate their own statutes to those of others, but by weighing the governmental interests of each jurisdiction.[4] That is, the

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[1] *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (statutes); and Smithsonian Institution v. St. John, 214 U.S. 19 (1909) (state constitutional provision).

[2] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998), *quoted in* Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003). Justice Nelson in the *Dred Scott* case drew an analogy to international law, concluding that states, as well as nations, judge for themselves the rules governing property and persons within their territories. Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857). "One State cannot exempt property from taxation in another," the Court concluded in Bonaparte v. Tax Court, 104 U.S. 592 (1882), holding that a law exempting from taxation certain bonds of the enacting State did not operate extraterritorially by virtue of the full faith and credit clause. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589–96 (1839); Kryger v. Wilson, 242 U.S. 171 (1916); and Bond v. Hume, 243 U.S. 15 (1917).

[3] Baker v. General Motors Corp., 522 U.S. at 232.

[4] Alaska Packers Ass'n. v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932). When, in a state court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the full faith and credit clause. *See also* Western Life Indemnity Co. v. Rupp,

Full Faith and Credit Clause, in its design to transform the States from independent sovereigns into a single unified Nation, directs that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. But because the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.[5] In order for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.[6] Once that threshold is met, the Court will not weigh the competing interests. "[T]he question of which sovereign interest should be deemed more weighty is not one that can be easily answered," the Court explained, "declin[ing] to embark on the constitutional course of balancing coordinate States' competing interests to resolve conflicts of laws under the Full Faith and Credit Clause."[7]

Section 2. Interstate Comity

Clause 1. State Citizenship: Privileges and Immunities

PRIVILEGES AND IMMUNITIES

Origin and Purpose

[P. 912, add to text at end of section:]

A violation can occur whether or not a statute explicitly discriminates against out-of-state interests.[8]

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235 U.S. 261 (1914), citing Glenn v. Garth, 147 U.S. 360 (1893), Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900); Allen v. Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R.R. v. Miller, 221 U.S. 408 (1911); National Mut. B. & L. Ass'n v. Brahan, 193 U.S. 635 (1904); Johnson v. New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co. 243 U.S. 93 (1917).

[5] E.g., Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[6] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

[7] Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 498, 499 (2003).

[8] "[A]bsence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a] claim." Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 67 (2003).

FIRST AMENDMENT

ESTABLISHMENT OF RELIGION

Governmental Encouragement of Religion in Public Schools: Prayers and Bible Readings

[P. 1047, add to n.163:]

An opportunity to flesh out this distinction was lost when the Court dismissed for lack of standing an Establishment Clause challenge to public school recitation of the Pledge of Allegiance with the words "under God." Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

FREE EXERCISE OF RELIGION

[P. 1061, add new paragraph at end of section:]

"Play in the joints" can work both ways, the Court ruled in upholding a state's exclusion of theology students from a college scholarship program.[1] Although the state could have included theology students in its scholarship program without offending the Establishment Clause, its choice not to fund religious training did not offend the Free Exercise Clause even though that choice singled out theology students for exclusion.[2] Refusal to fund religious training, the Court observed, was "far milder" than restrictions on religious practices that have been held to offend the Free Exercise Clause.[3]

Free Exercise Exemption from General Governmental Requirements

[P. 1066, add to n.264:]

In 2004, the Court rejected for lack of standing an Establishment Clause challenge to recitation of the Pledge of Allegiance in public schools. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

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[1] Locke v. Davy, 124 S. Ct. 1307 (2004).

[2] 124 S. Ct. at 1312–13. Excluding theology students but not students training for other professions was permissible, the Court explained, because "training someone to lead a congregation is an essentially religious endeavor," and the Constitution's special treatment of religion finds "no counterpart with respect to other callings or professions." Id. at 1313.

[3] 124 S. Ct. at 1312 (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law aimed at restricting ritual of a single religious group); McDaniel v. Paty, 435 U.S. 618 (1978) (law denying ministers the right to serve as delegates to a constitutional convention); and Sherbert v. Verner, 374 U.S. 398 (1963) (among the cases prohibiting denial of benefits to Sabbatarians)).

FREEDOM OF EXPRESSION—SPEECH AND PRESS

The Doctrine of Prior Restraint

—Obscenity and Prior Restraint

[P. 1090, add to n.394 cite to Fort Wayne Books:]

City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219, 2226 (2004) ("Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria . . . and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type");

Subsequent Punishment: Clear and Present Danger and Other Tests

—Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, Narrow Tailoring, and Effectiveness of Speech Restrictions

[P. 1108, add to text immediately before comma preceding n.481:]

and indecency

[P. 1108, add to n.481:]

Reno v. ACLU, 521 U.S. 844, 870–874 (1997). In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court held that a "decency" criterion for the awarding of grants, which "in a criminal statute or regulatory scheme . . . could raise substantial vagueness concerns," was not unconstitutionally vague in the context of a condition on public subsidy for speech.

[P. 1108, add to text following n.484, and replace remainder of section:]

But, even in a First Amendment situation, the Court has written, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do now swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation. . .. Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[4]

[4] Virginia v. Hicks, 539 U.S. 113, 119–20, 124 (2003) (italics in original; citations omitted) (upholding, as not addressed to speech, an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose

Closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to do so, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort."[5] Thus, when the Court applies "strict scrutiny" to a content-based regulation of fully protected speech, it requires that the regulation be "the least restrictive means to further the articulated interest."[6] Similarly, the Court requires "narrow tailoring" even of restrictions to which it does not apply strict scrutiny. Thus, in the case of restrictions that are not content-based (time, place, or manner restrictions; incidental restrictions); or in the case of restrictions of speech to which the Court accords less than full First Amendment protection (campaign contributions and other freedoms of association; commercial speech), though the Court does not require that the government use the least restrictive means available to accomplish its end, it does require that the regulation not restrict speech unreasonably.[7] The Court uses tests closely related to one another in these instances in which it does not apply strict scrutiny. It has indicated

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for being on the premises"). *Virginia v. Hicks* cited Broadrick v. Oklahoma, 413 U.S. 601 (1973), which, in the opinion of the Court and in Justice Brennan's dissent, id. at 621, contains extensive discussion of the overbreadth doctrine. Other restrictive decisions are Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974); Parker v. Levy, 417 U.S. 733, 757–61 (1974); and New York v. Ferber, 458 U.S. 747, 766–74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815–18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932–34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633–39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874–879 (1997) (statute banning "indecent" material on the Internet).

[5] Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002).

[6] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[7] E.g., Frisby v. Schultz, 487 U.S. 474, 481 (1988) (time, place, and manner restriction upheld as "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication"); Ward v. Rock Against Racism, 491 U.S. 781, 798–799 (1989) (incidental restriction upheld as "promot[ing] a substantial governmental interest that would be achieved less effectively absent the regulation"); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (campaign contribution ceiling "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom"); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (commercial speech restrictions need not be "absolutely the least severe that will achieve the desired end," but must exhibit "a 'fit between the legislature's ends and the means chosen to accomplish those ends,'—a fit that is not necessarily perfect, but reasonable . . ."). But see Thompson v. Western States Medical Center, 535 U.S. 357, 371 (2002) (commercial speech restriction struck down as "more extensive than necessary to serve" the government's interests).

that the test for determining the constitutionality of an incidental restriction on speech "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," [8] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context." [9]

Also, except apparently when the government seeks to deny minors access to sexually explicit material, the Supreme Court, even when applying less than strict scrutiny, requires that, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." [10]

Particular Government Regulations That Restrict Expression

—Government as Regulator of the Electoral Process: Elections

[P. 1156, add to text following first full paragraph on page, and change beginning of second paragraph:]

The Court in *Buckley* recognized that political contributions "serve[ ] to affiliate a person with a candidate" and "enable[ ] like-minded persons to pool their resources in furtherance of common political goals." Contribution ceilings, therefore, "limit one important means of associating with a candidate or committee. . . ." [11] Yet "[e]ven a significant interference with protected rights of polit-

[8] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[9] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

[10] Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (incidental restriction on speech). The Court has applied the same principle with respect to commercial speech restrictions (Edenfield v. Fane, 507 U.S. 761, 770–771 (1993)), and campaign contribution restrictions (Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000)). With respect to denying minors' access to sexually explicit material, one court wrote: "We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved." Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp. 2d 702, 716 (D. Del. 1998), *aff'd,* 529 U.S. 803 (2000). In a case upholding a statute that, to shield minors from "indecent" material, limited the hours that such material may be broadcast on radio and television, the court of appeals wrote, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . ." Action for Children's Television v. FCC, 58 F.3d 654, 662 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1043 (1996). A dissenting opinion complained that "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." Id. at 671 (Edwards, C.J., dissenting).

[11] 424 U.S. at 22.

ical association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." [12]

Applying this standard, the *Buckley* Court sustained the contribution limitation as imposing . . . .

[P. 1162, add to text at end of section:]

In *FEC v. Beaumont,* [13] the Court held that the federal law that bars corporations from contributing directly to candidates for federal office may constitutionally be applied to nonprofit advocacy corporations. Corporations may make such contributions only through PACs, and the Court in *Beaumont* wrote that, in *National Right to Work,* it had "specifically rejected the argument . . . that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations." [14] Though nonprofit advocacy corporations, the Court held in *Massachusetts Citizens for Life,* have a First Amendment right to make independent expenditures, the same is not true for direct contributions to candidates.

In *McConnell v. Federal Election Commission,* [15] the Court upheld against facial constitutional challenges key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). A majority opinion coauthored by Justices Stevens and O'Connor upheld two major provisions of BCRA: (1) the prohibition on "national party committees and their agents from soliciting, receiving, directing, or spending any soft money," [16] which is money donated for the purpose of influencing state or local elections, or for "mixed-purpose activities—including get-out-the-vote drives and generic party advertising," [17] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance "electioneering communications," [18] which BCRA defines as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal Office," made within 60 days before a general election or 30 days before a primary election. Electioneering communications thus include both "express advocacy and so-called issue advocacy." [19]

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[12] 424 U.S. at 25 (internal quotation marks omitted).
[13] 539 U.S. 146 (2003).
[14] 539 U.S. at 157.
[15] 540 U.S. 93 (2003).
[16] 540 U.S. at 133.
[17] 540 U.S. at 123.
[18] 540 U.S. at 204.
[19] 540 U.S. at 190.

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits."[20] and found it "closely drawn to match a sufficiently important interest."[21] The Court's decision to use less rigorous scrutiny, it wrote, "reflects more than the limited burdens they [*i.e.,* the contribution restrictions] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"[22]

As for the prohibition on corporations and labor unions' using their general treasury funds to finance electioneering communications, the Court applied strict scrutiny, but found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals."[23] These corrosive and distorting effects result both from express advocacy and from so-called issue advocacy. The Court also noted that, because corporations and unions "remain free to organize and administer segregated funds, or PACs," for electioneering communications, the provision was not a complete ban on expression.[24]

—Government as Administrator of Prisons

[P. 1171, add to n.814:]

In *Overton v. Bazzetta,* 539 U.S. 126 (2003), the Court applied *Turner* to uphold various restrictions on visitation by children and by former inmates, and on all visitation except attorneys and members of the clergy for inmates with two or more substance-abuse violations; an inmate subject to the latter restriction could apply for reinstatement of visitation privileges after two years. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." Id. at 137.

—Government and Power of the Purse

[P. 1176, add to text at end of section:]

In *United States v. American Library Association, Inc.,* a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it,

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[20] 540 U.S. at 141.
[21] 540 U.S. at 136 (internal quotation marks omitted).
[22] 540 U.S. at 136.
[23] 540 U.S. at 205.
[24] 540 U.S. at 204.

provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." [25] The plurality considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring public libraries (public schools were not involved in the case) to limit their freedom of speech if they accept federal funds. The plurality, citing *Rust v. Sullivan,* found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized." [26] The plurality distinguished *Legal Services Corporation v. Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them *against* the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance." [27]

Government Regulation of Communications Industries

—Commercial Speech

[P. 1179, add to n.862:]

In *Nike, Inc. v. Kasky,* 45 P.3d 243 (2002), *cert. dismissed,* 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certioriari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike's statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed "'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." Id. at 657 (Stevens, J., concurring). Nike subsequently settled the suit.

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[25] 539 U.S. 194, 199 (2003).

[26] 539 U.S. at 211.

[27] 539 U.S. at 213 (emphasis in original). Other grounds for the plurality decision are discussed under "Non-obscene But Sexually Explicit and Indecent Expression" and "Internet as Public Forum."

Government Restraint of Content of Expression

—Group Libel, Hate Speech

[P. 1206, add new paragraph at end of section:]

In *Virginia v. Black,* the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.[28] Such a prohibition does not discriminate on the basis of a defendant's beliefs—"as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . .. The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ."[29]

—Non-obscene but Sexually Explicit and Indecent Expression

[P. 1234, add to text following n.1254:]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source."[30]

In *United States v. American Library Association,* a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides

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[28] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. 538 U.S. at 365–66.

[29] 538 U.S. at 362–63.

[30] Ashcroft v. ACLU, 124 S. Ct. 2783, 2792 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" (id. at 2801) and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 2802. In addition, Breyer asserted, "filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision." Id. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." Id. at 2793.

that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[31] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires."[32] Does CIPA, in other words, effectively violate library *patrons'* rights? The plurality concluded that it does not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[33]

The plurality acknowledged "the tendency of filtering software to 'overblock'—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[34] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[35]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance—in other words, does it violate public *libraries'* rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[36]

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[31] 539 U.S. 194, 199 (2003).

[32] 539 U.S. at 203.

[33] 539 U.S. at 205.

[34] 539 U.S. at 208.

[35] 539 U.S. at 209. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." Id. at 215. Justice Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." Id. at 233.

[36] 539 U.S. at 212.

Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating

—The Public Forum

[P. 1245, replace section's final paragraph with:]

In *United States v. American Library Association, Inc.,* a four-justice plurality of the Supreme Court found that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[37] The plurality therefore did not apply "strict scrutiny" in upholding the Children's Internet Protection Act, which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[38] The plurality found that Internet access in public libraries is not a "traditional" public forum because "[w]e have 'rejected the view that traditional public forum status extends beyond its historical confines.'"[39] And Internet access at public libraries is not a "designated" public forum because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[40]

Nevertheless, although Internet access in public libraries is not a public forum, and particular Web sites, like particular newspapers, would not constitute public fora, the Internet as a whole might be viewed as a public forum, despite its lack of a historic tradition. The Supreme Court has not explicitly held that the Internet as a whole is a public forum, but, in *Reno v. ACLU,* which struck down the Communications Decency Act's prohibition of "indecent" material on the Internet, the Court noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers,

[37] 539 U.S. 194, 205 (2003).

[38] 539 U.S. at 199.

[39] 539 U.S. at 206.

[40] 539 U.S. at 206 (citation omitted).

and buyers. Any person or organization with a computer connected to the Internet can 'publish' information."[41]

—Door-to-Door Solicitation

[P. 1262, add to n.1312:]

In Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

[41] A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes,* 523 U.S. at 679 ("reject[ing] the view that traditional public forum status extends beyond its historic confines" [to a public television station]) *with Reno v. ACLU,* 521 U.S. 844, 851–53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web)." Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternate citations to *Forbes* and *Reno* omitted).

FOURTH AMENDMENT

SEARCH AND SEIZURE

History and Scope of the Amendment

—Arrests and Other Detentions

[P. 1292, add to n.61 following cite to Terry v. Ohio:]

Kaupp v. Texas, 538 U.S. 626 (2003).

[P. 1294, add to n.69 following cite to Taylor v. Alabama:]

Kaupp v. Texas, 538 U.S. 626 (2003).

Searches and Seizures Pursuant to Warrant

—Particularity

[P. 1304, add to end of section:]

The purpose of the particularity requirement extends beyond prevention of general searches; it also assures the person whose property is being searched of the lawful authority of the executing officer and of the limits of his power to search. It follows, therefore, that the warrant itself must describe with particularity the items to be seized, or that such itemization must appear in documents incorporated by reference in the warrant and actually shown to the person whose property is to be searched.[1]

—Execution of Warrants

[P. 1311, add to text following n.168:]

Similarly, if officers choose to knock and announce before searching for drugs, circumstances may justify forced entry if there is not a prompt response.[2]

[P. 1312, add to n.173:]

But see Maryland v. Pringle, 124 S. Ct. 795 (2003) (distinguishing *Ybarra* on basis that passengers in car often have "common enterprise," and noting that the tip in *Di Re* implicated only the driver).

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[1] Groh v. Ramirez, 124 S. Ct. 1284 (2004) (a search based on a warrant that did not describe the items to be seized was "plainly invalid"; particularity contained in supporting documents not cross-referenced by the warrant and not accompanying the warrant is insufficient).

[2] United States v. Banks, 124 S. Ct. 521 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search warrant," and waited 15–20 seconds with no response).

Valid Searches and Seizures Without Warrants

—Detention Short of Arrest: Stop-and-Frisk

[P. 1315, add to text following first sentence of paragraph that begins on page, and begin new paragraph with second sentence, as indicated:]

A partial answer was provided in 2004, the Court upholding a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[3] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[4]

After *Terry,* the standard for stops . . ..

—Vehicular Searches

[P. 1325, add to n.247:]

See also United States v. Flores-Montano, 124 S. Ct. 1582 (2004) (upholding a search at the border involving disassembly of a vehicle's fuel tank).

[P. 1325, add to n.248:]

Edmond was distinguished in llinois v. Lidster, 124 S. Ct. 885 (2004), upholding use of a checkpoint to ask motorists for help in solving a recent hit-and-run accident that had resulted in death. The public interest in solving the crime was deemed "grave," while the interference with personal liberty was deemed minimal.

[P. 1325, add to n.252 following cite to New York v. Belton:]

Thornton v. United States, 124 S. Ct. 2127 (2004) (the *Belton* rule applies regardless of whether the arrestee exited the car at the officer's direction, or whether he did so prior to confrontation);

[P. 1326, add to end of sentence containing n.258:]

, or unless there is individualized suspicion of criminal activity by the passengers.[5]

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[3] Hiibel v. Sixth Judicial Dist. Ct., 124 S. Ct. 2451 (2004).

[4] 124 S. Ct. at 2458.

[5] Maryland v. Pringle, 124 S. Ct. 795 (2003) (probable cause to arrest passengers based on officers finding $783 in glove compartment and cocaine hidden beneath back seat armrest, and on driver and passengers all denying ownership of the cocaine).

FIFTH AMENDMENT

DOUBLE JEOPARDY

Development and Scope

[P. 1370, add to end of sentence containing n.58:]

, and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.[1]

Reprosecution Following Conviction

—Sentence Increases

[P. 1385, add to n.134:]

But see Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (state may seek the death penalty in a retrial when defendant appealed following discharge of the sentencing jury under a statute authorizing discharge based on the court's "opinion that further deliberation would not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

SELF-INCRIMINATION

Development and Scope

[P. 1396, add to text following n.185:]

, and there can be no valid claim if there is no criminal prosecution.[2]

Confessions: Police Interrogation, Due Process, and Self-Incrimination

—Miranda v. Arizona

[P. 1425, add to n.340:]

Yarborough v. Alvarado, 124 S. Ct. 2140 (2004) (state court determination that teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal habeas review).

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[1] United States v. Lara, 124 S. Ct. 1628 (2004) (federal prosecution for assaulting a federal officer after tribal conviction for "violence to a policeman"). The Court concluded that Congress has power to recognize tribal sovereignty to prosecute nonmember Indians, that Congress had done so, and that consequently the tribal prosecution was an exercise of tribal sovereignty, not an exercise of delegated federal power on which a finding of double jeopardy could be based.

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

[P. 1429, add to n.363:]

Elstad was distinguished in Missouri v. Seibert, 124 S. Ct. 2601 (2004), however, when the failure to warn prior to the initial questioning was a deliberate attempt to circumvent Miranda by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

[P. 1429, add to n.365:]

See also Harrison v. United States, 392 U.S. 219 (1968) (rejecting as tainted the prosecution's use at the second trial of defendant's testimony at his first trial rebutting confessions obtained in violation of McNabb-Mallory).

[P. 1429, eliminate clause containing n.367 and substitute the following:]

On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[3]

DUE PROCESS

Procedural Due Process

—Aliens: Entry and Deportation

[P. 1443, add as first sentence of section:]

The Court has frequently said that Congress exercises "sovereign" or "plenary" power over the substance of immigration law, and this power is at its greatest when it comes to exclusion of aliens.[4]

[P. 1444, add as first sentence of only paragraph beginning on page:]

Procedural due process rights are more in evidence when it comes to deportation or other proceedings brought against aliens already within the country.

[P. 1445, add to text following n.444:]

In *Demore v. Kim,*[5] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of remov-

[3] United States v. Patane, 124 S. Ct. 2601 (2004) (allowing introduction of a pistol, described as a "nontestimonial physical fruit[ ]" of an unwarned statement). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant's statement elicited without proper *Miranda* warning).

[4] *See* discussion under Art. I, § 8, cl. 4, The Power of Congress to Exclude Aliens.

[5] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.

ability, the Court reaffirmed Congress's broad powers over aliens. "[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." [6]

—Judicial Review of Administrative or Military Proceedings

[P. 1446, add new paragraph after only full paragraph on page:]

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld.*[7] During a military action in Afghanistan,[8] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to detain Hamdi as an "enemy combatant," and to deny him meaningful access to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[9] However, the Court ruled that the Government may not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney.[10]

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[6] 538 U.S. at 528. There was disagreement among the Justices as to whether existing procedures afforded the alien an opportunity for individualized determination of danger to society and risk of flight.

[7] 124 S. Ct. 2633 (2004).

[8] In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force, Pub. L. 107–40, 115 Stat. 224 (2001), which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

[9] There was no opinion of the Court in *Hamdi.* Rather, a plurality opinion, authored by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) relied on the statutory "Authorization for Use of Military Force" to support the detention. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[10] 124 S. Ct. at 2648, 2652 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsberg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. Id. at 2660 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus, and thus would have required a criminal prosecution of the petitioner. Id. at 2660–61 (dissenting).

NATIONAL EMINENT DOMAIN POWER

Public Use

[P. 1465, add to text following n.575:]

Most recently, the Court put forward an added indicium of "public use": whether the government purpose could be validly achieved by tax or user fee.[11]

Just Compensation

[P. 1467, add to n.584 following first cite:]

The owner's loss, not the taker's gain, is the measure of such compensation. Brown v. Legal Found. of Washington, 538 U.S. 216, 236 (2003).

[11] Brown v. Legal Found. of Washington, 538 U.S. 216, 232 (2003). *But see* id. at 1422 n.2 (Justice Scalia dissenting).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

—Criminal Proceedings to Which the Guarantee Applies

[P. 1506–1507, substitute for last two paragraphs of section:]

Within the context of a criminal trial, what factual issues are submitted to the jury has traditionally been determined by whether the fact to be established is an element of a crime or instead is a sentencing factor. Under this approach, the right to a jury extends to the finding of all facts establishing the elements of a crime, and sentencing factors may be evaluated by a judge. Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[1]

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[2] "The relevant inquiry is one not of form, but of effect."[3] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum," the Court concluded, "must be submitted to a jury, and proved beyond a reasonable doubt."[4] The one exception the *Apprendi* Court recognized was for sentencing enhancements based on recidivism.[5] Subsequently, the Court refused

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[1] For instance, the Court held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in the main text under "Proof, Burden of Proof, and Presumptions."

[2] 530 U.S. 466, 490 (2000).

[3] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).

[4] 530 U.S. at 490.

[5] 530 U.S. at 490. Enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, and a judge may find the existence of previous valid

to apply *Apprendi's* principles to judicial factfinding that supports imposition of mandatory minimum sentences.[6]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations. In *Ring v. Arizona,*[7] the Court, overruling precedent,[8] applied *Apprendi* to invalidate an Arizona law that authorized imposition of the death penalty only if the judge made a factual determination as to the existence of any of several aggravating factors. Although Arizona required that the judge's findings as to aggravating factors be made beyond a reasonable doubt, and not merely by a preponderance of the evidence, the Court ruled that those findings must be made by a jury.[9]

In *Blakely v. Washington,*[10] the Court sent shockwaves through federal as well as state sentencing systems when it applied *Apprendi* to invalidate a sentence imposed under Washington State's sentencing statute. Blakely, who plead guilty to an offense for which the "standard range" under the state's sentencing law was 49 to 53 months, was sentenced to 90 months based on the

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convictions even if the result is a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States is subject to a maximum sentence of two years, but upon proof of a felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has the burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[6] Prior to its decision in *Apprendi,* the Court had held that factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi, McMillan* was subsequently reaffirmed in Harris v. United States, 536 U.S. 545, 568–69 (2002). Five Justices in *Harris* thought that factfinding required for imposition of mandatory minimums fell within *Apprendi's* reasoning, but one of the five, Justice Breyer, concurred in the judgment on practical grounds despite his recognition that *McMillan* was not "easily" distinguishable "in terms of logic." 536 U.S. at 569. Justice Thomas's dissenting opinion, id. at 572, joined by Justices Stevens, Souter, and Ginsburg, elaborated on the logical inconsistency, and suggested that the Court's deference to Congress' choice to treat mandatory minimums as sentencing factors made avoidance of *Apprendi* a matter of "clever statutory drafting." Id. at 579.

[7] 536 U.S. 584 (2002).

[8] Walton v. Arizona, 497 U.S. 639 (1990). The Court's decision in *Ring* also appears to overrule a number of previous decisions on the same issue, such as Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638, 640–41 (1989) (*per curiam*), and undercuts the reasoning of another. *See* Clemons v. Mississippi, 494 U.S. 738 (1990) (appellate court may reweigh aggravating and mitigating factors and uphold imposition of death penalty even though jury relied on an invalid aggravating factor).

[9] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609. The Court rejected Arizona's request that it recognize an exception for capital sentencing in order not to interfere with elaborate sentencing procedures designed to comply with the Eighth Amendment. Id. at 605–07.

[10] 124 S. Ct. 2531 (2004).

judge's determination—not derived from facts admitted in the guilty plea—that the offense had been committed with "deliberate cruelty," a basis for an "upward departure" under the statute. The 90–month sentence was thus within a statutory maximum, but the Court made "clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*" *i.e.,* "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." [11] This approach brings into question sentencing under other states' laws and in addition under the federal Sentencing Guidelines. *Blakely* is already generating litigation, and may also prompt legislative responses.[12] Much will depend upon whether the Court, in applying *Blakely,* attempts to limit its reach.[13]

CONFRONTATION

[P. 1522, substitute for both paragraphs on page (entire content of page):]

In Ohio v. Roberts, a Court majority adopted the reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[14] *Roberts* was applied and narrowed over the course of 24 years,[15] and then overruled in

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[11] 124 S. Ct. at 2537 (emphasis original).

[12] *Blakely*-related developments may be followed at *http//sentencing.typepad.com* (November 2004).

[13] The Court has agreed to review two decisions raising issues under the Sentencing Guidelines. United States v. Booker, 375 F.3d 508 (7th Cir. 2004), and United States v. Fanfan, 2004 WL 1723113 (D. Me. 2004). The cases, 04–104 and 04–105, respectively, were argued on October 4, 2004.

[14] 448 U.S. 56 (1980). "[O]nce a witness is shown to be unavailable . . ., the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). The Court indicated that reliability could be inferred without more if the evidence falls within a firmly rooted hearsay exception.

[15] Applying *Roberts,* the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in United States v. Inadi, 475 U.S. 387 (1986), holding that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. *See also* White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (insufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

Crawford v. Washington.[16] The Court in *Crawford* rejected reliance on "particularized guarantees of trustworthiness" as inconsistent with the requirements of the Confrontation Clause. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[17] Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test had been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[18] "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[19]

Crawford represents a decisive turning point for Confrontation Clause analysis. The basic principles are now clearly stated. "Testimonial evidence" may be admitted against a criminal defendant only if the declarant is available for cross-examination at trial, or, if the declarant is unavailable even though the government has made reasonable efforts to procure his presence, the defendant has had a prior opportunity to cross-examine as to the content of the statement.[20] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" The Court indicated, however, that the term covers "at a minimum" prior testimony at a preliminary hearing, at a former trial, or before a grand jury, and statements made during police interrogation.[21]

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

—Johnson v. Zerbst

[P. 1528, add to n.208:]

A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 124 S. Ct. 1379 (2004) (holding not constitutionally required warnings detailing how an attorney could help inform the decision whether to plead guilty).

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[16] 124 S. Ct. 1354 (2004).

[17] 124 S. Ct. at 1370.

[18] 124 S. Ct. at 1371.

[19] 124 S. Ct. at 1374.

[20] The *Roberts* Court had stated a two-part test, the first a "necessity" rule under which the prosecution must produce or demonstrate unavailability of the declarant despite reasonable, good-faith efforts to produce the declarant at trial (448 U.S. at 65, 74), and the second part turning on the reliability of a hearsay statement by an unavailable witness. *Crawford* overruled *Roberts* only with respect to reliability, and left the unavailability test intact.

[21] 124 S. Ct. at 1374.

—Effective Assistance of Counsel

[P. 1535, add to n.252 following initial cite:]

Compare Wiggins v. Smith, 539 U.S. 510 (2003) (attorney's failure to pursue defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable) *with* Woodford v. Visciotti, 537 U.S. 19 (2003) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors).

[P. 1535, add to end of n.252:]

Yarborough v. Gentry, 124 S. Ct. 1 (2003) (deference to attorney's choice of tactics for closing argument).

Right to Assistance of Counsel in Nontrial Situations

—Custodial Interrogation

[P. 1539, add note at end of paragraph continued from p. 1538:]

The different issues in Fifth and Sixth Amendment cases were recently summarized in Fellers v. United States, 124 S. Ct. 1019 (2004), holding that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENTS

Capital Punishment

—Limitations on Capital Punishment: Diminished Capacity

[P. 1590, add to n.139:]

See also Tennard v. Dretke, 124 S. Ct. 2562 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

—Limitations on Habeas Corpus Review of Capital Sentences

[P. 1594, remove last sentence from n.161, and add new note at end of 2d sentence of paragraph:]

The "new rule" limitation was suggested in a plurality opinion in *Teague.* A Court majority in *Penry* and later cases has adopted it. "*Teague* by its terms applies only to procedural rules." Bousley v. United States, 523 U.S. 614, 620 (1998). "New substantive rules generally apply retroactively." This is so because new substantive rules "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." Schriro v. Summerlin, 124 S. Ct. 2519, 2522 (2004) (citation and internal quotation omitted) (decision in *Ring v. Arizona,* holding that jury not judge must decide existence of aggravating factors on which imposition of death sentence may be based, was a procedural, not a substantive rule).

[P. 1594, add to n.162 following initial citation:]

The first exception parallels the standard for substantive rules. The second exception, for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," Saffle v. Parks, 494 U.S. 484, 495 (1990), was at issue in Sawyer v. Smith. . . .

Proportionality

[P. 1601, add new paragraph at end of section:]

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at $399 apiece.[1] A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record,"and hence was not the

[1] Ewing v. California, 538 U.S. 11 (2003).

"rare case" of "gross disproportional[ity]."[2] The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[3] and Justice Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle."[4] Not surprisingly, the Court also rejected a habeas corpus challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[5] Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."[6]

Prisons and Punishment

[P. 1601, add to n.200:]

See also Overton v. Bazzetta, 539 U.S. 126 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

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[2] 538 U.S. at 29–30.

[3] 538 U.S. at 31.

[4] 538 U.S. at 32. The dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. *See* 538 U.S. at 32, n.1 (opinion of Justice Stevens).

[5] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive 25–year-to-life sentences on a 37–year-old convicted of two petty thefts with a prior conviction.

[6] 538 U.S. at 72.

ELEVENTH AMENDMENT

STATE SOVEREIGN IMMUNITY

Suits Against States

[P. 1636, add to text at end of section:]

In some of these cases, the state's immunity is either waived or abrogated by Congress. In other cases, the 11th Amendment does not apply because the procedural posture is such that the Court does not view the suit as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the *res,* or property in dispute, is in fact the legal target of a dispute.[1]

—Congressional Withdrawal of Immunity

[P. 1639, add to n.85:]

See also Frey v. Hawkins, 124 S. Ct. 899 (2004) (upholding enforcement of consent decree).

Suits Against State Officials

[P. 1648, add new note at end of first paragraph:]

In Frey v. Hawkins, 124 S. Ct. 899 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst,* arguing that unless an actual violation of federal law had been found by a court, such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the 11th Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. *Id.* at 906.

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[1] *See* Tennessee Student Assistance Corp. v. Hood, 124 S. Ct. 1905, 1910–13 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a State does not infringe the State's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507–08 (1998) (despite state claims to title of a ship-wrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign).

FOURTEENTH AMENDMENT

SECTION 1. RIGHTS GUARANTEED

DUE PROCESS OF LAW

Definitions

—Liberty

[P. 1682, add to n.57:]

But see Chavez v. Martinez, 538 U.S. 760 (2003) (case remanded to federal circuit court to determine whether coercive questioning of severely injured suspect gave rise to a compensable violation of due process).

Fundamental Rights (Noneconomic Substantive Due Process)

—Development of the Right of Privacy

[P. 1767, delete rest of paragraph after n.552, and add the following:]

However, in *Bowers v. Hardwick,*[1] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples.[2] Then, in *Lawrence v. Texas,*[3] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

—Privacy After Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?

[P. 1784, delete last sentence of paragraph carried over from p. 1783, and add the following:]

Although *Bowers* has since been overruled by *Lawrence v. Texas*[4] based on precepts of personal autonomy, the latter case did not ap-

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[1] 478 U.S. 186 (1986).

[2] The Court upheld the statute only as applied to the plaintiff, who was a homosexual, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at 192–93. In a dissent, Justice Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy. Id. at 199–203 (Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens).

[3] 539 U.S. 558 (2003) (overruling *Bowers*).

[4] 539 U.S. 558 (2003).

pear to signal the resurrection of the doctrine of protecting activities occurring in private places.

[P. 1784, delete second full paragraph, and all remaining paragraphs within the topic, and add the following:]

Despite the limiting language of *Roe,* the concept of privacy still retains sufficient strength to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services International,*[5] recognition of the "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[6] The Court significantly extended the *Griswold-Baird* line of cases so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to protect only that interest or interests.

For a time, the limits of the privacy doctrine were contained by the 1986 case of *Bowers v. Hardwick,*[7] where the Court by a 5–4 vote roundly rejected the suggestion that the privacy cases pro-

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[5] 431 U.S. 678 (1977).

[6] 431 U.S. at 684–91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the State. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691–99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

[7] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

tecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[8] and also rejected the more comprehensive claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[9] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[10] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[11] Interestingly, Justice Blackmun, in dissent, was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[12]

Yet, the case of *Lawrence v. Texas,*[13] by overruling *Bowers,* has brought the outer limits of noneconomic substantive due process

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[8] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190–91.

[9] Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases. 478 U.S. at 191. The Court concluded that there was no "fundamental right [of] homosexuals to engage in acts of consensual sodomy" because homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191–92.

[10] 478 U.S. at 191–92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[11] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195– 96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.

[12] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See id.* at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204–06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, motherhood, procreation, and child rearing." 478 U.S. at 190. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[13] 539 U.S. 558 (2003).

into question by once again utilizing the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold,* the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . .. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." [14]

Although it quarreled with the Court's finding in *Bowers v. Hardwick* that the proscription against homosexual behavior had "ancient roots," the *Lawrence* Court did not attempt to establish that such behavior was in fact historically condoned. This raises the question as to what limiting principles are available in evaluating future arguments based on personal autonomy. While the Court does seem to recognize that a State may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects," [15] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[16] Thus, the parameters for regulation of sexual conduct remain unclear.

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[17] Analysis of this question is hampered, however, because the Court has still not explained what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[18] little elucidates the answers.[19]

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[14] Id. at 567.

[15] Id.

[16] The Court noted with approval Justice Stevens' dissenting opinion in *Bowers v. Hardwick* stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." Id. at 577–78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

[17] The Court reserved this question in *Carey,* 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[18] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey,* 431 U.S. at 684–85.

[19] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—compelling interest justification by holding that

Despite the Court's decision in *Lawrence,* there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of "privacy" or under the more limited "liberty" set out in *Roe.* There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is also now accepted as a "liberty" protected under the due process clauses, however, the analytical significance of denominating the particular right or interest as an element of privacy seems open to question.

PROCEDURAL DUE PROCESS

The Procedure which is Due Process

—The Liberty Interest

[P. 1807, add new note to end of second paragraph]

In Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 6–7 (2003), holding that the state's posting on the Internet of accurate information regarding convicted sex offenders did not violate their due process rights, the Court stated that *Paul v. Davis* "held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."

—When Process is Due

[P. 1815, add new paragraph to text after paragraph ending with n.801:]

A delay in processing a claim for recovery of money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David,*[20] a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30–day delay was unlikely to create

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the "key" to discovering whether an interest or a relationship is a "fundamental"one is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this restriction is not holding with respect to equal protection analysis or due process analysis can be easily discerned. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

[20] 538 U.S. 715 (2003).

a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

Power of the States to Regulate Procedure

—Costs, Damages, and Penalties

[P. 1838, add to n.932 after the cite to BMW v. Gore:]

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (applying *Gore* guideposts to hold that a $145 million judgment for refusing to settle an insurance claim was excessive, in part because it included consideration of conduct occurring in other states as well as conduct bearing no relation to the plaintiffs' harm).

[P. 1838, add to n.933:]

The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424 (2003).

PROCEDURAL DUE PROCESS: CRIMINAL

The Elements of Due Process

—Fair Trial

[P. 1855, add to n.1025 after the cite to Rose v. Clark:]

Middleton v. McNeil,124 S. Ct. 1830 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear.)

—Prosecutorial Misconduct

[P. 1858, add new note following the words "prosecutor withheld it" in the third sentence of the first full paragraph:]

It should be noted that a statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283–84 (1999); Banks v. Dretke, 124 S. Ct. 1256, 1273 (2004).

[P. 1859, add to n.1044:]

Illinois v. Fisher, 124 S. Ct. 1200 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

[P. 1859, add to n.1049:]

See also Banks v. Dretke, 124 S. Ct. 1256, 1273 (2004) (failure of prosecution to correct perjured statement that witness had not been coached and to disclose that separate witness was a paid government informant established prejudice for purposes of habeas corpus review).

—Proof, Burden of Proof, and Presumptions

[P. 1861, add note following the words "constitute the crime charged" in the first sentence of the first full paragraph:]

Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process.

—The Problem of the Incompetent or Insane Defendant of Convict

[P. 1866, add to text at end of section:]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper,*[21] the Court had found that an individual has a significant "liberty interest" in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States,*[22] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case.[23] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

—Rights of Prisoners

[P. 1875, add to n.1136:]

See Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over whom a prisoner's parental rights have been terminated, and all regular visitation for a period following a prisoner's violation of substance abuse rules).

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[21] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[22] 539 U.S. 166 (2003).

[23] For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government's interest in prosecution. 539 U.S. at 180.

[P. 1875, add note to the end of the fifth sentence of the first full paragraph:]

For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. Overton v. Bazzetta, 539 U.S. 126, 135 (2003).

EQUAL PROTECTION OF LAWS

Scope and Applicaton

—State Action

[P. 1893, add to n.1223:]

But see City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWERS

Taxation

—Classification for Purposes of Taxation

[P. 1923, add to n.1390 after the paragraph on "Electricity":]

Gambling: slot machines on excursion river boats are taxed at a maximum rate of 20 percent, while slot machines at a racetrack are taxed at a maximum rate of 36 percent. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[P. 1924, add to n.1391:]

Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

Equal Protection and Race

—Permissible Remedial Utilization of Racial Classifications

[P. 1970, add to text at end of section:]

By applying strict scrutiny, the Court was in essence affirming Justice Powell's individual opinion in *Bakke,* which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether the Court would endorse Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the

Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger*[24] and *Gratz v. Bollinger.*[25]

In *Grutter,* the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in his file (*e.g.,* grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (*e.g.,* strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." While the policy did not limit diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[26]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who otherwise might not have been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[27] As the University did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the University's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.

The law school's admission policy, however, can be contrasted with the University's undergraduate admission policy. In *Gratz,* the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the Law School. Applicants with scores over 100 were usually admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was the fact that an applicant was entitled to 20 points based solely upon membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of

[24] 539 U.S. 306 (2003).
[25] 539 U.S. 244 (2003).
[26] 539 U.S. at 323–26.
[27] 539 U.S. at 335.

certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[28]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's opinion in *Bakke.* While Justice Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file," [29] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz,* the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an underrepresented minority group, the policy effectively admitted every qualified minority applicant. While acknowledging that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve the University's asserted compelling interest in diversity.[30]

THE NEW EQUAL PROTECTION

Fundamental Interests: The Political Process

—Apportionment and Districting

[P. 2012, add the following paragraph after the paragraph ending at n.1841:]

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were unsuccessful. And when the Supreme Court revisited the issue in 2004, it practically closed the door entirely on such challenges. In *Vieth v. Jubelirer,*[31] the Court upheld Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. A four-Justice plurality[32] would have held the issue nonjusticiable, arguing that partisan considerations are an intrinsic part of establishing districts,[33] that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,[34] and that the power to address the issue of political gerrymandering

[28] 539 U.S. at 272–73.
[29] 438 U.S. at 317.
[30] 438 U.S. at 284–85.
[31] 124 S. Ct. 1769 (2004).
[32] The plurality opinion was written by Justice Scalia, and joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas.
[33] 124 S. Ct. at 1781.
[34] 124 S. Ct. at 1778–84.

resides in Congress.[35] Justice Kennedy, while concurring in the judgment, held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale" is identified in the future to evaluate partisan redistricting.[36]

SECTION 5. ENFORCEMENT

Congressional Definition of Fourteenth Amendment Rights

[P. 2047, add to text at end of section:]

The Court's most recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs,*[37] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees can take up to twelve weeks of unpaid leave to care for a close relative with a serious health condition. Noting that the Fourteenth Amendment could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than men were provided paternity leave. Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel,* which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test[38] . . . it was easier for Congress

[35] 124 S. Ct. at 1775 (noting that Article I, § 4 authorizes Congress to make or alter regulations of the manner of holding elections for Senators and Representatives).

[36] 124 S. Ct. at 1793 (Justice Kennedy, concurring). While Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposes on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.

[37] 538 U.S. 721 (2003).

[38] Statutory classifications that distinguish between males and females are subject to heightened scrutiny, Craig v. Boren, 429 U.S. 190, 197–199 (1976); they must be substantially related to the achievement of important governmental objectives. United States v. Virginia, 518 U.S. 515, 533 (1996).

to show a pattern of state constitutional violations."[39] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the gender stereotype.

Applying the same approach, the Court in *Tennessee v. Lane*[40] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act (ADA) provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[41] but since disability is not a suspect class, the application of Title II against states would seem suspect under the reasoning of *Garrett.*[42] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[43] Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[44] However, as pointed out by both the majority and by Justice Rehnquist in dissent, the deprivations relied upon by the majority were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[45] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage and voting, and on limitations of access to public services beyond the use of courts.[46]

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[39] 538 U.S. at 736.

[40] 124 S. Ct. 1978 (2004).

[41] 42 U.S.C. § 12132.

[42] 531 U.S. 356 (2001).

[43] *See, e.g.,* Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[44] 124 S. Ct. at 1989.

[45] 124 S. Ct. at 1999.

[46] 124 S. Ct. at 1989–90. Justice Rehnquist, in dissent, disputed Congress' reliance on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. Id. at 1999–2000. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, Mt. Healthy City Bd. of Educ. v. Doyle, U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as South Carolina v. Katzenbach, 383 U.S. 301, 312–15 (1966).

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

159. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, §§ 213, 318; 2 U.S.C. §§ 315(d)(4), 441k.

Section 213 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' right to make unlimited independent expenditures. Section 318 of BCRA, which amended FECA to prohibit persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors.

McConnell v. FEC, 124 S. Ct. 619 (2003).

STATE CONSTITUTIONAL OR STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

I. STATE LAWS HELD UNCONSTITUTIONAL

936. *Stogner v. California,* 539 U.S. 607 (2003).

A California statute that permits resurrection of an otherwise time-barred criminal prosecution for sexual abuse of a child, and that was itself enacted after the pre-existing limitations period had expired for the crimes at issue, violates the Ex Post Facto Clause of Art. I, § 10, cl. 1.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg.

Justices dissenting: Kennedy, Scalia, Thomas, Rehnquist., C.J.

937. *Virginia v. Black,* 538 U.S. 343 (2003).

The *prima facie* evidence provision of Virginia's cross-burning statute, stating that a cross burning "shall be *prima facie* evidence of an intent to intimidate," is unconstitutional.

Justices concurring: O'Connor, Stevens, Breyer, Rehnquist, C.J.

Justices concurring specially: Souter, Kennedy, Ginsburg.

Justices dissenting: Scalia, Thomas.

938. *Lawrence v. Texas,* 539 U.S. 558 (2003).

A Texas statute making it a crime for two people of the same sex to engage in sodomy violates the Due Process Clause of the Fourteenth Amendment. The right to liberty protected by the Due Process Clause includes the right of two adults, "with full and mutual consent from each other, [to] engag[e] in sexual practices common to a homosexual lifestyle."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.

Justice concurring specially: O'Connor.

Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

939. *Blakely v. Washington,* 124 S. Ct. 2531 (2004).

Washington State's sentencing law, which allows a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence," is inconsistent with the Sixth Amendment right to trial by jury.

Justices concurring: Scalia, Stevens, Souter, Thomas, and Ginsburg.

Justices dissenting: O'Connor, Breyer, Kennedy, Rehnquist, C.J.

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

225. *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1 (2003).

Alabama's usury statute is preempted by sections 85 and 86 of the National Bank Act as applied to interest rates charged by national banks.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, and Rehnquist, C.J.

Justices dissenting: Scalia and Thomas.

226. *American Ins. Ass'n v. Garamendi,* 539 U.S. 396 (2003).

California's Holocaust Victim Insurance Relief Act, which requires any insurance company doing business in the state to disclose information about policies it or "related" companies sold in Europe between 1920 and 1945, is preempted as interfering with the Federal Government's conduct of foreign relations.

Justices concurring: Souter, O'Connor, Kennedy, Breyer, and Chief Justice Rehnquist.

Justices dissenting: Ginsburg, Stevens, Scalia, and Thomas.

227. *Aetna Health Inc. v. Davila,* 124 S. Ct. 2488 (2004).

Suits brought in state court alleging that HMOs violated their duty under the Texas Health Care Liability Act "to exercise ordinary care when making health care treatment decisions" are preempted by ERISA § 502(a), which authorizes suit "to recover benefits due [a participant] under the terms of his plan."

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

	Overruling Case	*Overruled Case(s)*
221.	*Lapides v. Board of Regents,* 535 U.S. 613 (2002).	*Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459 (1945).
222.	*Atkins v. Virginia,* 536 U.S. 304 (2002).	*Penry v. Lynaugh,* 492 U.S. 302 (1989).
223.	*Ring v. Arizona,* 536 U.S. 584 (2002).	*Walton v. Arizona,* 497 U.S. 639 (1990).
224.	*Lawrence v. Texas,* 539 U.S. 558 (2003).	*Bowers v. Hardwick,* 478 U.S. 186 (1986).
225.	*Crawford v. Washington,* 124 S. Ct. 1354 (2004).	*Ohio v. Roberts,* 448 U.S. 56 (1980).

TABLE OF CASES

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110TH CONGRESS *1st Session* | SENATE | DOCUMENT No. 110–6

THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2006 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 2006

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ARTICLE I

Section 2. House of Representatives

Clause 1. Congressional Districting

CONGRESSIONAL DISTRICTING

[P. 112, add to n.299:]

Vieth v. *Jubelirer*, 541 U.S. 267 (2004) (same); *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006). Additional discussion of this issue appears under Amendment 14, The New Equal Protection, Apportionment and Districting.

Section 7. Bills and Resolutions

Clause 3. Presentation of Resolutions

THE LEGISLATIVE PROCESSδ

Presentation of Resolutions

[Pp. 148-49, substitute for entire section:]

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[1] Why a separate clause was needed for this purpose has not been explained. 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.[2] If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. 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. Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity for law-making; that is, any "order, resolution, or vote" must be submitted if it is to have the force of law. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the other

[1] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 301-302, 304-305; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 889, at 335 (1833).

[2] 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).

House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[3]

Although the ORV Clause excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments, the practice and understanding, beginning with the Bill of Rights, have been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. *Hollingsworth v. Virginia*,[4] in which 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, is usually cited for the proposition that presentation of constitutional amendment resolutions is not required.[5]

Section 8. Powers of Congress

Clause 1. Power to Tax and Spend

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

[P. 164, add new paragraph at end of section:]

As with its other powers, Congress may enact legislation "necessary and proper" to effectuate its purposes in taxing and spending. In upholding a law making it a crime to bribe state and local officials who administer programs that receive federal funds, the Court declared that Congress has authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."[6] Congress' failure to require proof of a direct connection between the bribery and the federal funds was permissible, the Court concluded, because "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."[7]

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[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 Tillman, *supra*), 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").

[6] Sabri v. United States, 541 U.S. 600, 605 (2004).

[7] 541 U.S. at 606.

—Conditional Grants-in-Aid

[P. 165, add to n.603:]

This is not to say that Congress may police the effectiveness of its spending only by means of attaching conditions to grants; Congress may also rely on criminal sanctions to penalize graft and corruption that may impede its purposes in spending programs. Sabri v. United States, 541 U.S. 600 (2004).

[P. 166, add to n.608:]

Arlington Central School Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006) (because Individuals with Disabilities Education Act, which was enacted pursuant to the Spending Clause, does not furnish clear notice to states that prevailing parents may recover fees for services rendered by experts in IDEA actions, it does not authorize recovery of such fees).

Clause 3. Commerce Power

POWER TO REGULATE COMMERCE

Definition of Terms

—Necessary and Proper Clause

[P. 175, add to n.665:]

Gonzales v. Raich, 125 S. Ct. 2195 (2005).

[P. 175, add to text after n.665:]

In other cases, the clause may not have been directly cited, but the dictates of Chief Justice Marshall have been used to justify more expansive applications of the commerce power.[8]

THE COMMERCE CLAUSE AS A SOURCE OF NATIONAL POLICE POWER

Is There an Intrastate Barrier to Congress' Commerce Power.

[P. 212, substitute for second paragraph of section:]

Congress' commerce power has been characterized as having three, or sometimes four, very interrelated principles of decision, some old, some of recent vintage. The Court in 1995 described "three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those

[8] *See, e.g.*, United States v. Darby, 312 U.S. 100, 115-16 (1941).

activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[9]

[P. 218, add to text at end of section:]

Yet, the ultimate impact of these cases on the Congress' power over commerce may be limited. In *Gonzales v. Raich*,[10] 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).[11] 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 the dictates of *Lopez* and *Morrison* to select applications of a statute, holding that the Court would defer to Congress if there was a rational basis to believe that regulation of home-consumed marijuana would affect the market for marijuana generally. 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.[12] 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,"[13] 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.

The Court's decision also contained an intertwined but potentially separate argument that the Congress had ample authority

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[9] United States v. Lopez, 514 U.S. 549, 558-59 (1995) (citations omitted). Illustrative of the power to legislate to protect the channels and instrumentalities of interstate commerce is *Pierce County v. Guillen*, 537 U.S. 129, 147 (2003), in which the Court upheld a prohibition on the use in state or federal court proceedings of highway data required to be collected by states on the basis 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."

[10] 125 S. Ct. 2195 (2005).

[11] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.

[12] 125 S. Ct. at 2206-09.

[13] 125 S. Ct. at 2211, quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966).

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.[14] The Court quotes 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.[15] Justice Scalia, in concurrence, suggests 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.[16]

[P. 217, add to n.883:]

Lopez did not "purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

—Congressional Authorization of Impermissible State Action

[Pp. 228-229, substitute for second paragraph of section:]

The Court applied the "original package" doctrine to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce."[17] Although holding that a state was entitled to prohibit the manufacture and sale of intoxicants within its boundaries,[18] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Ry. Co.*,[19] that, so long as Congress remained silent in the matter, a state lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the importation of liquor from a sister state. This holding was soon followed by another to the effect that, so

[14] 125 S. Ct. at 2206, 2210, 2211

[15] 125 S. Ct. at 2206-09.

[16] 125 S. Ct. at 2216 (Scalia, J., concurring).

[17] The Court had developed the "original package" doctrine to restrict application of a state tax on imports from a foreign country in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827). Although Chief Justice Marshall had indicated in dictum in *Brown* that the same rule would apply to imports from sister states, the Court had refused to follow that dictum in *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869).

[18] Mugler v. Kansas, 123 U.S. 623 (1887). Relying on the distinction between manufacture and commerce, the Court soon applied this ruling to authorize states to prohibit manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888).

[19] 125 U.S. 465 (1888)

long as Congress remained silent, a state had no power to prevent the sale in the original package of liquors introduced from another state.[20] Congress soon attempted to overcome the effect of the latter decision by enacting the Wilson Act,[21] which empowered states to regulate imported liquor on the same terms as domestically produced liquor, but the Court interpreted the law narrowly as subjecting imported liquor to local authority only after its resale.[22] Congress did not fully nullify the *Bowman* case until 1913, when it enacted of the Webb-Kenyon Act[23] which clearly authorized states to regulate direct shipments for personal use.

National Prohibition, imposed by the Eighteenth Amendment, temporarily mooted these conflicts, but they reemerged with repeal of Prohibition by the Twenty-first Amendment. Section 2 of the Twenty-first Amendment prohibits "the importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." Initially the Court interpreted this language to authorize states to discriminate against imported liquor in favor of that produced in-state, but the modern Court has rejected this interpretation, holding instead that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[24]

[P. 231, add to n.954 after initial citation:]

See also Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws).

State Taxation and Regulation: The Modern Law

—Taxation

[P. 246, add to n.1038:]

But see American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2419 (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.

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[20] Leisy v. Hardin, 135 U.S. 100 (1890).

[21] Ch. 728, 26 Stat. 313 (1890), upheld in In re Rahrer, 140 U.S. 545 (1891).

[22] Rhodes v. Iowa, 170 U.S. 412 (1898).

[23] Ch. 90, 37 Stat. 699 (1913), sustained in Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). *See also* Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

[24] Granholm v. Heald, 544 U.S. 460, 487 (2005). *See also* Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. The Beer Institute, 491 U.S. 324 (1989), and the analysis of section 2 under Discrimination Between Domestic and Imported Products.

—Regulation

[P. 249, add to n.1051:]

But cf. Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644 (2003) (state prescription drug program providing rebates to participating companies does not regulate prices of out-of-state transactions and does not favor in-state over out-of-state companies).

Foreign Commerce and State Powers

[P. 256, substitute for last two sentences of first full paragraph:]

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.[25] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[26]

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

—The Standards Applied

[P. 262, add to n.1109:]

Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted).

[P. 265, add to n.1118:]

But cf. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (interpreting preemption language and saving clause in Federal Boat Safety Act as not precluding a state common law tort action).

[P. 266, add footnote at end of second line of text on the page:]

For a more recent decision applying express preemption language to a variety of state common law claims, see *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (interpreting FIFRA, the federal law governing pesticides).

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[25] Reliance could not be placed on Executive statements, the Court explained, since "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.

[26] *The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 139-49 (1993).

COMMERCE WITH INDIAN TRIBES

[P. 278, add to n.1189:]

United States v. Lara, 541 U.S. 193, 200 (2004).

[P. 281, add to n.1206:]

Congress may also remove restrictions on tribal sovereignty. The Court has held that, absent authority from federal statute or treaty, tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court also held, in *Duro v. Reina*, 495 U.S. 676 (1990), that a tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reservation; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction. Congress, however, quickly enacted a statute recognizing inherent authority of tribal governments to exercise criminal jurisdiction over nonmember Indians, and the Court upheld congressional authority to do so in *United States v. Lara*, 541 U.S. 193 (2004).

Clause 8. Copyrights and Patents

Scope of the Power

[P. 312, substitute for sentence ending with n.1421:]

These English statutes curtailed the royal prerogative in the creation and bestowal of monopolistic privileges, and the Copyright and Patent Clause similarly curtails congressional power with regard both to subject matter and to the purpose and duration of the rights granted.[27]

[P. 313, convert final sentence of paragraph to a separate paragraph and place it after the following new paragraph to be added at end of section:]

The constitutional limits, however, do not prevent the Court from being highly deferential to congressional exercise of its power. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," the Court has said.[28] "Satisfied" in *Eldred v. Ashcroft* that the Copyright Term Extension Act did not violate the "limited times" prescription, the Court saw the only remaining question as whether the enactment was "a rational exercise of the legislative authority conferred by the Copyright Clause."[29] The Act, the Court concluded, "reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain." Moreover, the limitation on the duration of copyrights and patents is largely unenforceable. The protection period may extend well be-

[27] Graham v. John Deere Co., 383 U.S. 1, 5, 9 (1966).

[28] Eldred v. Ashcroft, 537 U.S. 186, 205 (2003) (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984)).

[29] 537 U.S. at 204.

yond the life of the author or inventor.[30] Congress may extend the duration of existing copyrights and patents, and in so doing may protect the rights of purchasers and assignees.[31]

Nature and Scope of the Right Secured

[P. 316, substitute for first paragraph of section:]

The leading case on the nature of the rights that Congress is authorized to "secure" under the Copyright and Patent Clause is *Wheaton v. Peters*.[32] Wheaton was the official reporter for the Supreme Court from 1816 to 1827, and Peters was his successor in that role. Wheaton charged Peters with having infringed his copyright in the twelve volumes of "Wheaton's Reports" by reprinting material from Wheaton's first volume in "a volume called 'Condensed Reports of Cases in the Supreme Court of the United States'";[33] Wheaton based his claim on both common law and a 1790 act of Congress. On the statutory claim, the Court remanded to the trial court for a determination of whether Wheaton had complied with all the requirements of the act.[34] On the common law claim, the Court held for Peters, finding that, under common law, publication divests an author of copyright protection. Wheaton argued that the Constitution should be held to protect his common law copyright, because "the word *secure* . . . clearly indicates an intention, not to originate a right, but to protect one already in existence."[35] The Court found, however, that "the word *secure*, as used in the constitution, could not mean the protection of an acknowledged legal right," but was used "in reference to a future right."[36] Thus, the exclusive right that the Constitution authorizes Congress to "secure" to authors and inventors owes its existence solely to acts of Congress that secure it, from which it follows that the

[30] The Court in *Eldred* upheld extension of the term of existing copyrights from life of the author plus 50 years to life of the author plus 70 years. Although the more general issue was not raised, the Court opined that this length of time, extendable by Congress, was "clearly" not a regime of "perpetual" copyrights. The only two dissenting Justices, Stevens and Breyer, challenged this assertion.

[31] Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).

[32] 33 U.S. (8 Pet.) 591 (1834).

[33] 33 U.S. (8 Pet.) at 595.

[34] 33 U.S. (8 Pet.) at 667.

[35] 33 U.S. (8 Pet.) at 661; Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[36] 33 U.S. (8 Pet.) at 661.

rights granted by a patent or copyright are subject to such qualifications and limitations as Congress sees fit to impose.[37]

[P. 317, add to n.1448:]

Cf. *Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd*., 545 U.S. 913 (2005) (active encouragement of infringement by distribution of software for sharing of copyrighted music and video files can constitute infringement).

Clauses 11, 12, 13, and 14. War; Military Establishment

CONSTITUTIONAL RIGHTS IN WARTIME

The Constitution at Home in Wartime

—Enemy Aliens

[P. 347, add to text at end of section:]

Because this use of military tribunals was sanctioned by Congress, the Court found it unnecessary to decide whether "the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity.'"[38]

Clause 18. Necessary and Proper Clause

Scope of Incidental Powers

[P. 357, substitute for first sentence of section:]

The Necessary and Proper Clause, sometimes called the "coefficient" or "elastic" clause, is an enlargement, not a constriction, of the powers expressly granted to Congress. Chief Justice Marshall's classic opinion in *McCulloch v. Maryland*[39] set the standard in words that reverberate to this day.

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[37] 33 U.S. (8 Pet.) at 662; Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815). A major limitation of copyright law is that "fair use" of a copyrighted work is not an infringement. Fair use can involve such things as quotation for the use of criticism and reproduction for classroom purposes, but it may not supersede the use of the original work. *See* Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (an unauthorized 300- to 400-word excerpt, published as a news "scoop" of the authorized prepublication excerpt of former President Ford's memoirs and substantially affecting the potential market for the authorized version, was not a fair use within the meaning of § 107 of the Copyright Act. 17 U.S.C. § 107). For fair use in the context of a song parody, *see Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994).

[38] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 (2006). *But see*, id. at 2773 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need.").

[39] 17 U.S. (4 Wheat.) 316 (1819).

Operation of Clause

[P. 358, add to n.1734:]

Congress may also legislate to protect its spending power. Sabri v. United States, 541 U.S. 600 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

Courts and Judicial Proceedings

[P. 361, add clause in text after n.1759:]

may require the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court,[40]

Section 10 — Powers Denied to States

Clause 1. Making Treaties, Coining Money, Ex Post Facto Laws, Impairing Contracts

Ex Post Facto Laws

—Scope of the Provision

[P. 382, add to text after n.1912:]

Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe*[41] upholding application of Alaska's "Megan's Law" to sex offenders who were convicted before the law's enactment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords "considerable deference" to legislative intent; if the legislature's purpose was to enact a civil regulatory scheme, then the law can be ex post facto only if there is "the clearest proof" of punitive effect.[42] Here, the Court determined, the legislative intent was civil and non-punitive — to promote public safety by "protecting the public from sex offenders." The Court then identified several "useful guideposts" to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment."[43] The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or

[40] Jinks v. Richland County, 538 U.S. 456 (2003).

[41] 538 U.S. 84 (2003).

[42] 538 U.S. at 92.

[43] The law's requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan's Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. 538 U.S. at 98.

occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.[44] Nor is the act "excessive" in relation to its regulatory purpose.[45] Rather, "the means chosen are 'reasonable' in light of the [state's] non-punitive objective" of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.[46]

—Changes in Punishment

[P. 383, substitute for first sentence of section:]

Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of ex post facto laws, two of which related to punishment. One such category was laws that inflict punishment "where the party was not, by law, liable to any punishment"; the other was laws that inflict greater punishment than was authorized when the crime was committed.[47]

Illustrative of the first of these punishment categories is "a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecution." Such a law, the Court ruled in *Stogner v. California*,[48] is prohibited as *ex post facto*. Courts that had upheld extension of unexpired statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person "effective amnesty" as being "unfair" in the sense addressed by the *Ex Post Facto* Clause.

Illustrative of the second punishment category are statutes that changed an indeterminate sentence law to require a judge to

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[44] 538 U.S. at 102.

[45] Excessiveness was alleged to stem both from the law's duration (15 years of notification by those convicted of less serious offenses; lifetime registration by serious offenders) and in terms of the widespread (Internet) distribution of the information.

[46] 538 U.S. at 105. Unlike involuntary civil commitment, where the "magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness. Id. at 103.

[47] 3 U.S. (3 Dall.) 386, 389 (1798).

[48] 539 U.S. 607, 632-33 (2003) (invalidating application of California's law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

impose the maximum sentence,[49] that required solitary confinement for prisoners previously sentenced to death,[50] and that allowed a warden to fix, within limits of one week, and keep secret the time of execution.[51]

[49] Lindsey v. Washington, 301 U.S. 397 (1937). But note the limitation of *Lindsey* in *Dobbert v. Florida*, 432 U.S. 282, 298-301 (1977).

[50] Holden v. Minnesota, 137 U.S. 483, 491 (1890).

[51] Medley, Petitioner, 134 U.S. 160, 171 (1890).

ARTICLE II

Section 1. The President

Clause 1. Powers and Term of the President.

NATURE AND SCOPE OF PRESIDENTIAL POWER

—The Youngstown Case

[P. 442, add to n.40:]

And, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Kennedy, in a concurring opinion joined by three other Justices, id. at 2800.

Section 2. Powers and Duties of the President

Clause 1. Commander-in-Chiefship; Presidential Advisers; Pardons

COMMANDER-IN-CHIEF

Martial Law and Constitutional Limitations

[P. 483, add new section after "Articles of War: World War II Crimes":]

—Articles of War: Response to the Attacks of September 11, 2001

In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the Authorization for Use of Military Force,[1] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a military action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statutory grounds.[2] However, the Court did find that the government

[1] Pub. L. 107-40, 115 Stat. 224 (2001).

[2] Hamdi v. Rumsfeld, 542 U.S. 507 (2004). There was no opinion of the Court. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy and Justice

may not detain the petitioner indefinitely for purposes of interrogation, without giving him the opportunity to offer evidence that he is not an enemy combatant.[3]

In *Rasul v. Bush*,[4] the Court rejected an Executive Branch argument that foreign prisoners being held at Guantanamo Bay, Cuba were outside of federal court jurisdiction. The Court distinguished earlier case law arising during World War II that denied *habeas corpus* petitions from German citizens who had been captured and tried overseas by United States military tribunals.[5] In *Rasul*, the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[6] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised exclusive jurisdiction and control.[7] In addition, the Court found that statutory grounds existed for the extension of *habeas corpus* to these prisoners.[8]

Clause 2. Treaties and Appointment of Officers

THE TREATY-MAKING POWER

Treaties as Law of the Land

[P. 494, add to text after n.271:]

The meaning of treaties, as of statutes, is determined by the courts. "If treaties are to be given effect as federal law under our legal sys-

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Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II. Justice Souter, joined by Justice Ginsberg, rejected the argument that the Congress had authorized such detentions, while Justice Scalia, joined with Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*.

[3] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney. 542 U.S. at 533, 539.

[4] 542 U.S. 466 (2004).

[5] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[6] The petitioners were Australians and Kuwaitis.

[7] Rasul v. Bush, 542 U.S. at 467.

[8] The Court found that 28 U.S.C. § 2241, which had previously been construed to require the presence of a petitioner in a district court's jurisdiction, was now satisfied by the presence of a jailor-custodian. See Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's *habeas* jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld was not sufficient to satisfy the presence requirement under 28 U.S.C. § 2241).

tem, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." [9] In addition, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.'" [10] Decisions of the International Court of Justice (ICJ) interpreting treaties, however, have "*no binding force* except between the parties and in respect of that particular case." [11] ICJ decisions "are therefore entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court." [12]

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The Domestic Obligation of Executive Agreements

[P. 527, substitute for first sentence of first full paragraph on page:]

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[13] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying

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[9] Sanchez-Llamas v. Oregon,126 S. Ct. 2669, 2684 (2006), quoting Marbury v. Madison, 5 U.S. (1 Cr.) 137, 177 (1803). In *Sanchez-Llamas*, two foreign nationals were arrested in the United States, and, in violation of Article 36 of the Vienna Convention on Consular Relations, their nations' consuls were not notified that they had been detained by authorities in a foreign country (the U.S.). The foreign nationals were convicted in Oregon and Virginia state courts, respectively, and cited the violations of Article 36 in challenging their convictions. The Court did not decide whether Article 36 grants rights that may be invoked by individuals in a judicial proceeding (four justices would have held that it did grant such rights). The reason that the Court did not decide whether Article 36 grants rights to defendants was that it held, by a 6-to-3 vote, that, even if Article 36 does grant rights, the defendants in the two cases before it were not entitled to relief on their claims. It found, specifically, that "suppression of evidence is [not] a proper remedy for a violation of Article 36," and that "an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." Id. at 2677.

[10] Sanchez-Llamas v. Oregon, 126 S. Ct. at 2685, quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[11] Sanchez-Llamas v. Oregon, 126 S. Ct. at 2684, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 933 (1945) (emphasis added by the Court).

[12] Sanchez-Llamas v. Oregon, 126 S. Ct. at 2685, quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

[13] *E.g.*, United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. WILLOUGHBY, *supra*, at 589. The State Department held the same view. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 426 (1944).

on the Constitution's vesting of foreign relations power in the national government.

[P. 529, substitute for last paragraph of section:]

*Belmon*t and *Pink* were reinforced in *American Insurance Association v. Garamendi*.[14] In holding that California's Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government's conduct of foreign relations, as expressed in executive agreements, the Court reiterated that "valid executive agreements are fit to preempt state law, just as treaties are."[15] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[16] Because there was a "clear conflict" between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being "well within the Executive's responsibility for foreign affairs"), the state law was preempted.[17]

[P. 529, add new section after "The Domestic Obligation of Executive Agreements":]

State Laws Affecting Foreign Relations — Dormant Federal Power and Preemption

If the foreign relations power is truly an exclusive federal power, with no role for the states, a logical consequence, the Supreme Court has held, is that some state laws impinging on foreign relations are invalid even in the absence of a relevant federal policy. There is, in effect, a "dormant" foreign relations power. The scope of this power remains undefined, however, and its constitutional basis is debated by scholars.

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."[18] A hundred

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[14] 539 U.S. 396 (2003). The Court's opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

[15] 539 U.S. at 416.

[16] 539 U.S. at 413.

[17] 539 U.S. at 420.

[18] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United

years later the Court remained emphatic about federal exclusivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." [19]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation's foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller*,[20] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confiscation." [21] Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state probate courts in denying payments to persons from Communist countries.[22] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government." [23]

States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

[19] United States v. Pink, 315 U.S. 203, 233-34 (1942). Chief Justice Stone and Justice Roberts dissented.

[20] 389 U.S. 429 (1968).

[21] In *Clark v. Allen*, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

[22] 389 U.S. at 440.

[23] 389 U.S. at 440, 441.

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign governments or to curtail trade with out-of-favor countries.[24] In 1999, the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[25] Similarly, in 2003 the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[26]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[27] and grants of power.[28] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court in *Garamendi*, field preemption may be appropriate if a state legislates "simply to take a position

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[24] *See, e.g.*, Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Carlos Manuel Vazquez, *Whither Zschernig*? 46 VILL. L. REV. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 149-69 (2d ed. 1996).

[25] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (1999). For the appeals court's application of *Zschernig, see* National Foreign Trade Council v. Natsios, 181 F.3d 38, 49-61 (1st Cir. 1999).

[26] American Insurance Association v. Garamendi, 539 U.S. at 419 & n.11 (2003).

[27] It is contended, for example, that Article I, § 10's specific prohibitions against states' engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, *supra*, 75 NOTRE DAME L. REV. 341.

[28] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.

on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional responsibility, "but in a way that affects foreign relations."[29] We must await further litigation to see whether the Court employs this distinction.[30]

THE EXECUTIVE ESTABLISHMENT

Appointments and Congressional Regulation of Offices

—Congressional Regulation of Conduct in Office

[P. 540, substitute for final paragraph of section:]

Until 1993, § 9(a) of the Hatch Act[31] prohibited any person in the executive branch, or any executive branch department or agency, except the President and the Vice President and certain "policy determining" officers, to "take an active part in political management or political campaigns," although employees had been permitted to "express their opinions on all political subjects and candidates." In *United Public Workers v. Mitchell*,[32] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments. The Hatch Act Reform Amendments of 1993, however, substantially liberalized the rules for political activities during off-duty hours for most executive branch employees, subject to certain limitations on off-duty hours activities and express prohibitions against on-the-job partisan political activities.[33]

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[29] 539 U.S. at 419 n.11.

[30] Justice Ginsburg's dissent in *Garamendi*, joined by the other three dissenters, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting HENKIN, *supra* n.24, at 164). But Justice Ginsburg also voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, *supra* n.24, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[31] 53 Stat. 1147, 1148 (1939), then 5 U.S.C. § 7324(a). The 1940 law, § 12(a), 54 Stat. 767-768, applied the same broad ban to employees of federally funded state and local agencies, but this provision was amended in 1974 to restrict state and local government employees in only one respect: running for public office in partisan elections. Act of Oct. 15, 1974, P. L. 93-443, § 401(a), 88 Stat. 1290, 5 U.S.C. § 1502.

[32] 330 U.S. 75 (1947). See also *Civil Serv. Corp. v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court's expanding free speech jurisprudence, but the act was again sustained. A "little Hatch Act" of a state, applying to its employees, was sustained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[33] P. L. 103-94, § 2(a), 107 Stat. 1001 (1993), 5 U.S.C. §§ 7321-7326. Executive branch employees (except those appointed by the President, by and with the advice

The Presidential Aegis: Demands for Papers

—Private Access to Government Information

[P. 556, add to text at end of section:]

Reynolds dealt with an evidentiary privilege. There are other circumstances, however, in which cases must be "dismissed on the pleadings without ever reaching the question of evidence."[34] In holding that federal courts should refuse to entertain a breach of contract action seeking enforcement of an agreement to compensate someone who performed espionage services during the Civil War, the Court in *Totten v. United States* declared that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[35]

—Prosecutorial and Grand Jury Access to Presidential Documents

[P. 559, add to text at end of section:]

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.[36] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon*,[37] and, in instructing the appeals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[38]

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and consent of the Senate) who are listed in § 7323(b)(2), which generally include those employed by agencies involved in law enforcement or national security, remain under restrictions similar to the those in the old Hatch Act on taking an active part in political management or political campaigns.

[34] *Reynolds*, 345 U.S. at 11, n.26.

[35] 92 U.S. 105, 107 (1875). *See also* Tenet v. Doe, 544 U.S. 1, 9 (2005) (reiterating and applying *Totten's* "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden"). The Court in *Tenet* distinguished *Webster v. Doe* on the basis of "an obvious difference . . . between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy." Id. at 10.

[36] Cheney v. United States District Court, 542 U.S. 367 (2004).

[37] Although the information sought in *Nixon* was important to "the constitutional need for production of relevant evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 542 U.S. at 383, 384.

[38] The Court recognized "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 542 U.S. at 382. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

Power Denied by Congress

[P. 599, add to n.718:]

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006), Justice Kennedy, in a concurring opinion joined by three other Justices, endorsed "the three-part scheme used by Justice Jackson" as "[t]he proper framework for assessing whether Executive actions are authorized." The Court in this case found "that the military commission convened [by the President, in Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice]." Id. at 2759. Thus, as Justice Kennedy noted, "the President has acted in a field with a history of congressional participation and regulation." Id. at 2800.

ARTICLE III

Section 1. Judicial Power, Courts, Judges

ANCILLARY POWERS OF FEDERAL COURTS

Power to Issue Writs: The Act of 1789

—*Habeas Corpus*: Congressional and Judicial Control

[P. 669, substitute for first sentence of section:]

The writ of *habeas corpus* [text n.241] has a special status because its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2. The writ also has a venerable common law tradition, long antedating its recognition in the Judiciary Act of 1789,[1] as a means "to relieve detention by executive authorities without judicial trial."[2] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts.

—*Habeas Corpus*: The Process of the Writ

[P. 671, add to text after n.254:]

The writ acts upon the custodian, not the prisoner, so the issue under the jurisdictional statute is whether the custodian is within the district court's jurisdiction.[3]

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[1] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.

[2] INS v. St. Cyr, 533 U.S. 289, 301 (2001), as quoted in Rasul v. Bush, 542 U.S. 466, 474 (2004).

[3] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973) (issue is whether "the custodian can be reached by service of process"). *See also* Rasul v. Bush, 542 U.S. 466 (2004) (federal district court for District of Columbia had jurisdiction of *habeas* petitions from prisoners held at U.S. Naval base at Guantanamo Bay, Cuba); Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal district court in New York lacks jurisdiction over prisoner being held in a naval brig in Charleston, South Carolina; the commander of the brig, not the Secretary of Defense, is the immediate custodian and proper respondent).

Section 2. Judicial Power and Jurisdiction

Clause 1. Cases and Controversies; Grants of Jurisdiction

JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Substantial Interest: Standing

—Taxpayer Suits

[P. 690, add to text after n.352:]

Most recently, the Court refused to create an exception for Commerce Clause violations to the general prohibition on taxpayer standing.[4]

[P. 690, add to n.353:]

In *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006), the Court held that a plaintiff's status as a *municipal* taxpayer does not give him standing to challenge a *state* tax credit.

[P. 690, substitute for final sentence of section:]

The taxpayer's action in *Doremus*, the Court wrote, "is not a direct dollars-and-cents injury but is a religious difference."[5] This rationale was similar to the spending program-regulatory program distinction of *Flast*. But, even a dollar-and-cents injury resulting from a state spending program will apparently not constitute a *direct* dollars-and-cents injury. The Court in *Doremus* wrote that a taxpayer challenging either a federal or a state statute "must be able to show not only that the statute is invalid but that he has sustained some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[6]

—Standing to Assert the Constitutional Rights of Others

[P. 698, add to n.396:]

Caplin & Drysdale was distinguished in *Kowalski v. Tesmer*, 543 U.S. 123, 131 (2004), the Court's finding that attorneys seeking to represent hypothetical indigent clients in challenging procedures for appointing appellate counsel had "no relationship at all" with such potential clients, let alone a "close" relationship.

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[4] DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1864-65 (2006) (standing denied to taxpayer claim that state tax credit given to vehicle manufacturer violated the Commerce Clause).

[5] 342 U.S. at 434.

[6] 342 U.S. at 434, quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); quoted with approval in DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1863 (2006).

The Requirement of a Real Interest

—Retroactivity Versus Prospectivity

[P. 722, add to n.534:]

For recent application of the principles, see *Schriro v. Summerlin*, 542 U.S. 348 (2004) (requirement that aggravating factors justifying death penalty be found by the jury was a new procedural rule that does not apply retroactively).

Political Questions

—The Doctrine Reappears

[P. 734, add to n.605:]

But see Vieth v. Jubelirer, 541 U.S. 267 (2004) (no workable standard has been found for measuring burdens on representational rights imposed by political gerrymandering).

Clause 2. Original and Appellate Jurisdiction

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

—Res Judicata

[P. 842, add to text at end of section:]

Closely related is the *Rooker-Feldman* doctrine, holding that federal subject-matter jurisdiction of federal district courts does not extend to review of state court judgments.[7] The Supreme Court, not federal district courts, has such appellate jurisdiction. The doctrine thus prevents losers in state court from obtaining district court review, but "does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions."[8]

Conflicts of Jurisdiction: Federal Court Interference with State Courts

—*Habeas Corpus*: Scope of the Writ

[P. 858, add to n.1312:]

In *House v. Bell*, 126 S. Ct. 2064, 2086-2087 (2006), the Court declined to resolve the issue that in *Herrera* it had assumed without deciding: that "a truly persuasive

[7] The doctrine derives its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[8] Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) (*Rooker-Feldman* has no application when federal court proceedings have been initiated prior to state court proceedings; preclusion law governs in that situation.)

demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." See Amendment 8, Limitations on *Habeas Corpus* Review of Capital Sentences.

ARTICLE IV

Section 1. Full Faith and Credit

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

[P. 896, substitute for entire section:]

Although the language of section one suggests that the same respect should be accorded to "public acts" that is accorded to "judicial proceedings" ("full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"), and the Court has occasionally relied on this parity of treatment,[1] the Court has usually differentiated "the credit owed to laws (legislative measures and common law) and to judgments."[2] The current understanding is that the Full Faith and Credit Clause is "exacting" with respect to final judgments of courts, but "is less demanding with respect to choice of laws."[3]

The Court has explained that where a statute or policy of the forum state is set up as a defense to a suit brought under the statute of another state or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each state to subordinate their own statutes to those of others, but by weighing the governmental interests of each jurisdiction.[4] That is, the

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[1] *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (statutes); and Smithsonian Institution v. St. John, 214 U.S. 19 (1909) (state constitutional provision).

[2] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998), quoted in Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003). Justice Nelson in the *Dred Scott* case drew an analogy to international law, concluding that states, as well as nations, judge for themselves the rules governing property and persons within their territories. Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857). "One State cannot exempt property from taxation in another," the Court concluded in *Bonaparte v. Tax Court*, 104 U.S. 592 (1882), holding that no provision of the Constitution, including the Full Faith and Credit Clause, enabled a law exempting from taxation certain debts of the enacting state to prevent another state (the state in which the creditor resided) from taxing the debts. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589-96 (1839); Kryger v. Wilson, 242 U.S. 171 (1916); and Bond v. Hume, 243 U.S. 15 (1917).

[3] Baker v. General Motors Corp., 522 U.S. at 232.

[4] Alaska Packers Ass'n. v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932). When, in a state court, the validity of an act of the legislature of another state is not in question, and the controversy turns merely upon its interpretation or construction, no question arises

Full Faith and Credit Clause, in its design to transform the states from independent sovereigns into a single unified Nation, directs that a state, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other states and avoid infringement upon their sovereignty. But because the forum state is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.[5] In order for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.[6] Once that threshold is met, the Court will not weigh the competing interests. "[T]he question of which sovereign interest should be deemed more weighty is not one that can be easily answered," the Court explained, "declin[ing] to embark on the constitutional course of balancing coordinate States' competing interests to resolve conflicts of laws under the Full Faith and Credit Clause."[7]

Section 2. Interstate Comity

Clause 1. State Citizenship: Privileges and Immunities

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

Origin and Purpose

[P. 912, add to text at end of section:]

A violation can occur whether or not a statute explicitly discriminates against out-of-state interests.[8]

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under the Full Faith and Credit Clause. *See also* Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914), citing Glenn v. Garth, 147 U.S. 360 (1893), Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900); Allen v. Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R.R. v. Miller, 221 U.S. 408 (1911); National Mut. B. & L. Ass'n v. Brahan, 193 U.S. 635 (1904); Johnson v. New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co. 243 U.S. 93 (1917).

[5] *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[6] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

[7] Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 498, 499 (2003).

[8] "[A]bsence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a] claim." Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 67 (2003).

ARTICLE V

AMENDMENT OF THE CONSTITUTION

Proposing a Constitutional Amendment

—Proposals by Congress

[P. 941, substitute for n.20:]

In *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Court rejected a challenge to the Eleventh Amendment based on the argument that it had not been submitted to the President for approval or veto. The Court's brief opinion merely determined that the Eleventh Amendment was "constitutionally adopted." Id. at 382. Apparently during oral argument, Justice Chase opined that "[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution." Id. at 381. *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), for extensive analysis of what *Hollingsworth*'s delphic pronouncement could mean. Whatever the Court decided in *Hollingsworth*, it has since treated the issue as settled. 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").

FIRST AMENDMENT

RELIGION

Establishment of Religion

—Governmental Encouragement of Religion in Public Schools: Prayers and Bible Readings

[P. 1047, add to n.163:]

An opportunity to flesh out this distinction was lost when the Court dismissed for lack of standing an Establishment Clause challenge to public school recitation of the Pledge of Allegiance with the words "under God." Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

—Religious Displays on Government Property

[P. 1058, add to text at end of section:]

Displays of the Ten Commandments on government property occasioned two decisions in 2005. As in *Allegheny County*, a closely divided Court determined that one display violated the Establishment Clause and one did not. And again, context and imputed purpose made the difference. The Court struck down display of the Ten Commandments in courthouses in two Kentucky counties,[1] but held that a display on the grounds of the Texas State Capitol was permissible.[2] The displays in the Kentucky courthouses originally "stood alone, not part of an arguably secular display."[3] Moreover, the history of the displays revealed "a predominantly religious purpose" that had not been eliminated by steps taken to give the appearance of secular objectives.[4]

There was no opinion of the Court in *Van Orden*. Justice Breyer, the swing vote in the two cases,[5] distinguished the Texas Capitol grounds display from the Kentucky courthouse displays. In

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[1] McCreary County v. ACLU of Kentucky, 125 S. Ct. 2722 (2005).

[2] Van Orden v. Perry, 125 S. Ct. 2854 (2005).

[3] 125 S. Ct. at 2738. The Court in its previous Ten Commandments case, *Stone v. Graham*, 449 U.S. 39, 41 (1980) (invalidating display in public school classrooms) had concluded that the Ten Commandments are "undeniably a sacred text," and the 2005 Court accepted that characterization. *McCreary*, 125 S. Ct. at 2732.

[4] 125 S. Ct. at 2745. An "indisputable" religious purpose was evident in the resolutions authorizing a second display, and the Court characterized statements of purpose accompanying authorization of the third displays as "only . . . a litigating position." 125 S. Ct. at 2739, 2740.

[5] Only Justice Breyer voted to invalidate the courthouse displays and uphold the capitol grounds display. The other eight Justices were split evenly, four (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) voting to uphold both displays, and four (Justices Stevens, O'Connor, Souter, and Ginsburg) voting to invalidate both.

some contexts, the Ten Commandments can convey a moral and historical message as well as a religious one, the Justice explained. Although it was "a borderline case" turning on "a practical matter of degree," the capitol display served "a primarily nonreligious purpose."[6] The monument displaying the Ten Commandments was one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular organization; and it had been in place, unchallenged, for 40 years. Under the circumstances, Justice Breyer thought it unlikely that the monument will be understood to represent an attempt by government to favor religion.[7]

Free Exercise of Religion

[P. 1060, add to text after n.234:]

"There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference."[8]

[P. 1061, add to n.236:]

Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding a provision of the Religious Land Use and Institutionalized Persons Act of 2000 that prohibits governments from imposing a "substantial burden on the religious exercise" of an institutionalized person unless the burden furthers a "compelling governmental interest").

[P. 1061, add to text at end of section:]

Government need not, however, offer the same accommodations to secular entities that it extends to religious practitioners in order to facilitate their religious exercise; "[r]eligious accommodations . . . need not 'come packaged with benefits to secular entities.'"[9]

"Play in the joints" can work both ways, the Court ruled in upholding a state's exclusion of theology students from a college scholarship program.[10] Although the state could have included theology students in its scholarship program without offending the Establishment Clause, its choice not to fund religious training did not offend the Free Exercise Clause even though that choice singled out theology students for exclusion.[11] Refusal to fund religious train-

[6] 125 S. Ct. at 2869, 2871.

[7] 125 S. Ct. at 2871.

[8] Walz v. Tax Comm'n, 397 U.S. at 669. *See also* Locke v. Davy, 540 U.S. 712, 718 (2004); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

[9] Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (quoting Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

[10] Locke v. Davy, 540 U.S. 712 (2004).

[11] 540 U.S. at 720-21. Excluding theology students but not students training for other professions was permissible, the Court explained, because "[t]raining someone to lead a congregation is an essentially religious endeavor," and the Constitution's

ing, the Court observed, was "far milder" than restrictions on religious practices that have been held to offend the Free Exercise Clause.[12]

—Free Exercise Exemption from General Governmental Requirements

[P. 1066, add to n.264:]

In 2004, the Court rejected for lack of standing an Establishment Clause challenge to recitation of the Pledge of Allegiance in public schools. Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

[P. 1075, substitute for final paragraph of section:]

Boerne did not close the books on *Smith*, however, or even on RFRA. Although *Boerne* held that RFRA was not a valid exercise of Fourteenth Amendment enforcement power as applied to restrict states, it remained an open issue whether RFRA may be applied to the federal government, and whether its requirements could be imposed pursuant to other powers. Several lower courts answered these questions affirmatively.[13]

Congress responded to *Boerne* by enacting a new law purporting to rest on its commerce and spending powers. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[14] imposes the same strict scrutiny test struck down in *Boerne* but limits its application to certain land use regulations and to religious exercise by persons in state institutions.[15] In *Cutter v. Wilkinson*,[16] the Court upheld RLUIPA's prisoner provision against a facial chal-

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special treatment of religion finds "no counterpart with respect to other callings or professions." Id. at 721.

[12] 540 U.S. at 720-21 (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law aimed at restricting ritual of a single religious group); McDaniel v. Paty, 435 U.S. 618 (1978) (law denying ministers the right to serve as delegates to a constitutional convention); and Sherbert v. Verner, 374 U.S. 398 (1963) (among the cases prohibiting denial of benefits to Sabbatarians)).

[13] *See*, *e.g.*, In re Young, 141 F.3d 854 (8th Cir.), *cert. denied*, 525 U.S. 811 (1998) (RFRA is a valid exercise of Congress' bankruptcy powers as applied to insulate a debtor's church tithes from recovery by the bankruptcy trustee); O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) (RFRA may be applied to require the Bureau of Prisons to accommodate religious exercise by prisoners); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (RFRA applies to Bureau of Prisons).

[14] Pub. L. 106-274, 114 Stat. 804 (2000); 42 U.S.C. §§ 2000cc *et seq.*

[15] The Act requires that state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's exercise of religion be measured by a strict scrutiny test, and applies the same strict scrutiny test for any substantial burdens imposed on the exercise of religion by persons institutionalized in state or locally run prisons, mental hospitals, juvenile detention facilities, and nursing homes. Both provisions apply if the burden is imposed in a program that receives federal financial assistance, or if the burden or its removal would affect commerce.

[16] 544 U.S. 709 (2005).

lenge under the Establishment Clause, but it did not rule on congressional power to enact RLUIPA. The Court held that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices." [17] Rather, the provision "fits within the corridor" between the Free Exercise and Establishment Clauses, and is "compatible with the [latter] because it alleviates exceptional government-created burdens on private religious exercise." [18]

FREEDOM OF EXPRESSION — SPEECH AND PRESS

The Doctrine of Prior Restraint

—Obscenity and Prior Restraint

[P. 1090, add to n.394 after citation to Fort Wayne Books:]

City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 784 (2004) ("Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria . . . and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type");

Subsequent Punishment: Clear and Present Danger and Other Tests

—Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, Narrow Tailoring, and Effectiveness of Speech Restrictions

[P. 1108, add to text immediately before comma preceding n.481:]

and indecency

[P. 1108, add to n.481:]

Reno v. ACLU, 521 U.S. 844, 870-874 (1997). In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court held that a "decency" criterion for the awarding of grants, which "in a criminal statute or regulatory scheme . . . could raise substantial vagueness concerns," was not unconstitutionally vague in the context of a condition on public subsidy for speech.

[P. 1108, substitute for rest of section after n.484:]

But, even in a First Amendment situation, the Court has written, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do now swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute

[17] 544 U.S. at 714.
[18] 544 U.S. at 720.

sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation. . . . Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." [19]

Closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to do so, "[i]f the First Amendment means anything, it means that regulating speech must be a last — not first — resort." [20] Thus, when the Court applies "strict scrutiny" to a content-based regulation of fully protected speech, it requires that the regulation be "the least restrictive means to further the articulated interest." [21] Similarly, the Court requires "narrow tailoring" even of restrictions to which it does not apply strict scrutiny. Thus, in the case of restrictions that are not content-based (time, place, or manner restrictions; incidental restrictions); or in the case of restrictions of speech to which the Court accords less than full First Amendment protection (campaign contributions and other freedoms of association; commercial speech), though the Court does not require that the government use the least restrictive means available to accomplish its end, it does require that the regulation not restrict speech unreasonably.[22] The Court uses tests closely related to one another in

[19] Virginia v. Hicks, 539 U.S. 113, 119-20, 124 (2003) (italics in original; citations omitted) (upholding, as not addressed to speech, an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose for being on the premises"). *Virginia v. Hicks* cited *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which, in the opinion of the Court and in Justice Brennan's dissent, id. at 621, contains extensive discussion of the overbreadth doctrine. Other restrictive decisions are *Arnett v. Kennedy*, 416 U.S. 134, 158-64 (1974); *Parker v. Levy*, 417 U.S. 733, 757-61 (1974); and *New York v. Ferber*, 458 U.S. 747, 766-74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815-18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932-34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633-39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874-879 (1997) (statute banning "indecent" material on the Internet).

[20] Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002).

[21] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[22] *E.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) (time, place, and manner restriction upheld as "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication"); Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989) (incidental restriction upheld as

these instances in which it does not apply strict scrutiny. It has indicated that the test for determining the constitutionality of an incidental restriction on speech "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,"[23] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context."[24]

Also, except apparently when the government seeks to deny minors access to sexually explicit material, the Supreme Court, even when applying less than strict scrutiny, requires that, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[25]

"promot[ing] a substantial governmental interest that would be achieved less effectively absent the regulation"); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (campaign contribution ceiling "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom"); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (commercial speech restrictions need not be "absolutely the least severe that will achieve the desired end," but must exhibit "a 'fit' between the legislature's ends and the means chosen to accomplish those ends — a fit that is not necessarily perfect, but reasonable . . .") (internal quotation mark and citation ommited)). *But see* Thompson v. Western States Medical Center, 535 U.S. 357, 371 (2002) (commercial speech restriction struck down as "more extensive than necessary to serve" the government's interests).

[23] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[24] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

[25] Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (incidental restriction on speech). The Court has applied the same principle with respect to commercial speech restrictions (Edenfield v. Fane, 507 U.S. 761, 770-771 (1993)), and campaign contribution restrictions (Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000)). With respect to denying minors' access to sexually explicit material, one court wrote: "We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved." Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp. 2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000). In a case upholding a statute that, to shield minors from "indecent" material, limited the hours that such material may be broadcast on radio and television, the court of appeals wrote, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . ." Action for Children's Television v. FCC, 58 F.3d 654, 662 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1043 (1996). A dissenting opinion complained that "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful — indeed, the nature of the alleged 'harm' is never explained." Id. at 671 (Edwards, C.J., dissenting).

Freedom of Belief

—Flag Salute Cases

[P. 1111, change heading to "Flag Salutes and Other Compelled Speech"]

[P. 1111, add to n.501:]

The First Amendment is not violated when the government compels financial contributions to fund *government* speech, even if the contributions are raised through a targeted assessment rather than through general taxes. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

[P. 1112, add to text at end of section:]

Other governmental efforts to compel speech have also been held by the Supreme Court to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[26] a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their records,[27] an Ohio statute that prohibited the distribution of anonymous campaign literature,[28] and a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message — in this case support for gay rights — that the organizers did not wish to convey.[29]

By contrast, the Supreme Court has found no First Amendment violation when government compels disclosures in commercial speech, or when it compels the labeling of foreign political propaganda. Regarding compelled disclosures in commercial speech, the Court held that an advertiser's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information

[26] Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Assocs.*, Inc., 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who has retained 85 percent of gross receipts from donors, but falsely represented that "a significant amount of each dollar donated would be paid over to" a charitable organization, could be sued for fraud.

[27] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), a Court plurality held that a state could not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees.

[28] McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

[29] Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557 (1995).

regarding his services is not . . . a fundamental right." [30] Regarding compelled labeling of foreign political propaganda, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The Court found that "Congress did not prohibit, edit, or restrain the distribution of advocacy materials. . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda." [31]

Right of Association

[P. 1120, substitute for n.556:]

530 U.S. at 653. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1312 (2006), the Court held that the Solomon Amendment's forcing law schools to allow military recruiters on campus does not violate the schools' freedom of expressive association because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Rumsfeld* is discussed below under "Government and the Power of the Purse."

[P. 1121, add to n.561:]

California Democratic Party v. Jones, 530 U.S. 567, 577 (2000) (requirement of a "blanket" primary, in which all registered voters, regardless of political affiliation, may participate, unconstitutionally "forces political parties to associate with — to have their nominees, and hence their positions, determined by — those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." Clingman v. Beaver, 544 U.S. 581 (2005) (Oklahoma statute that allowed only registered members of a political party, and registered independents, to vote in the party's primary does not violate freedom of association; Oklahoma's "semiclosed primary system" distinguished from Connecticut's closed primary that was struck down in *Tashjian*.

Particular Government Regulations That Restrict Expression

—Government as Employer: Free Expression Generally

[P. 1148, add to text after n.699:]

In *City of San Diego v. Roe*,[32] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression

[30] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985).
[31] Meese v. Keene, 481 U.S. 465, 480 (1987).
[32] 543 U.S. 77 (2004) (per curiam).

does not qualify as a matter of public concern . . . and *Pickering* balancing does not come into play."[33] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[34] was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and functions of his employer."[35] Therefore, the Court had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [*i.e., Pickering* or *NTEU*]."[36] This leaves uncertain whether, had the officer's expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there is no protection — *Pickering* balancing is not to be applied — "when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[37] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[38] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[39] Rather, the "controlling factor" was that his expressions

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[33] 543 U.S. at 84.

[34] 513 U.S. 454 (1995) (discussed under "Government as Employer: Political and Other Outside Activities," *supra*).

[35] 543 U.S. at 84.

[36] 543 U.S. at 80.

[37] 126 S. Ct. 1951, 1960 (2006).

[38] 126 S. Ct. at 1960.

[39] The Court cited *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979), for these points. In *Givhan*, the Court had upheld the First Amendment right of a public school teacher to complain to the school principal about "employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect." Id. at 413. The difference between *Givhan* and *Ceballos* was apparently that Givhan's complaints were not made pursuant to her job duties, whereas Ceballos' were. Therefore, Givhan spoke as a citizen whereas Ceballos spoke as a government employee. See *Ceballos*, 126 S. Ct. at 1959.

were made pursuant to his duties."[40] Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

—Government as Regulator of the Electoral Process: Elections

[P. 1156, add to text after first full paragraph on page, and change beginning of second paragraph as indicated:]

The Court in *Buckley* recognized that political contributions "serve[ ] to affiliate a person with a candidate" and "enable[ ] like-minded persons to pool their resources in furtherance of common political goals." Contribution ceilings, therefore, "limit one important means of associating with a candidate or committee. . . ."[41] Yet "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[42]

Applying this standard, the *Buckley* Court sustained the contribution limitation as imposing . . . .

[P. 1162, add to text at end of section:]

In *FEC v. Beaumont*,[43] the Court held that the federal law that bars corporations from contributing directly to candidates for federal office may constitutionally be applied to nonprofit advocacy corporations. Corporations may make such contributions only through PACs, and the Court in Beaumont wrote that, in *National Right to Work*, it had "specifically rejected the argument . . . that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations."[44] Though nonprofit advocacy corporations, the Court held in *Massachusetts Citizens for Life*, have a First Amendment right to make independent expenditures, the same is not true for direct contributions to candidates.

In *McConnell v. Federal Election Commission*,[45] the Court upheld against facial constitutional challenges key provisions of the

[40] 126 S. Ct. at 1959-60.
[41] 424 U.S. at 22.
[42] 424 U.S. at 25 (internal quotation mark omitted).
[43] 539 U.S. 146 (2003).
[44] 539 U.S. at 157.
[45] 540 U.S. 93 (2003).

Bipartisan Campaign Reform Act of 2002 (BCRA). A majority opinion coauthored by Justices Stevens and O'Connor upheld two major provisions of BCRA: (1) the prohibition on "national party committees and their agents from soliciting, receiving, directing, or spending any soft money,"[46] which is money donated for the purpose of influencing state or local elections, or for "mixed-purpose activities — including get-out-the-vote drives and generic party advertising,"[47] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance "electioneering communications,"[48] which BCRA defines as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal Office," made within 60 days before a general election or 30 days before a primary election. Electioneering communications thus include both "express advocacy and so-called issue advocacy."[49]

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits."[50] and found it "closely drawn to match a sufficiently important interest."[51] The Court's decision to use less rigorous scrutiny, it wrote, "reflects more than the limited burdens they [*i.e.*, the contribution restrictions] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits — interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"[52]

As for the prohibition on corporations and labor unions' using their general treasury funds to finance electioneering communications, the Court applied strict scrutiny, but found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals."[53] These corrosive and distorting effects result both from express advocacy and from so-called issue advocacy. The Court also noted that, because corporations and unions "remain free to organize and

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[46] 540 U.S. at 133.
[47] 540 U.S. at 123.
[48] 540 U.S. at 204.
[49] 540 U.S. at 190.
[50] 540 U.S. at 141.
[51] 540 U.S. at 136 (internal quotation marks omitted).
[52] 540 U.S. at 136.
[53] 540 U.S. at 205.

administer segregated funds, or PACs," for electioneering communications, the provision was not a complete ban on expression.[54]

In *Randall v. Sorrell*, a plurality of the Court struck down a Vermont campaign finance statute's limitations on both expenditures and contributions.[55] As for the statute's expenditure limitations, the plurality found *Buckley* to control and saw no reason to overrule it and no adequate basis upon which to distinguish it. As for the statute's contribution limitations, the plurality, following *Buckley*, considered whether the "contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny."[56] The plurality found that they were. Vermont's limit of $200 per gubernatorial election "(with significantly lower limits for contributions to candidates for State Senate and House of Representatives) . . . are well below the limits this Court upheld in *Buckley*," and "are the lowest in the Nation."[57] But the plurality struck down Vermont's contribution limits "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections."[58]

—Government as Investigator: Reporter's Privilege

[P. 1165, substitute for n.783:]

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell, despite having joined the majority opinion, also submitted a concurring opinion in which he suggested a privilege might be available if, in a particular case, "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. Justice Stewart's dissenting opinion in *Branzburg* referred to Justice Powell's concurring opinion as "enigmatic." Id. at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Powell] wrote separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." In re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concur-

[54] 540 U.S. at 204.

[55] 126 S. Ct. 2479 (2006). Justice Breyer wrote the plurality opinion, with only Chief Justice Roberts joining it in full. Justice Alito joined the opinion as to the contribution limitations but not as to the expenditure limitations. Justice Alito and three other Justices concurred in the judgment as to the limitations on both expenditures and contributions, and three Justices dissented.

[56] 126 S. Ct. at 2492 (citation omitted).

[57] 126 S. Ct. at 2493 (citation omitted). The plurality noted that, "in terms of real dollars (*i.e.*, adjusting for inflation)," they were lower still. Id.

[58] 126 S. Ct. at 2495.

ring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

"[C]ourts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context." Association of the Bar of the City of New York, The Federal Common Law of Journalists' Privilege: A Position Paper (2005) at 4-5 [http://www.abcny.org/pdf/report/ White%20paper%20on%20reporters%20 privilege.pdf](citing examples).

[P. 1165, substitute for paragraph in text that begins "The Court":]

The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[59] Although efforts in Congress have failed, 49 states have done so — 33 (plus the District of Columbia) by statute and 16 by court decision, with Wyoming the sole holdout.[60] As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[61] The federal courts have not resolved whether the common law provides a journalists' privilege.[62]

—Government as Administrator of Prisons

[P. 1171, add to n.814:]

In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court applied *Turner* to uphold various restrictions on visitation by children and by former inmates, and on all visitation except attorneys and members of the clergy for inmates with two or more substance-abuse violations; an inmate subject to the latter restriction could apply for reinstatement of visitation privileges after two years. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." Id. at 137.

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[59] 408 U.S. at 706.

[60] *E.g.*, Cal. Evid. Code § 1070; N.J. Rev. Stat. §§ 2A:84A-21, -21a, -29. The reported cases evince judicial hesitancy to give effect to these statutes. *See, e.g.*, Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976). The greatest difficulty these laws experience, however, is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See* Matter of Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom*. New York Times v. New Jersey, 439 U.S. 997 (1978). *See also* New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[61] Rule 501 also provides that, in civil actions and proceedings brought in federal court under state law, the availability of a privilege shall be determined in accordance with state law.

[62] *See, e.g.*, In re: Grand Jury Subpoena. Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006) (U.S. Court of Appeals for the District of Columbia "is not of one mind on the existence of a common law privilege").

[P. 1171: substitute in text for material between n.814 and n.817:]

Four factors "are relevant in determining the reasonableness of a regulation at issue."[63] "First, is there a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?"[64] Two years after *Turner v. Safley*, in *Thornburgh v. Abbott*, the Court restricted *Procunier v. Martinez* to the regulation of *outgoing* correspondence, finding that the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[65]

In *Beard v. Banks*, a plurality of the Supreme Court upheld "a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates."[66] These inmates were housed in Pennsylvania's Long Term Segregation Unit and one of the prison's penological rationales for its policy, which the plurality found to satisfy the four Turner factors, was to motivate better behavior on the part of the prisoners by providing them with an incentive to move back to the regular prison population.[67] Applying the four *Turner* factors to this rationale, the plurality found that (1) there was a logical connection between depriving inmates of newspapers and magazines and providing an incentive to improve behavior; (2) the Policy provided no alternatives to the deprivation of newspapers and magazines, but this was "not 'conclusive' of the reasonableness of the Policy"; (3) the impact of accommodating the asserted constitutional right would be negative; and (4) no alternative would "fully accommodate the prisoner's rights at *de minimis* cost to valid peno-

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[63] 482 U.S. at 89.

[64] Beard v. Banks,126 S. Ct. 2572, 2578 (2006) (citations and internal quotation marks omitted; this quotation quotes language from *Turner v. Safley*, 482 U.S. at 89-90).

[65] 490 U.S. 401, 411-14 (1989). *Thornburgh v. Abbott* noted that, if regulations deny prisoners publications on the basis of their content, but the grounds on which the regulations do so is content-neutral, *e.g.*, to protect prison security), then the regulations will be deemed neutral. Id. at 415-16.

[66] 126 S. Ct. 2572, 2575 (2006). This was a 4-2-2 decision, with Justice Alito, who had written the court of appeals decision, not participating.

[67] 126 S. Ct. at 2579.

logical interests."[68] The plurality believed that its "real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation" between the Policy and legitimate penological objections, as *Turner* requires.[69] The plurality concluded that he had. Justices Thomas and Scalia concurred in the result but would do away with *Turner* factors because they believe that "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivation — *provided only that those deprivations are consistent with the Eighth Amendment*.[70]

—Government and Power of the Purse

[P. 1176, add to text at end of section:]

In *United States v. American Library Association, Inc.*, a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[71] The plurality considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring public libraries (public schools were not involved in the case) to limit their freedom of speech if they accept federal funds. The plurality, citing *Rust v. Sullivan*, found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized."[72] The plurality distinguished *Legal Services Corporation v. Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them *against* the Government, and there is no comparable assumption that they must be free of any conditions

[68] 126 S. Ct. at 2579-2580.

[69] 126 S. Ct. at 2580.

[70] 126 S. Ct. at 2582-2583 (Thomas, J., concurring), quoting Overton v. Bazzetta, 539 U.S. at 139 (Thomas, J., concurring) (emphasis originally in *Overton*).

[71] 539 U.S. 194, 199 (2003).

[72] 539 U.S. at 211.

that their benefactors might attach to the use of donated funds or other assistance."[73]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides that, in the Court's summary, "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[74] FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding. The Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."[75] The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do* — afford equal access to military recruiters — not what they may or may not *say*."[76] The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech."[77] Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation."[78]

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. . . . This sort of recruiting assistance, however, is a far cry from the compelled speech

[73] 539 U.S. at 213 (emphasis in original). Other grounds for the plurality decision are discussed under "Non-obscene But Sexually Explicit and Indecent Expression" and "Internet as Public Forum."

[74] 126 S. Ct. 1297, 1302 (2006).

[75] 126 S. Ct. at 1307. The Court stated that Congress' authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. 126 S. Ct. at 1306.

[76] 126 S. Ct. at 1307.

[77] 126 S. Ct. at 1310.

[78] 126 S. Ct. at 1311.

in *Barnette* and *Wooley*. . . . [It] is plainly incidental to the Solomon Amendment's regulation of conduct."[79] As for forcing one speaker to host or accommodate another, "[t]he compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[80] By contrast, the Court wrote, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[81] Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept a homosexual scoutmaster, and that the Supreme Court struck down as violating the Boy Scouts' "right of expressive association."[82] Recruiters, unlike the scoutmaster, are "outsiders who come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association."[83]

Government Regulation of Communications Industries

—Commercial Speech

[P. 1179, add to n.862:]

In *Nike, Inc. v. Kasky*, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certioriari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike's statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed "'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." Id. at 657 (Stevens, J., concurring). Nike subsequently settled the suit.

Government Restraint of Content of Expression

—Group Libel, Hate Speech

[P. 1206, add new paragraph at end of section:]

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of per-

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[79] 126 S. Ct. at 1308.
[80] 126 S. Ct. at 1309.
[81] 126 S. Ct. at 1310.
[82] 126 S. Ct. at 1312, quoting Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).
[83] 126 S. Ct. at 1312.

sons.[84] Such a prohibition does not discriminate on the basis of a defendant's beliefs — "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . . . The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ."[85]

—Non-obscene but Sexually Explicit and Indecent Expression

[P. 1234. add to text after n.1254:]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source."[86] Subsequently, a federal district court issued a permanent injunction against the enforcement of COPA.[87]

In *United States v. American Library Association*, a four-justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to

[84] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. 538 U.S. at 365-66.

[85] 538 U.S. at 362-63.

[86] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 684. In addition, Breyer asserted, "filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision." Id. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." Id. at 669.

[87] American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

them."[88] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires."[89] Does CIPA, in other words, effectively violate library *patrons*' rights? The plurality concluded that it does not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[90]

The plurality acknowledged "the tendency of filtering software to 'overblock' — that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[91] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[92]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance — in other words, does it violate public *libraries'* rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[93]

Speech Plus — The Constitutional Law of Leafleting, Picketing, and Demonstrating

—The Public Forum

[P. 1245, substitute for final paragraph of section:]

In *United States v. American Library Association, Inc.*, a four-justice plurality of the Supreme Court found that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[94] The plurality therefore did not apply "strict scrutiny" in

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[88] 539 U.S. 194, 199 (2003).
[89] 539 U.S. at 203.
[90] 539 U.S. at 205.
[91] 539 U.S. at 208.
[92] 539 U.S. at 209. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." Id. at 215. Justice Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." Id. at 233.
[93] 539 U.S. at 212.
[94] 539 U.S. 194, 205 (2003).

upholding the Children's Internet Protection Act, which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[95] The plurality found that Internet access in public libraries is not a "traditional" public forum because "[w]e have 'rejected the view that traditional public forum status extends beyond its historical confines.'"[96] And Internet access at public libraries is not a "designated" public forum because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[97]

Nevertheless, although Internet access in public libraries is not a public forum, and particular Web sites, like particular newspapers, would not constitute public fora, the Internet as a whole might be viewed as a public forum, despite its lack of a historic tradition. The Supreme Court has not explicitly held that the Internet as a whole is a public forum, but, in *Reno v. ACLU*, which struck down the Communications Decency Act's prohibition of "indecent" material on the Internet, the Court noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information."[98]

—Door-to-Door Solicitation

[P. 1262, add to n.1312:]

In *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing

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[95] 539 U.S. at 199.
[96] 539 U.S. at 206.
[97] 539 U.S. at 206 (citation omitted).
[98] A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes*, 523 U.S. at 679 ("reject[ing] the view that traditional public forum status extends beyond its historic confines" [to a public television station]) *with Reno v. ACLU*, 521 U.S. 844, 851-53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web)." Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternate citations to *Forbes and Reno* omitted).

fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

FOURTH AMENDMENT

SEARCH AND SEIZURE

History and Scope of the Amendment

—Scope of the Amendment

[P. 1285, add to n.22:]

Brigham City, Utah v. Stuart, 126 S. Ct. 1943 (2006) (warrantless entry into a home when police have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury).

—The Interest Protected

[P. 1291, add to n.53 after citation to Steagald v. United States:]

Kirk v. Louisiana, 536 U.S. 635 (2002) (per curiam).

—Arrests and Other Detentions

[P. 1292, add to n.61 after citation to Terry v. Ohio:]

Kaupp v. Texas, 538 U.S. 626 (2003).

[P. 1293, add new footnote after "person," in second line on page:]

The justification must be made to a neutral magistrate, not to the arrestee. There is no constitutional requirement that an officer inform an arrestee of the reason for his arrest. Devenpeck v. Alford, 543 U.S. 146, 155 (2004) (the offense for which there is probable cause to arrest need not be closely related to the offense stated by the officer at the time of arrest).

[P. 1294, add to n.69 after citation to Taylor v. Alabama:]

Kaupp v. Texas, 538 U.S. 626 (2003).

Searches and Seizures Pursuant to Warrant

—Probable Cause

[P. 1301, add to n. 101:]

An "anticipatory" warrant does not violate the Fourth Amendment as long as there is probable cause to believe that the condition precedent to execution of the search warrant will occur and that, once it has occurred, "there is a fair probability that contraband or evidence of a crime will be found in a specified place." United States v. Grubbs, 126 S. Ct. 1494, 1499, 1500 (2006), quoting Illinois v. Gates, 462 U.S. 213, 238 (1983). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.'" 126 S. Ct. at 1498.

—Particularity

[P. 1304, add to text at end of section:]

The purpose of the particularity requirement extends beyond prevention of general searches; it also assures the person whose property is being searched of the lawful authority of the executing officer and of the limits of his power to search. It follows, therefore, that the warrant itself must describe with particularity the items to be seized, or that such itemization must appear in documents incorporated by reference in the warrant and actually shown to the person whose property is to be searched.[1]

—Execution of Warrants

[P. 1311, add to text after n.168:]

Similarly, if officers choose to knock and announce before searching for drugs, circumstances may justify forced entry if there is not a prompt response.[2]

[P. 1312, add to n.173:]

But see Maryland v. Pringle, 540 U.S. 366 (2003) (distinguishing *Ybarra* on basis that passengers in car often have "common enterprise," and noting that the tip in *Di Re* implicated only the driver).

[P. 1312, add to text after n.175:]

For the same reasons, officers may use "reasonable force," including handcuffs, to effectuate a detention.[3]

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[1] Groh v. Ramirez, 540 U.S. 551 (2004) (a search based on a warrant that did not describe the items to be seized was "plainly invalid"; particularity contained in supporting documents not cross-referenced by the warrant and not accompanying the warrant is insufficient). United States v. Grubbs, 126 S. Ct. 1494, 1500-01 (2006) (because the language of the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized[,]' . . . the Fourth Amendment does not require that the triggering condition for an anticipatory warrant be set forth in the warrant itself."

[2] United States v. Banks, 540 U.S. 31 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search warrant," and waited 15-20 seconds with no response).

[3] Muehler v. Mena, 544 U.S. 93, 98-99 (2005) (also upholding questioning the handcuffed detainee about her immigration status).

Valid Searches and Seizures Without Warrants

—Detention Short of Arrest: Stop-and-Frisk

[P. 1315, add to text after first sentence of paragraph that begins on page, and begin new paragraph with second sentence, as indicated:]

The Court provided a partial answer in 2004, when it upheld a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[4] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[5]

After *Terry*, the standard for stops . . . .

[P. 1318, add to n.208:]

See also United States v. Drayton, 536 U.S. 194 (2002), applying *Bostick* to uphold a bus search in which one officer stationed himself in the front of the bus and one in the rear, while a third officer worked his way from rear to front, questioning passengers individually. Under these circumstances, and following the arrest of his traveling companion, the defendant had consented to the search of his person.

[P. 1319, add to n.213:]

Cf. Illinois v. Caballes, 543 U.S. 405 (2005) (a canine sniff around the perimeter of a car following a routine traffic stop does not offend the Fourth Amendment if the duration of the stop is justified by the traffic offense).

—Vehicular Searches

[P. 1324, add to n.244 after parenthetical that ends with "Mexican ancestry":]

But cf. United States v. Arvizu, 534 U.S. 266 (2002) (reasonable suspicion justified stop by border agents of vehicle traveling on unpaved backroads in an apparent effort to evade a border patrol checkpoint on the highway).

[P. 1325, add to n.247:]

See also United States v. Flores-Montano, 541 U.S. 149 (2004) (upholding a search at the border involving disassembly of a vehicle's fuel tank).

[P. 1325, add to n.248:]

Edmond was distinguished in *llinois v. Lidster*, 540 U.S. 419 (2004), upholding use of a checkpoint to ask motorists for help in solving a recent hit-and-run accident that had resulted in death. The public interest in solving the crime was deemed "grave," while the interference with personal liberty was deemed minimal.

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[4] Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).

[5] 542 U.S. at 186.

[P. 1325, add to n.250:]

And, because there also is no legitimate privacy interest in possessing contraband, and because properly conducted canine sniffs are "generally likely, to reveal only the presence of contraband," police may conduct a canine sniff around the perimeter of a vehicle stopped for a traffic offense. Illinois v. Caballes, 543 U.S. 405, 409 (2005).

[P. 1325, add to n.252 after citation to New York v. Belton:]

Thornton v. United States, 541 U.S. 615 (2004) (the *Belton* rule applies regardless of whether the arrestee exited the car at the officer's direction, or whether he did so prior to confrontation);

[P. 1326, add to end of sentence containing n.258:]

, or unless there is individualized suspicion of criminal activity by the passengers.[6]

—Consent Searches

[P. 1328, add to n. 271:]

United States v. Drayton, 536 U.S. 194, 207 (2002) (totality of circumstances indicated that bus passenger consented to search even though officer did not explicitly state that passenger was free to refuse permission).

[P. 1329, add to text at end of section:]

If, however, one occupant consents to a search of shared premises, but a physically present co-occupant expressly objects to the search, the search is unreasonable.[7]

—Border Searches

[P. 1330, add to n.283 after citation to United States v. Cortez:]

, and United States v. Arvizu, 534 U.S. 266 (2002)

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[6] Maryland v. Pringle, 540 U.S. 366 (2003) (probable cause to arrest passengers based on officers finding $783 in glove compartment and cocaine hidden beneath back seat armrest, and on driver and passengers all denying ownership of the cocaine).

[7] Georgia v. Randolph, 126 S. Ct. 1515 (2006) (warrantless search of a defendant's residence based on his estranged wife's consent was unreasonable and invalid as applied to a physically present defendant who expressly refused to permit entry). The Court in *Randolph* admitted that it was "drawing a fine line," id. at 1527, between situations where the defendant is present and expressly refuses consent, and that of *United States v. Matlock*, 415 U.S. 164, 171 (1974), and *Illinois v. Rodriguez*, 497 U.S. 177 (1990), where the defendants were nearby but were not asked for their permission. In a dissenting opinion, Chief Justice Roberts observed that the majority's ruling "provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room." Id. at 1531.

—Prisons and Regulation of Probation

[P. 1333, change heading to "Prisons and Regulation of Probation and Parole"]

[P. 1334, add to text at end of section:]

A warrant is also not required if the purpose of a search of a probationer is investigate a crime rather than to supervise probation.[8]

"[O]n the 'continuum' of state-imposed punishments . . . , parolees have [even] fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[9] The Fourth Amendment, therefore, is not violated by a warrantless search of a parolee that is predicated upon a parole condition to which a prisoner agreed to observe during the balance of his sentence.[10]

—Drug Testing

[P. 1336, add to text after n.322:]

Seven years later, the Court in *Board of Education v. Earls*[11] extended *Vernonia* to uphold a school system's drug testing of all junior high and high school students who participated in extra-curricular activities. The lowered expectation of privacy that athletes have "was not essential" to the decision in *Vernonia*, Justice Thomas wrote for a 5-4 Court majority.[12] Rather, that decision "depended primarily upon the school's custodial responsibility and authority."[13] Another distinction was that, although there was some evidence of drug use among the district's students, there was no evidence of a significant problem, as there had been in *Vernonia*. Rather, the Court referred to "the nationwide epidemic of drug use," and stated that there is no "threshold level" of drug use that need be present.[14] Because the students subjected to testing in *Earls* had the choice of not participating in extra-curricular activities rather than submitting to drug testing, the case stops short of holding that public school authorities may test all junior and senior

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[8] United States v. Knights, 534 U.S. 112 (2005) (probationary status informs both sides of the reasonableness balance).

[9] Samson v. California, 126 S. Ct. 2193, 2198 (2006).

[10] 126 S. Ct. at 2199. The parole condition at issue in *Samson* required prisoners to "agree in writing to be subject to a search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Id. at 2196, quoting Cal. Penal Code Ann. § 3067(a).

[11] 536 U.S. 822 (2002).

[12] 536 U.S. at 831.

[13] 536 U.S. at 831

[14] 536 U.S. at 836.

high school students for drugs. Thus, although the Court's rationale seems broad enough to permit across-the-board testing,[15] Justice Breyer's concurrence, emphasizing among other points that "the testing program avoids subjecting the entire school to testing,"[16] raises some doubt on this score. The Court also left another basis for limiting the ruling's sweep by asserting that "regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren."[17]

Enforcing the Fourth Amendment: The Exclusionary Rule

—Alternatives to the Exclusionary Rule

[P. 1344, add to n.361 after citation to Saucier v. Katz:]

See also Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (because cases create a "hazy border between excessive and acceptable force," an officer's misunderstanding as to her authority to shoot a suspect attempting to flee in a vehicle was not unreasonable).

—Narrowing Application of the Exclusionary Rule

[P. 1354, add to text after n.409:]

In addition, a violation of the "knock-and-announce" procedure that police officers must follow to announce their presence before entering a residence with a lawful warrant[18] does not require suppression of the evidence gathered pursuant to the warrant.[19]

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[15] Drug testing was said to be a "reasonable" means of protecting the school board's "important interest in preventing and deterring drug use among its students," and the decision in *Vernonia* was said to depend "primarily upon the school's custodial responsibility and authority." 536 U.S. at 838, 831.

[16] Concurring Justice Breyer pointed out that the testing program "preserves an option for a conscientious objector," who can pay a price of nonparticipation that is "serious, but less severe than expulsion." 536 U.S. at 841. Dissenting Justice Ginsburg pointed out that extracurricular activities are "part of the school's educational program" even though they are in a sense "voluntary." "Voluntary participation in athletics has a distinctly different dimension" because it "expose[s] students to physical risks that schools have a duty to mitigate." Id. at 845, 846.

[17] 536 U.S. at 831-32. The best the Court could do to support this statement was to assert that "some of these clubs and activities require occasional off-campus travel and communal undress," to point out that all extracurricular activities "have their own rules and requirements," and to quote from general language in *Vernonia*. Id. Dissenting Justice Ginsburg pointed out that these situations requiring change of clothes on occasional out-of-town trips are "hardly equivalent to the routine communal undress associated with athletics." Id. at 848.

[18] The "knock and announce" requirement is codified at 18 U.S.C. § 3109, and the Court has held that the rule is also part of the Fourth Amendment reasonableness inquiry. Wilson v. Arkansas, 514 U.S. 927 (1995).

[19] Hudson v. Michigan, 126 S. Ct. 2159 (2006). Writing for the majority, Justice Scalia explained that the exclusionary rule was inappropriate because the purpose of the knock-and-announce requirement was to protect human life, property, and the homeowner's privacy and dignity; the requirement has never protected an individual's interest in preventing seizure of evidence described in a warrant. Id. at 2165.

Furthermore, the Court believed that the "substantial social costs" of applying the exclusionary rule would outweigh the benefits of deterring knock-and-announce violations by applying it. Id. The Court also reasoned that other means of deterrence, such as civil remedies, were available and effective, and that police forces have become increasingly professional and respectful of constitutional rights in the past half-century. Id. at 2168. Justice Kennedy wrote a concurring opinion emphasizing that "the continued operation of the exclusionary rule . . . is not in doubt." Id. at 2170. In dissent, Justice Breyer asserted that the majority's decision "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection." Id. at 2171.

FIFTH AMENDMENT

DOUBLE JEOPARDY

Development and Scope

[P. 1370, add to end of sentence containing n.58:]

, and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.[1]

Reprosecution Following Conviction

—Sentence Increases

[P. 1385, add to n.134:]

But see Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (state may seek the death penalty in a retrial when defendant appealed following discharge of the sentencing jury under a statute authorizing discharge based on the court's "opinion that further deliberation would not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

Reprosecution Following Acquittal

—Acquittal by the Trial Judge

[P. 1379, substitute for first paragraph of section:]

When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.[2] There is no possibility of retrial for the same offense.[3] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be able to appeal or the judge may be able to reconsider.[4] The question is "whether the rul-

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[1] United States v. Lara, 541 U.S. 193 (2004) (federal prosecution for assaulting a federal officer after tribal conviction for "violence to a policeman"). The Court concluded that Congress has power to recognize tribal sovereignty to prosecute nonmember Indians, that Congress had done so, and that consequently the tribal prosecution was an exercise of tribal sovereignty, not an exercise of delegated federal power on which a finding of double jeopardy could be based.

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

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

[4] As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. Smith v. Massachusetts, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's

ing of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[5] Thus, an appeal by the Government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the Government had not proved facts constituting the offense.[6] Even if, as happened in *Sanabria v. United States*,[7] the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.[8]

SELF-INCRIMINATION

Development and Scope

[P. 1396, add to text following n.185:]

, and there can be no valid claim if there is no criminal prosecution.[9]

Confessions: Police Interrogation, Due Process, and Self-Incrimination

—Miranda v. Arizona

[P. 1425, add to n.340:]

Yarborough v. Alvarado, 541 U.S. 652 (2004) (state court determination that teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal *habeas* review).

[P. 1429, add to n.363:]

Elstad was distinguished in *Missouri v. Seibert*, 542 U.S. 600 (2004), however, when the failure to warn prior to the initial questioning was a deliberate attempt to circumvent *Miranda* by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

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midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

[5] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[6] 430 U.S. at 570-76. *See also* United States v. Scott, 437 U.S. 82, 87-92 (1978); Smalis v. Pennsylvania, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

[7] 437 U.S. 54 (1978).

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

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

[P. 1429, add to n.365:]

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

[P. 1429, substitute for clause containing n.367:]

On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[10]

DUE PROCESS

Procedural Due Process

—Aliens: Entry and Deportation

[P. 1443, add as first sentence of section:]

The Court has frequently said that Congress exercises "sovereign" or "plenary" power over the substance of immigration law, and this power is at its greatest when it comes to exclusion of aliens.[11]

[P. 1444, add as first sentence of only paragraph beginning on page:]

Procedural due process rights are more in evidence when it comes to deportation or other proceedings brought against aliens already within the country.

[P. 1445, add to text following n.444:]

In *Demore v. Kim*,[12] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of removability, the Court reaffirmed Congress' broad powers over aliens. "[W]hen the Government deals with deportable aliens, the

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

[11] *See* discussion under Art. I, § 8, cl. 4, "The Power of Congress to Exclude Aliens."

[12] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.

Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[13]

—Judicial Review of Administrative or Military Proceedings

[P. 1446, add new paragraph after only full paragraph on page:]

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld*.[14] During a military action in Afghanistan,[15] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to detain Hamdi as an "enemy combatant," and to deny him meaningful access to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[16] However, the Court ruled that the Government may not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney.[17]

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[13] 538 U.S. at 528. There was disagreement among the Justices as to whether existing procedures afforded the alien an opportunity for individualized determination of danger to society and risk of flight.

[14] 542 U.S. 507 (2004).

[15] In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force," Pub. L. 107-40, 115 Stat. 224 (2001), which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

[16] There was no opinion of the Court in *Hamdi*. Rather, a plurality opinion, authored by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) relied on the statutory "Authorization for Use of Military Force" to support the detention. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[17] 542 U.S. 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsberg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. Id. at 553 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*, and thus would have required a criminal prosecution of the petitioner. Id. at 554 (dissenting).

NATIONAL EMINENT DOMAIN POWER

Public Use

[P. 1464, add new footnote on line 3 after "determination.":]

Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005). The taking need only be "rationally related to a conceivable public purpose." Id. at 2669 (Justice Kennedy concurring).

[P. 1465, add to text after n.575:]

Subsequently, the Court put forward an added indicium of "public use": whether the government purpose could be validly achieved by tax or user fee.[18]

[P. 1466, add new footnote at end of sentence beginning "For 'public use'":]

Most recently, the Court equated public use with "public purpose." Kelo v. City of New London, 125 S. Ct. 2655, 2662 (2005).

[P. 1466, add new paragraph to text at end of section:]

The expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.[19] There, a five-justice majority upheld as a public use the private-to-private transfer of land for purposes of economic development, at least in the context of a well-considered, areawide redevelopment plan adopted by a municipality to invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to the legislative judgment as to public needs. At the same time, the Court cautioned that private-to-private condemnations of individual properties, not part of an "integrated development plan . . . raise a suspicion that a private purpose [is] afoot."[20] A vigorous four-justice dissent countered that localities will always be able to manufacture a plausible public purpose, so that the majority opinion leaves the vast majority of private parcels subject to condemnation when a higher-valued use is desired.[21] Backing off from the Court's past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters asserted that such was "errant language" that was "unnecessary" to the holdings of those decisions.[22]

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[18] Brown v. Legal Found. of Washington, 538 U.S. 216, 232 (2003). *But see* id. at 242 n.2 (Justice Scalia dissenting).

[19] 125 S. Ct. 2665 (2005).

[20] 125 S. Ct. at 2667.

[21] Written by Justice O'Connor, and joined by Justices Scalia and Thomas, and Chief Justice Rehnquist.

[22] 125 S. Ct. at 2675.

Just Compensation

[P. 1467, add to n.584 after first citation:]

The owner's loss, not the taker's gain, is the measure of such compensation. Brown v. Legal Found. of Washington, 538 U.S. 216, 236 (2003).

When Property is Taken

—Regulatory Takings

[P. 1483, substitute for n.683:]

Tahoe-Sierra, 535 U.S. at 323. *Tahoe-Sierra's* sharp physical-regulatory dichotomy is hard to reconcile with dicta in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

[Pp. 1485-86, substitute for paragraph that begins on page 1485 and for first paragraph that begins on page 1486:]

The first prong of the *Agins* test, asking whether land use controls "substantially advance legitimate governmental interests," has now been erased from takings jurisprudence, after a quarter-century run. The proper concern of regulatory takings law, said *Lingle v. Chevron U.S.A. Inc.*,[23] is the magnitude, character, and distribution of the burdens that a regulation imposes on property rights. In "stark contrast," the "substantially advances" test addresses the means-end efficacy of a regulation, more in the nature of a due process inquiry.[24] As such, it is not a valid takings test.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. A two-part test has emerged. The first part debuted in *Nollan v. California Coastal Commission*,[25] and holds that in order not to be a taking, an exaction condition on a development permit approval (requiring, for example, that a portion of a tract to be subdivided be dedicated for public roads) must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of extortion."[26] The second part of the exaction-takings test, an-

[23] 544 U.S. 528 (2005).

[24] 544 U.S. at 542.

[25] 483 U.S. 825 (1987).

[26] 483 U.S. at 837. Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (*e.g.*, congestion)

nounced in *Dolan v. City of Tigard*,[27] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner, and the impact of the property owner's proposed development on the community — at least in the context of adjudicated (rather than legislated) conditions.

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[28] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. Still unclear, however, is whether the Court meant to place outside *Dolan* exactions of a purely monetary nature, in contrast with the physically invasive dedication conditions involved in *Nollan* and *Dolan*.[29]

The announcement following *Penn Central* of the above *per se* rules in *Loretto* (physical occupations), *Agins* and *Lucas* (total elimination of economic use), and *Nollan/Dolan* (exaction conditions) prompted speculation that the Court was replacing its ad hoc *Penn Central* approach with a more categorical takings jurisprudence. Such speculation was put to rest, however, by three decisions from 2001 to 2005 expressing distaste for categorical regulatory takings analysis. These decisions endorse *Penn Central* as the dominant mode of analysis for inverse condemnation claims, confining the Court's *per se* rules to the "relatively narrow" physical occupation and total wipeout circumstances, and the "special context" of exactions.[30]

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that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

[27] 512 U.S. 374 (1994)

[28] 526 U.S. 687 (1999).

[29] A strong hint that monetary exactions are indeed outside *Nollan/Dolan* was provided in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005), explaining that these decisions were grounded on the doctrine of unconstitutional conditions as applied to *easement* conditions that would have been *per se physical* takings if condemned directly.

[30] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). The other two decisions are *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

[P. 1490, add new paragraph to text at end of section:]

The requirement that state remedies be exhausted before bringing a federal taking claim to federal court has occasioned countless dismissals of takings claims brought initially in federal court, while at the same time posing a bar under doctrines of preclusion to filing first in state court, per *Williamson County*, then relitigating in federal court. The effect in many cases is to keep federal takings claims out of federal court entirely — a consequence the plaintiffs' bar has long argued could not have been intended by the Court. In *San Remo Hotel, L.P. v. City and County of San Francisco*,[31] the Court unanimously declined to create an exception to the federal full faith and credit statute[32] that would allow relitigation of federal takings claims in federal court. Nor, said the Court, may an *England* reservation of the federal taking claim in state court[33] be used to require a federal court to review the reserved claim, regardless of what issues the state court may have decided. While concurring in the judgment, four justices asserted that the state-exhaustion prong of *Williamson County* "may have been mistaken."[34]

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[31] 125 S. Ct. 2491 (2005).

[32] 28 U.S.C. § 1738. The statute commands that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ." The statute has been held to encompass the doctrines of claim and issue preclusion.

[33] *See* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964).

[34] 125 S. Ct. at 2507 (Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

—The Attributes and Function of the Jury

[P. 1505, add to text at end of section:]

Subsequently, the Court held that, just as failing to prove materiality to the jury beyond a reasonable doubt can be harmless error, so can failing to prove a sentencing factor to the jury beyond a reasonable doubt. "Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes." [1]

—Criminal Proceedings to Which the Guarantee Applies

[P.1506, add to end of first full paragraph:]

The Court has consistently, held, however, that a jury is not required for purposes of determining whether a defendant is insane or mentally retarded and consequently not eligible for the death penalty.[2]

[P. 1506-1507, substitute for last two paragraphs of section:]

Within the context of a criminal trial, what factual issues are submitted to the jury has traditionally been determined by whether the fact to be established is an element of a crime or instead is a sentencing factor.[3] Under this approach, the right to a jury extends to the finding of all facts establishing the elements of a crime, and sentencing factors may be evaluated by a judge. Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[4]

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[1] Washington v. Recuenco, 126 S. Ct. 2546, 2552 (2006). *Apprendi* is discussed in the next section.

[2] Ford v. Wainwright, 477 U.S. 399, 416-417 (1986); Atkins v. Virginia, 536 U.S. 304, 317 (2002); Schriro v. Smith, 126 S. Ct. 7, 9 (2005). *See* Eighth Amendment, "Limitations on Capital Punishment: Diminished Capacity," *infra*.

[3] In *Washington v. Recuenco*, however, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element [of a crime] to the jury, is not structural error," entitling the defendant to automatic reversal, but can be harmless error. 126 S. Ct. 2546, 2553 (2006).

[4] For instance, the Court held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and deter-

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[5] "The relevant inquiry is one not of form, but of effect."[6] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum," the Court concluded, "must be submitted to a jury, and proved beyond a reasonable doubt."[7] The one exception the *Apprendi* Court recognized was for sentencing enhancements based on recidivism.[8] Subsequently, the Court refused to apply *Apprendi*'s principles to judicial factfinding that supports imposition of mandatory minimum sentences.[9]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations. In *Ring v. Arizona*,[10] the

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mined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in the main text under "Proof, Burden of Proof, and Presumptions."

[5] 530 U.S. 466, 490 (2000).

[6] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).

[7] 530 U.S. at 490.

[8] 530 U.S. at 490. Enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, and a judge may find the existence of previous valid convictions even if the result is a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States is subject to a maximum sentence of two years, but upon proof of a felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has the burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[9] Prior to its decision in *Apprendi*, the Court had held that factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi, McMillan* was subsequently reaffirmed in *Harris v. United States*, 536 U.S. 545, 568-69 (2002). Five Justices in *Harris* thought that factfinding required for imposition of mandatory minimums fell within *Apprendi*'s reasoning, but one of the five, Justice Breyer, concurred in the judgment on practical grounds despite his recognition that *McMillan* was not "easily" distinguishable "in terms of logic." 536 U.S. at 569. Justice Thomas' dissenting opinion, id. at 572, joined by Justices Stevens, Souter, and Ginsburg, elaborated on the logical inconsistency, and suggested that the Court's deference to Congress' choice to treat mandatory minimums as sentencing factors made avoidance of *Apprendi* a matter of "clever statutory drafting." Id. at 579.

[10] 536 U.S. 584 (2002).

Court, overruling precedent,[11] applied *Apprendi* to invalidate an Arizona law that authorized imposition of the death penalty only if the judge made a factual determination as to the existence of any of several aggravating factors. Although Arizona required that the judge's findings as to aggravating factors be made beyond a reasonable doubt, and not merely by a preponderance of the evidence, the Court ruled that those findings must be made by a jury.[12]

In *Blakely v. Washington*,[13] the Court sent shockwaves through federal as well as state sentencing systems when it applied *Apprendi* to invalidate a sentence imposed under Washington State's sentencing statute. Blakely, who pled guilty to an offense for which the "standard range" under the state's sentencing law was 49 to 53 months, was sentenced to 90 months based on the judge's determination — not derived from facts admitted in the guilty plea — that the offense had been committed with "deliberate cruelty," a basis for an "upward departure" under the statute. The 90-month sentence was thus within a statutory maximum, but the Court made "clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." [14]

In *United States v. Booker*,[15] the Court held that the same principles limit sentences that courts may impose under the federal Sentencing Guidelines. As the Court restated the principle in Booker, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted

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[11] Walton v. Arizona, 497 U.S. 639 (1990). The Court's decision in *Ring* also appears to overrule a number of previous decisions on the same issue, such as *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989) (*per curiam*), and undercuts the reasoning of another. *See* Clemons v. Mississippi, 494 U.S. 738 (1990) (appellate court may reweigh aggravating and mitigating factors and uphold imposition of death penalty even though jury relied on an invalid aggravating factor).

[12] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609. The Court rejected Arizona's request that it recognize an exception for capital sentencing in order not to interfere with elaborate sentencing procedures designed to comply with the Eighth Amendment. Id. at 605-07.

[13] 542 U.S. 296 (2004).

[14] 542 U.S. at 303-304 (italics in original; citations omitted).

[15] 543 U.S. 220 (2005).

by the defendant or proved to a jury beyond a reasonable doubt."[16] Attempts to distinguish *Blakely* were rejected. Because the Sentencing Reform Act made application of the Guidelines "mandatory and binding on all judges,"[17] the Court concluded that the fact that the Guidelines were developed by the Sentencing Commission rather than by Congress "lacks constitutional significance.[18] The mandatory nature of the Guidelines was also important to the Court's formulation of a remedy.[19] Rather than engrafting a jury trial requirement onto the Sentencing Reform Act, the Court instead invalidated two of its provisions, one making application of the Guidelines mandatory, and one requiring *de novo* review for appeals of departures from the mandatory Guidelines, and held that the remainder of the Act could remain intact.[20] As the Court explained, this remedy "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well."[21]

CONFRONTATION

[P. 1522, substitute for both paragraphs on page (entire content of page):]

In *Ohio v. Roberts*, 448 U.S. 56 (1980), a Court majority adopted the reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[22] *Roberts* was applied and narrowed over the course of 24 years,[23] and then

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[16] 543 U.S. at 244.

[17] 543 U.S. at 233.

[18] 543 U.S. at 237. Relying on *Mistretta v. United States*, 488 U.S. 361 (1989), the Court also rejected a separation-of-powers argument. Id. at 754-55.

[19] There were two distinct opinions of the Court in *Booker*. The first, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg (the same Justices who comprised the five-Justice *Blakely* majority), applied *Blakely* to find a Sixth Amendment violation; the other, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg (the *Blakely* dissenters joined by Justice Ginsburg), set forth the remedy.

[20] 543 U.S. at 259. The Court substituted a "reasonableness" standard for the *de novo* review standard. Id. at 262.

[21] 543 U.S. at 245-246 (statutory citations omitted).

[22] "[O]nce a witness is shown to be unavailable . . . , the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" 448 U.S. at 65, quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934). The Court indicated that reliability could be inferred without more if the evidence falls within a firmly rooted hearsay exception.

[23] Applying *Roberts*, the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in *United States v. Inadi*, 475 U.S. 387 (1986), which held that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is

overruled in *Crawford v. Washington*.[24] The Court in *Crawford* rejected reliance on "particularized guarantees of trustworthiness" as inconsistent with the requirements of the Confrontation Clause. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[25] Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test had been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[26] "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[27]

Crawford represents a decisive turning point for Confrontation Clause analysis. The basic principles are now clearly stated. "Testimonial evidence" may be admitted against a criminal defendant only if the declarant is available for cross-examination at trial, or, if the declarant is unavailable even though the government has made reasonable efforts to procure his presence, the defendant has had a prior opportunity to cross-examine as to the content of the statement.[28] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" The Court indicated, however, that the term covers "at a minimum" prior testimony at a preliminary hearing, at a former trial, or before a grand jury, and statements made during police interrogation.[29]

In *Davis v. Washington*,[30] the Court began an exploration of the parameters of *Crawford* by considering when a police interrogation is "testimonial" for purposes of the Confrontation Clause. The *Davis* case involved a 911 call in which a women described being assaulted by a former boyfriend. A tape of that call was admitted

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inapplicable to co-conspirators' out-of-court statements. *See also* White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822-23 (1990) (insufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

[24] 541 U.S. 36 (2004).

[25] 541 U.S. at 60-61.

[26] 541 U.S. at 63.

[27] 541 U.S. at 68-69.

[28] The *Roberts* Court had stated a two-part test, the first a "necessity" rule under which the prosecution must produce or demonstrate unavailability of the declarant despite reasonable, good-faith efforts to produce the declarant at trial (448 U.S. at 65, 74), and the second part turning on the reliability of a hearsay statement by an unavailable witness. *Crawford* overruled *Roberts* only with respect to reliability, and left the unavailability test intact.

[29] 541 U.S. at 68.

[30] 126 S. Ct. 2266 (2006).

as evidence of a felony violation of a domestic no-contact order, despite the fact that the women in question did not testify. While again declining to establish all parameters of when a response to police interrogation is testimonial, the Court did hold that statements to the police are nontestimonial when made under circumstances that "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[31] Statements made after such emergency has ended, however, would be treated as testimonial, and could not be introduced.[32]

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

—Johnson v. Zerbst

[P. 1528, add to n.208:]

A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 541 U.S. 77 (2004) (holding that warnings by trial judge detailing risks of waiving right to counsel are not constitutionally required before accepting guilty plea from uncounseled defendant).

—Protection of the Right to Retained Counsel

[P. 1531, add new paragraph in text after n.229:]

Where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant.[33] Further, because such a denial is not a "trial error" (a constitutional error that occurs during presentation of a case to the jury), but a "structural defect" (a constitutional error that affects the framework of the trial),[34] the Court had held that the decision is not subject to a "harmless error" analysis.[35]

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[31] Id. at 2273.

[32] Id. at 2277-78. Thus, where police responding to a domestic violence report interrogated a woman in the living room while her husband was being questioned in the kitchen, there was no present threat to the woman, so such information as was solicited was testimonial. Id. at 2278 (facts of *Hammon v. Indiana*, considered together with *Davis*.)

[33] United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561-62 (2006).

[34] Arizona v. Fulminante, 499 U.S. 279, 307-310 (1991).

[35] *Gonzalez-Lopez*, 126 S. Ct. at 2557, 2563-64. The Court noted that an important component of the finding that denial of the right to choose one's own counsel was a "structural defect" was the difficulty of assessing the effect of such denial on a trial's outcome. Id. at 2564 n.4.

—Effective Assistance of Counsel

[P. 1535, add new footnote after "virtually unchallengeable," in sentence ending with n.252:]

Strickland, 466 U.S. at 689-91. *See also* Yarborough v. Gentry, 540 U.S. 1 (2003) (deference to attorney's choice of tactics for closing argument).

[P. 1535, substitute for n.252:]

Woodford v. Visciotti, 537 U.S. 19 (2002) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors). *But see* Wiggins v. Smith, 539 U.S. 510 (2003) (attorney's failure to pursue defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable); and Rompilla v. Beard, 125 S. Ct. 2456 (2005) (attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate).

[P. 1535, change period in text preceding n.252 to comma and add to text after n.252:]

and decisions selecting which issues to raise on appeal.[36]

[P. 1536, substitute for n.261:]

Cronic, 466 U.S. at 659 n.26.

[P. 1536, change the period in text before n.261 to a comma, and add after new comma:]

and consequently most claims of inadequate representation are to be measured by the *Strickland* standard.[37]

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[36] There is no obligation to present on appeal all nonfrivolous issues requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983) (appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

[37] *Strickland* and *Cronic* were decided the same day, and the Court's opinion in each cited the other. See *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 666 n.41. The *Cronic* presumption of prejudice may be appropriate when counsel's "overall performance" is brought into question, while *Strickland* is generally the appropriate test for "claims based on specified [counsel] errors." *Cronic*, 466 U.S. at 666 n.41. The narrow reach of Cronic has been illustrated by subsequent decisions. Not constituting *per se* ineffective assistance is a defense counsel's failure to file a notice of appeal, or in some circumstances even to consult with the defendant about an appeal. Roe v. Flores-Ortega, 528 U.S. 470 (2000). *But see* Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam). *See also* Florida v. Nixon, 543 U.S. 175 (2004) (no presumption of prejudice when a defendant has failed to consent to a tenable strategy counsel has adequately disclosed to and discussed with him). A standard somewhat different from *Cronic* and *Strickland* governs claims of attorney conflict of interest. See discussion of *Cuyler v. Sullivan, supra*.

—Self-Representation

[P. 1536, add to n. 262 before sentence beginning with "Related":]

The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 126 S. Ct. 407 (2005).

Right to Assistance of Counsel in Nontrial Situations

—Custodial Interrogation

[P. 1539, add new footnote at end of paragraph continued from page 1538:]

The different issues in Fifth and Sixth Amendment cases were recently summarized in *Fellers v. United States*, 540 U.S. 519 (2004), holding that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENTS

Capital Punishment

—Implementation of Procedural Requirements

[P. 1581, add to n.91:]

Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[P. 1583, add to n.99:]

Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 126 S. Ct. 2516, 2524 (2006).

[P. 1586, add new paragraph after paragraph carried over from page 1585:]

What is the effect on a death sentence if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor, to be weighed against mitigating factors, in determining whether a defendant who has been found eligible for the death penalty should receive it) is found invalid? In *Brown v. Sanders*, the Court announced "the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." [1]

[1] 126 S. Ct. 884, 892 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." Id. at 890. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." Id. Prior to *Brown v. Sanders*, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." Id.

[P. 1586, add new paragraph after first full paragraph:]

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not present at the scene of the crime."[2] Although "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[3] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime", and "thereby attacks a previously determined matter in a proceeding [*i.e.*, sentencing] at which, in principle, that matter is not at issue."[4]

—Limitations on Capital Punishment: Diminished Capacity

[P. 1590, add to n.139:]

See also Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[P. 1591, add new paragraph in text after n.143:]

In *Atkins*, the Court wrote, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[5] In *Schriro v. Smith*, the Court again quoted this language, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim."[6] States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge."[7]

[P. 1591, substitute for first two sentences of first full paragraph:]

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme

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[2] 126 S. Ct. 1226, 1231, 1230 (2006).
[3] 126 S. Ct. at 1231, 1232 (Court's emphasis deleted in part).
[4] 126 S. Ct. at 1232.
[5] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright.
[6] 126 S. Ct. 7, 9 (2005) (per curiam).
[7] 126 S. Ct. at 9.

that permitted capital punishment to be imposed for crimes committed before age 16, but upheld other statutes authorizing capital punishment for crimes committed by 16 and 17 year olds.

[P. 1591, substitute for rest of paragraph following n.148:]

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing the mentally retarded with what it saw as a lack of consensus regarding execution of juvenile offenders over age 15,[8] less than three years later the Court held that such a consensus had developed. The Court's decision in *Roper v. Simmons*[9] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age 16 or 17 when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, 30 states prohibited execution of juveniles: 12 that prohibited the death penalty altogether, and 18 that excluded juveniles from its reach. This meant that 20 states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the 10 years immediately preceding *Simmons*. Although the pace of change was slower than had been the case with execution of the mentally retarded, the consistent direction of change toward abolition was deemed more important.[10]

As in *Atkins*, the *Simmons* Court relied on its "own independent judgment" in addition to its finding of consensus among the states.[11] Three general differences between juveniles and

[8] 536 U.S. at 314, n.18.

[9] 543 U.S. 551 (2005). The case was decided by 5-4 vote. Justice Kennedy wrote the Court's opinion, and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor, who had joined the Court's 6-3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas.

[10] Dissenting in *Simmons*, Justice O'Connor disputed the consistency of the trend, pointing out that since *Stanford* two states had passed laws reaffirming the permissibility of executing 16- and 17-year-old-offenders. 543 U.S. at 596.

[11] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S.

adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pressure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed."[12] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed.[13] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[14]

The *Simmons* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty."[15] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[16]

—Limitations on *Habeas Corpus* Review of Capital Sentences

[P. 1594, delete everything after citation in n.161, and add new footnote at end of second sentence of paragraph in text:]

The "new rule" limitation was suggested in a plurality opinion in *Teague*. A Court majority in *Penry* and later cases has adopted it. "*Teague* by its terms applies only

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at 394-96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play alongwith their analysis of consensus on the issue of executing the mentally retarded.

[12] 543 U.S. at 569, 570.

[13] 543 U.S. at 570.

[14] w543 U.S. at 572-573. Strongly disagreeing, Justice O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." Id. at 600.

[15] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," id. at 575).

[16] Citing as precedent Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317, n.21; Enmund v. Florida, 458 U.S. 782, 796-97, n.22 (1982); Thompson v. Oklahoma, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

to procedural rules." Bousley v. United States, 523 U.S. 614, 620 (1998). "New substantive rules generally apply retroactively." This is so because new substantive rules "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." Schriro v. Summerlin, 542 U.S. 348, 351, 352 (2004) (citation and internal quotation omitted) (decision in *Ring v. Arizona*, holding that jury not judge must decide existence of aggravating factors on which imposition of death sentence may be based, was a procedural, not a substantive rule).

[P. 1594, add to n.162 following initial citation:]

The first exception parallels the standard for substantive rules. The second exception, for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495 (1990), was at issue in *Sawyer v. Smith* . . . .

[P. 1595, add to n.167:]

Accord, House v. Bell, 126 S. Ct. 2064, 2086-2087 (2006) (defendant failed to meet *Herrera* standard but nevertheless put forward enough evidence of innocence to meet the less onerous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), which "held that prisoners asserting innocence as a gateway to [*habeas* relief for claims forfeited under state law] must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 2076-2077, quoting Schlup v. Delo, 513 U.S. at 327.) The Court here distinguished "freestanding" claims under *Herrera* from "gateway" claims under *Schlup*, the difference apparently being that success on a freestanding claim results in the overturning of a conviction, whereas success on a gateway claim results in a remand to the trial court to hear the claim. *See also* Article III, "*Habeas Corpus*: Scope of the Writ."

Proportionality

[P. 1601, add new paragraph at end of section:]

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at $399 apiece.[17] A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the "rare case" of "gross disproportional[ity]."[18] The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[19] and Justice Thomas, who asserted that the Cruel and Unusual Punish-

[17] Ewing v. California, 538 U.S. 11 (2003).
[18] 538 U.S. at 29-30.
[19] 538 U.S. at 31.

ments Clause "contains no proportionality principle."[20] Not surprisingly, the Court also rejected a *habeas corpus* challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[21] Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."[22]

Prisons and Punishment

[P. 1601, add to n.200:]

See also Overton v. Bazzetta, 539 U.S. 126 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

[20] 538 U.S. at 32. The dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. *See* 538 U.S. at 32, n.1 (opinion of Justice Stevens).

[21] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive 25-year-to-life sentences on a 37-year-old convicted of two petty thefts with a prior conviction.

[22] 538 U.S. at 72.

ELEVENTH AMENDMENT

STATE SOVEREIGN IMMUNITY

Suits Against States

[P. 1636, add to text at end of section:]

In some of these cases, the state's immunity is either waived or abrogated by Congress. In other cases, the 11th Amendment does not apply because the procedural posture is such that the Court does not view the suit as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the *res*, or property in dispute, is in fact the legal target of a dispute.[1]

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular *res* the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. "The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[2] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state educational institutions,[3] the court held that the sovereign immunity of the state was not infringed despite the fact that the issue was "ancillary" to a bankruptcy court's *in rem* jurisdiction.[4]

[P. 1639, add to n.80 after citation to Mt. Healthy City Bd. of Education v. Doyle:]

Northern Insurance Company of New York v. Chatham County, 126 S. Ct. 1689, 1693 (2006).

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[1] See Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446-48 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a state does not infringe the state's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507-08 (1998) (despite state claims to title of a ship-wrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign)

[2] Central Virginia Community College v. Katz, 126 S. Ct. 990, 996 (2006).

[3] A "preferential transfer" was defined as the transfer of a property interest from an insolvent debtor to a creditor, which occurred on or within 90 days before the filing of a bankruptcy petition, and which exceeds what the creditor would have been entitled to receive under such bankruptcy filing. 11 U.S.C. § 547(b).

[4] 126 S. Ct. at 1001-02.

—Congressional Withdrawal of Immunity

[P. 1639, add to n.85:]

See also Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

Suits Against State Officials

[P. 1648, add new footnote at end of first paragraph:]

In *Frew v. Hawkins*, 540 U.S. 431 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst*, arguing that unless an actual violation of federal law had been found by a court, such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the 11th Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. *Id*. at 442.

FOURTEENTH AMENDMENT

Section 1. Rights Guaranteed

DUE PROCESS OF LAW

Definitions

—"Liberty"

[P. 1682, add to n.57:]

But see Chavez v. Martinez, 538 U.S. 760 (2003) (case remanded to federal circuit court to determine whether coercive questioning of severely injured suspect gave rise to a compensable violation of due process).

Fundamental Rights (Noneconomic Substantive Due Process)

—Development of the Right of Privacy

[P. 1767, Substitute for portion of paragraph following n.552:]

However, in *Bowers v. Hardwick*,[1] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples.[2] Then, in *Lawrence v. Texas*,[3] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

—Abortion

[P. 1778, add new footnote at end of last paragraph in the section:]

As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, see *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).

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[1] 478 U.S. 186 (1986).

[2] The Court upheld the statute only as applied to the plaintiff, who was a homosexual, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at 192-93. In a dissent, Justice Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court — whether there is a general right to privacy and autonomy in matters of sexual intimacy. Id. at 199-203 (Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens).

[3] 539 U.S. 558 (2003) (overruling *Bowers*).

—Privacy After Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?

[P. 1784, substitute for final sentence of paragraph carried over from p.1783:]

Although *Bowers* has since been overruled by *Lawrence v. Texas*[4] based on precepts of personal autonomy, the latter case did not appear to signal the resurrection of the doctrine of protecting activities occurring in private places.

[P. 1784, substitute for second full paragraph and all remaining paragraphs within the topic:]

Despite the limiting language of *Roe*, the concept of privacy still retains sufficient strength to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services International*,[5] recognition of the "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[6] The Court significantly extended the *Griswold-Baird* line of cases so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to protect only that interest or interests.

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[4] 539 U.S. 558 (2003).

[5] 431 U.S. 678 (1977).

[6] 431 U.S. at 684-91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the state. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the state presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691-99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

For a time, the limits of the privacy doctrine were contained by the 1986 case of *Bowers v. Hardwick*,[7] where the Court by a 5-4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[8] and also rejected the more comprehensive claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[9] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[10] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[11] Interestingly, Justice Blackmun, in dissent, was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[12]

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[7] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

[8] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190-91.

[9] Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases. 478 U.S. at 191. The Court concluded that there was no "fundamental right [of] homosexuals to engage in acts of consensual sodomy" because homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191-92.

[10] 478 U.S. at 191-92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[11] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195- 96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217-18) suggested that these crimes are readily distinguishable.

[12] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. See id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he as-

Yet, *Lawrence v. Texas*,[13] by overruling *Bowers*, brought the outer limits of noneconomic substantive due process into question by once again using the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." [14]

Although it quarreled with the Court's finding in *Bowers v. Hardwick* that the proscription against homosexual behavior had "ancient roots," the *Lawrence* Court did not attempt to establish that such behavior was in fact historically condoned. This raises the question as to what limiting principles are available in evaluating future arguments based on personal autonomy. While the Court does seem to recognize that a State may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects," [15] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[16] Thus, the parameters for regulation of sexual conduct remain unclear.

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[17] Analysis of this question is hampered, however, because the Court has still not explained what about the particular facets of human relationships — marriage, family, procreation — gives rise to a protected liberty, and how indeed these factors vary significantly enough

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serted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204-06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, motherhood, procreation, and child rearing." 478 U.S. at 190. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[13] 539 U.S. 558 (2003).

[14] Id. at 567.

[15] Id.

[16] The Court noted with approval Justice Stevens' dissenting opinion in *Bowers v. Hardwick* stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." Id. at 577-78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

[17] The Court reserved this question in *Carey*, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[18] little elucidates the answers.[19]

Despite the Court's decision in *Lawrence*, there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of "privacy" or under the more limited "liberty" set out in *Roe*. There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is also now accepted as a "liberty" protected under the due process clauses, however, the analytical significance of denominating the particular right or interest as an element of privacy seems open to question.

PROCEDURAL DUE PROCESS: CIVIL

Generally

—The Requirements of Due Process

[P. 1796, add to text after n.697]

This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available.[20]

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[18] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, 431 U.S. at 684-85.

[19] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests - compelling interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is not its social significance, but is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). That this limitation has not been honored with respect to equal protection analysis or due process analysis can be easily discerned. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

[20] Jones v. Flowers, 126 S. Ct. 1708, 1719 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.)

The Procedure Which is Due Process

—The Property Interest

[P. 1804, add new paragraph to text after paragraph ending with n.647:]

The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*,[21] the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes.[22] Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[23]

—The Liberty Interest

[P. 1807, add new footnote to end of second paragraph]

In *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 6-7 (2003), holding that the state's posting on the Internet of accurate information regarding convicted sex offenders did not violate their due process rights, the Court stated that Paul v. Davis "held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."

[P. 1809, add to n.770:]

Wilkinson v. Austin, 125 S. Ct. 2384, 2394-95 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypcial and significant" deprivation.)

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[21] 125 S. Ct. 2796 (2005).

[22] 125 S. Ct. at 2805. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. Such indeterminancy is not the "hallmark of a duty that is mandatory." Id. at 2807-08.

[23] 125 S. Ct. at 2809-10.

—When Process is Due

[P. 1815, add new paragraph to text after paragraph ending with n.801:]

A delay in processing a claim for recovery of money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David*,[24] a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected — the temporary loss of the use of the money — could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

Jurisdiction

—Notice: Service of Process

[P. 1834, add to the beginning of n.903:]

Thus, in *Jones v. Flowers*, 126 S. Ct. 1708 (2006), the Court held that, after a state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed," the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.

Power of the States to Regulate Procedure

—Costs, Damages, and Penalties

[P. 1838, add to n.932 after citation to BMW v. Gore:]

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (applying *BMW v. Gore* guideposts to hold that a $145 million judgment for refusing to settle an insurance claim was excessive, in part because it included consideration of conduct occurring in other states as well as conduct bearing no relation to the plaintiffs' harm).

[P. 1838, add to n.933:]

The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424 (2003).

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[24] 538 U.S. 715 (2003).

PROCEDURAL DUE PROCESS — CRIMINAL

The Elements of Due Process

—Fair Trial

[P. 1855, add to n.1025 after the citation to Rose v. Clark:]

Middleton v. McNeil, 541 U.S. 43 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear).

[P. 1856, add new paragraph to text following n.1028:]

The use of visible physical restraints, such as shackles, leg irons or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*,[25] the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need."[26] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings."[27] Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it, can such restraints be used.

[P. 1856, add to n.1030 after the citation to Crane v. Kentucky:]

Holmes v. South Carolina, 126 S. Ct. 1727 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability).

—Prosecutorial Misconduct

[P. 1857, add to n.1037:]

Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

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[25] 544 U.S. 622 (2005).

[26] 544 U.S. at 626. In *Illinois v. Allen*, 397 U.S. 337, 344 (1970), the Court held, in dicta, that "no person should be tried while shackled or gagged except as a last resort."

[27] 544 U.S. at 630, 631 (internal quotation marks omitted).

[P. 1858, add new footnote after the words "prosecutor withheld it" four lines from bottom of page:]

A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283-84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

[P. 1859, add to n.1044:]

Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

[P. 1859, add new paragraph to text after n.1049:]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' . . . '[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.'" [28]

[P. 1859, add to n.1049:]

See also Banks v. Dretke, 540 U.S. 668, 692-94 (2004) (failure of prosecution to correct perjured statement that witness had not been coached and to disclose that separate witness was a paid government informant established prejudice for purposes of *habeas corpus* review).

—Proof, Burden of Proof, and Presumptions

[P. 1861, add new footnote following "constitute the crime charged" in first sentence of first full paragraph of text:]

Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process.

[P. 1862, add to n.1063:]

See also Dixon v. United States, 126 S. Ct. 2437 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of mens *rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

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[28] Youngblood v. West Virginia, 126 S. Ct. 2188, 2190 (2006) (per curiam), quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995).

[P. 1862, add new paragraph to text after n.1064:]

Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[29] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark*, the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[30]

—The Problem of the Incompetent or Insane Defendant or Convict

[P. 1865, add new paragraph to text after n.1078:]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining criminal responsibility.[31] The Court has identified several tests that are used by states in varying combinations to address the issue: the M'Naghten test (cognitive incapacity or moral incapacity),[32] volitional incapacity,[33] and the irresistible-impulse test.[34] "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[35]

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[29] 126 S. Ct. 2709 (2006).

[30] 126 S. Ct. at 2731-32, 34-36.

[31] Clark v. Arizona, 126 S. Ct. 2709 (2006).

[32] *M'Naghten's Case*, 8 Eng. Rep. 718 (1843) states that "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[33] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible").

[34] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife — if the killing was the product of mental disease in him — he is not guilty; he is innocent — as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance").

[35] *Clark*, 126 S. Ct. at 2772. In *Clark*, the Court considered an Arizona statute, based on the *M'Naghten* case, that was amended to eliminate the defense of cog-

[P. 1866, add to text after n.1085:]

The Court, however, left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[36]

In *Atkins v. Virginia*, the Court held that the Eighth Amendment also prohibits the state from executing a person who is mentally retarded, and added, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[37]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*,[38] the Court had found that an individual has a significant "liberty interest" in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States*,[39] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case.[40] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

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nitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 2722.

[36] 477 U.S. at 416-17.

[37] 536 U.S. at 317 (citation omitted) (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). The Court quoted this language again in *Schriro v. Smith*, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." 126 S. Ct. 7, 9 (2005) (per curiam). States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." *Id*.

[38] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[39] 539 U.S. 166 (2003).

[40] For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government's interest in prosecution. 539 U.S. at 180.

—Guilty Pleas

[P. 1868, substitute for final sentence of n.1092:]

However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

—Rights of Prisoners

[P. 1874, add to n.1132:]

There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509-13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).

[P. 1875, add to n.1136:]

See Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over whom a prisoner's parental rights have been terminated, and all regular visitation for a period following a prisoner's violation of substance abuse rules).

[P. 1875, add new footnote to end of fifth sentence of first full paragraph:]

For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135.

[P. 1877, add new paragraph to text after n.1148, consisting of the following sentence followed by the material through n.1149:]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[41]

[41] Wilkinson v. Austin, 125 S. Ct. 2384, 2394-95 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypcial and significant" deprivation). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 2392-93, 2395-98.

EQUAL PROTECTION OF LAWS

Scope and Applicaton

—State Action

[P. 1893, add to n.1223:]

But see City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWERS

Taxation

—Classification for Purposes of Taxation

[P. 1923, add to n.1390 after the paragraph on "Electricity":]

Gambling: slot machines on excursion river boats are taxed at a maximum rate of 20 percent, while slot machines at a racetrack are taxed at a maximum rate of 36 percent. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[P. 1924, add to n.1391:]

Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

EQUAL PROTECTION AND RACE

Juries

[P. 1958, add new footnote at end of first sentence of second full paragraph:]

476 U.S. 79, 96 (1986). Establishing a *prima facie* case can be done through a "wide variety of evidence, so long as the sum of proffered facts gives rise to an inference of discriminatory purpose." Id. at 93-94. A state, however, cannot require that a defendant prove a *prima facie* case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

[P. 1958, add to n.1594:]

In fact, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[42] Such a rebuttal

[42] Rice v. Collins, 126 S. Ct. 969, 973-74 (2006) (citation omitted). The holding of the case was that, in a *habeas corpus* action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." Id. at 973. Justice Breyer, joined by Justice Souter, concurred but suggested "that

having been offered, "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" [43]

Permissible Remedial Utilization of Racial Classifications

[P. 1970, add new paragraph to text at end of section:]

By applying strict scrutiny, the Court was in essence affirming Justice Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether the Court would endorse Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger* [44] and *Gratz v. Bollinger*.[45]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in his file (*e.g.*, grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (*e.g.*, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." While the policy did not limit diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[46]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who otherwise might not

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legal life without peremptories is no longer unthinkable" and "that we should reconsider *Batson*'s test and the peremptory challenge system as a whole." Id. at 977.

[43] Rice v. Collins, 126 S. Ct. at 974 (citations omitted). In *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005), the Court found discrimination in the use of peremptory strikes based on numerous factors, including the high ratio of minorities struck from the venire panel (of 20 blacks, nine were excused for cause and ten were peremptorily struck). Other factors considered by the Court were the fact that the race-neutral reasons given for the peremptory strikes of black panelists "appeared equally on point as to some white jurors who served," id. at 2325-26; the prosecution used "jury shuffling" (rearranging the order of panel members to be seated and questioned) twice when blacks were at the front of the line; the prosecutor asked different questions of black and white panel members; and there was evidence of a long-standing policy of excluding blacks from juries.

[44] 539 U.S. 306 (2003).

[45] 539 U.S. 244 (2003).

[46] 539 U.S. at 323-26.

have been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[47] As the University did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the University's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.

The law school's admission policy, however, can be contrasted with the University's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the Law School. Applicants with scores over 100 were usually admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was the fact that an applicant was entitled to 20 points based solely upon membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[48]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's opinion in *Bakke*. While Justice Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[49] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an underrepresented minority group, the policy effectively admitted every qualified minority applicant. While acknowledging that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve the University's asserted compelling interest in diversity.[50]

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[47] 539 U.S. at 335.
[48] 539 U.S. at 272-73.
[49] 438 U.S. at 317.
[50] 438 U.S. at 284-85.

THE NEW EQUAL PROTECTION

Fundamental Interests: The Political Process

—Apportionment and Districting

[P. 2012, add new paragraphs after the paragraph ending at n.1841:]

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were generally unsuccessful. Then, when the Supreme Court revisited the issue in 2004, it all but closed the door on such challenges. In *Vieth v. Jubelirer*,[51] a four-Justice plurality would have overturned *Davis v. Bandemer*'s holding that challenges to political gerrymandering are justiciable, but five Justices disagreed. The plurality argued that partisan considerations are an intrinsic part of establishing districts,[52] that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,[53] and that the power to address the issue of political gerrymandering resides in Congress.[54]

Of the five Justices who believed that challenges to political gerrymandering are justiciable, four dissented, but Justice Kennedy concurred with the four-Justice plurality's holding, thereby upholding Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. Justice Kennedy agreed that the lack "of any agreed upon model of fair and effective representation" or "substantive principles of fairness in districting" left the Court with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."[55] But, though he concurred in the holding, Justice Kennedy held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale were found" to evaluate partisan redistricting. *Davis v. Bandemer* was thus preserved.[56]

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[51] 541 U.S. 267 (2004).

[52] 541 U.S. at 285-86.

[53] 541 U.S. at 281-90.

[54] 541 U.S. at 271 (noting that Article I, § 4 provides that Congress may alter state laws regarding the manner of holding elections for Senators and Representatives).

[55] 541 U.S. at 307-08 (Justice Kennedy, concurring).

[56] 541 U.S. at 306 (Justice Kennedy, concurring). Although Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposed on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.

In *League of United Latin American Citizens v. Perry*, a widely splintered Supreme Court plurality largely upheld a Texas congressional redistricting plan that the state legislature had drawn mid-decade, seemingly with the sole purpose of achieving a Republican congressional majority.[57] The plurality did not revisit the justiciability question, but examined "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[58] The plurality was "skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." For one thing, although "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, . . . partisan aims did not guide every line it drew."[59] Apart from that, the "sole-motivation theory" fails to show what is necessary to identify an unconstitutional act of partisan gerrymandering: "a burden, as measured by a reliable standard, on the complainants' representational rights."[60] Moreover, "[t]he sole-intent standard . . . is no more compelling when it is linked to . . . mid-decennial legislation. . . . [T]here is nothing inherently suspect about a legislature's decision to replace a mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders."[61] The plurality also found "that mid-decade redistricting for exclusively partisan purposes" did not in this case "violate[ ] the one-person, one-vote requirement."[62] Because ordinary mid-decade districting plans do not necessarily violate the one-person, one-vote requirement, the only thing out of the ordinary with respect to the Texas plan was that it was motivated solely by partisan considerations, and the plurality had already rejected the sole-motivation theory.[63] *League of United Latin American Citizens v. Perry* thus left earlier Court precedent essentially unchanged. Claims of unconstitutional partisan gerrymandering are justiciable, but a reliable measure of what constitutes unconstitutional partisan gerrymandering remains to be found.

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[57] 126 S. Ct. 2594, 2609 (2006). The design of one congressional district was held to violate the Voting Rights Act because it diluted the voting power of Latinos. Id. at 2612-2623.

[58] 126 S. Ct. at 2607.

[59] 126 S. Ct. at 2609-2610.

[60] 126 S. Ct. at 2610.

[61] 126 S. Ct. at 2610.

[62] 126 S. Ct. at 2611.

[63] 126 S. Ct. at 2612.

Section 5. Enforcement

Congressional Definition of Fourteenth Amendment Rights

[P. 2047, add to text at end of section:]

The Court's most recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs*,[64] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees can take up to twelve weeks of unpaid leave to care for a close relative with a serious health condition. Noting that the Fourteenth Amendment could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than men were provided paternity leave.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test[65] . . . it was easier for Congress to show a pattern of state constitutional violations."[66] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the gender stereotype.

Applying the same approach, the Court in *Tennessee v. Lane*[67] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act (ADA) provides that

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[64] 538 U.S. 721 (2003).

[65] Statutory classifications that distinguish between males and females are subject to heightened scrutiny, *Craig v. Boren*, 429 U.S. 190, 197-199 (1976); they must be substantially related to the achievement of important governmental objectives, *United States v. Virginia*, 518 U.S. 515, 533 (1996).

[66] 538 U.S. at 736.

[67] 541 U.S. 509 (2004).

no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[68] but since disability is not a suspect class, the application of Title II against states would seem suspect under the reasoning of Garrett.[69] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[70]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a "congruent and proportional" response to a congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[71] However, as pointed out by both the majority and by Justice Rehnquist in dissent, the deprivations relied upon by the majority were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[72] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage and voting, and on limitations of access to public services beyond the use of courts.[73]

Congress' authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[74] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the state of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were

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[68] 42 U.S.C. δ 12132.

[69] 531 U.S. 356 (2001).

[70] *See, e.g.*, Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[71] 541 U.S. at 531, 524.

[72] 541 U.S. at 541-542 (Rehnquist, C.J., dissenting).

[73] 541 U.S. at 524-525. Justice Rehnquist, in dissent, disputed Congress' reliance on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. Id. at 1999-2000. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, *Mt. Healthy City Bd. of Educ. v. Doyle*, U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as *South Carolina v. Katzenbach*, 383 U.S. 301 312-15 (1966).

[74] 125 S. Ct. 877 (2006).

based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[75]

[75] "While the Members of this Court have disagreed regarding the scope of Congress' 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for actual violations of those provisions." 125 S. Ct. at 881 (citations omitted).

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

159. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, §§ 213, 318; 2 U.S.C. §§ 315(d)(4), 441k.

Section 213 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' right to make unlimited independent expenditures. Section 318 of BCRA, which amended FECA to prohibit persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors.

McConnell v. FEC, 540 U.S. 93 (2003).

160. Act of April 30, 2003, Pub. L. 108-21, § 401(a)(1), 401(d)(2), 117 Stat. 667, 670; 18 U.S.C. §§ 3553(b)(1), 3742(e).

Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory, and one that sets forth standards governing appeals of departures from the mandatory Guidelines, are invalidated. The Sixth Amendment right to jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.

United States v. Booker, 543 U.S. 220 (2005).

Justices concurring: Breyer, O'Connor, Kennedy, Ginsburg, and Rehnquist, C.J.

Justices dissenting: Stevens, Souter, Scalia, and Thomas.

STATE CONSTITUTIONAL OR STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

I. STATE LAWS HELD UNCONSTITUTIONAL

936. *Stogner v. California*, 539 U.S. 607 (2003).

A California statute that permits resurrection of an otherwise time-barred criminal prosecution for sexual abuse of a child, and that was itself enacted after the pre-existing limitations period had expired for the crimes at issue, violates the *Ex Post Facto* Clause of Art. I, § 10, cl. 1.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg.
Justices dissenting: Kennedy, Scalia, Thomas, Rehnquist., C.J.

937. *Virginia v. Black*, 538 U.S. 343 (2003).

The *prima facie* evidence provision of Virginia's cross-burning statute, stating that a cross burning "shall be *prima facie* evidence of an intent to intimidate," is unconstitutional.

Justices concurring: O'Connor, Stevens, Breyer, Rehnquist, C.J.
Justices concurring specially: Souter, Kennedy, Ginsburg.
Justices dissenting: Scalia, Thomas.

938. *Lawrence v. Texas*, 539 U.S. 558 (2003).

A Texas statute making it a crime for two people of the same sex to engage in sodomy violates the Due Process Clause of the Fourteenth Amendment. The right to liberty protected by the Due Process Clause includes the right of two adults, "with full and mutual consent from each other, [to] engag[e] in sexual practices common to a homosexual lifestyle."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.
Justice concurring specially: O'Connor.
Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

939. *Blakely v. Washington*, 542 U.S. 296 (2004).

Washington State's sentencing law, which allows a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence," is inconsistent with the Sixth Amendment right to trial by jury.

Justices concurring: Scalia, Stevens, Souter, Thomas, and Ginsburg.
Justices dissenting: O'Connor, Breyer, Kennedy, Rehnquist, C.J.

940. *Granholm v. Heald*, 544 U.S. 460 (2005).

Michigan and New York laws that allow in-state wineries to sell wine directly to consumers but prohibit or discourage out-of-state

wineries from doing so discriminate against interstate commerce in violation of the Commerce Clause, and are not authorized by the Twenty-first Amendment.

Justices concurring: Kennedy, Scalia, Souter, Ginsburg, and Breyer.
Justices dissenting: Stevens, O'Connor, Thomas, Rehnquist, C.J.

941. *Halbert v. Michigan*, 125 S. Ct. 2582 (2005).

A Michigan statute making appointment of appellate counsel discretionary with the court for indigent criminal defendants who plead nolo contendere or guilty is unconstitutional to the extent that it deprives indigents of the right to the appointment of counsel to seek "first-tier review" in the Michigan Court of Appeals.

Justices concurring: Ginsburg, Stevens, O'Connor, Kennedy, Souter, and Breyer.
Justices dissenting: Thomas, Scalia, and Rehnquist, C.J.

942. *Roper v. Simmons*, 543 U.S. 551 (2005).

Missouri's law setting the minimum age at 16 for persons eligible for the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment as applied to persons who were under 18 at the time they committed their offense.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: O'Connor, Scalia, Thomas, and Rehnquist.

943. *Jones v. Flowers*, 126 S. Ct. 1708 (2006).

Arkansas statute violated due process when interpreted not to require the Arkansas Commissioner of State Lands to take additional reasonable steps to notify a property owner of intent to sell the property to satisfy a tax delinquency, after the initial notice was returned by the Post Office unclaimed.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: O'Connor, Scalia, Thomas, Rehnquist.

944. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

Vermont campaign finance statute's limitations on both expenditures and contributions violated freedom of speech.

Justices concurring: Breyer, Roberts, C.J., Alito, Kennedy, Thomas, Scalia.
Justices dissenting: Stevens, Souter, Ginsberg.

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

225. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003).

Alabama's usury statute is preempted by sections 85 and 86 of the National Bank Act as applied to interest rates charged by national banks.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, and Rehnquist, C.J.
Justices dissenting: Scalia and Thomas.

226. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

California's Holocaust Victim Insurance Relief Act, which requires any insurance company doing business in the state to disclose information about policies it or "related" companies sold in Europe between 1920 and 1945, is preempted as interfering with the Federal Government's conduct of foreign relations.

Justices concurring: Souter, O'Connor, Kennedy, Breyer, and Rehnquist, C.J..
Justices dissenting: Ginsburg, Stevens, Scalia, and Thomas.

227. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

Suits brought in state court alleging that HMOs violated their duty under the Texas Health Care Liability Act "to exercise ordinary care when making health care treatment decisions" are preempted by ERISA § 502(a), which authorizes suit "to recover benefits due [a participant] under the terms of his plan."

228. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

California law allowing use of marijuana for medical purposes is preempted by the Controlled Substances Act's categorical prohibition of the manufacture and possession of marijuana.

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: O'Connor, Thomas, Rehnquist, C.J.

229. *Arkansas Department of Health and Human Services v. Ahlborn*, 126 S. Ct. 1752 (2006).

Arkansas statute that imposes lien on tort settlements in an amount equal to Medicaid costs, even when Medicaid costs exceed the portion of the settlement that represents medical costs, is preempted by the Federal Medicaid law insofar as the Arkansas statute applies to amounts other than medical costs.

230. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006).

Part III of the opinion found a Texas redistricting statute to violate the federal Voting Rights Act because it diluted the voting power of Latinos.

Justices concurring in Part III: Kennedy, Stevens, Souter, Ginsberg, Breyer.
Justice dissenting from Part III: Roberts, C.J., Alito, Scalia, Thomas.

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

	Overruling Case	*Overruled Case(s)*
221.	*Lapides v. Board of Regents, 535 U.S. 613 (2002).*	*Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945).*
222.	*Atkins v. Virginia, 536 U.S. 304 (2002).*	*Penry v. Lynaugh, 492 U.S. 302 (1989).*
223.	*Ring v. Arizona, 536 U.S. 584 (2002).*	*Walton v. Arizona, 497 U.S. 639 (1990).*
224.	*Lawrence v. Texas, 539 U.S. 558 (2003).*	*Bowers v. Hardwick, 478 U.S. 186 (1986).*
225.	*Crawford v. Washington, 541U.S. 36 (2004).*	*Ohio v. Roberts, 448 U.S. 56 (1980).*

TABLE OF CASES

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110TH CONGRESS, 2d Session | SENATE | DOCUMENT No. 110–17

THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

2008 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 26, 2008

PREPARED BY THE
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CONSTITUTION OF THE UNITED STATES

[P. 35, delete from penultimate line of fn.10:]

Connecticut, May 6, 1919;

[P. 35, add to end of fn.10:]

Although some sources (including the main volume of this book) state that Connecticut ratified the 18th Amendment on May 6, 1919 (after the date that three-fourths of the states had ratified it, and after the Acting Secretary of State, on January 28, 1919, had certified that the 18th Amendment had become valid; see 40 Stat. 1941-42 (1919)), the Journal of the Senate of the State of Connecticut, January Session, 1919, reports on May 6, 1919, at page 1191: "The committee of Conference, to whom was referred a resolution [Senate Joint Resolution No. 56] ratifying an Amendment to the Constitution concerning the Manufacture, Sale and Transportation of Intoxicating Liquors, reported that they had the same under consideration and cannot agree . . . ." The New York Times (Feb. 5, 1919) reported that, on Feb. 4, 1919, the Connecticut Senate voted against ratification by a vote of 20 to 14. A week later (Feb. 12, 1919), the New York Times reported that, on Feb. 11, 1919, the Connecticut House of Representatives voted in favor of ratification by a vote of 153 to 96.

[P. 36, n.11, add, in the appropriate places, the following states that ratified the 19th Amendment:]

Texas, June 28, 1919; Utah, October 2, 1919; Washington, March 22, 1920; Tennessee, August 18, 1920.

ARTICLE I

Section 2. House of Representatives

Clause 1. Congressional Districting

CONGRESSIONAL DISTRICTING

[P. 112, add to n.299:]

Vieth v. Jubelirer, 541 U.S. 267 (2004) (same); League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006). Additional discussion of this issue appears under Amendment 14, The New Equal Protection, Apportionment and Districting.

Section 7. Bills and Resolutions

Clause 3. Presentation of Resolutions

THE LEGISLATIVE PROCESS

Presentation of Resolutions

[Pp. 148-49, substitute for entire section:]

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[1] Why a separate clause was needed for this purpose has not been explained. 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.[2] If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. 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.

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[1] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 301-302, 304-305; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 889, at 335 (1833).

[2] 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).

Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity for law-making; that is, any "order, resolution, or vote" must be submitted if it is to have the force of law. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[3]

Although the ORV Clause excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments, the practice and understanding, beginning with the Bill of Rights, have been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. *Hollingsworth v. Virginia*,[4] in which 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, is usually cited for the proposition that presentation of constitutional amendment resolutions is not required.[5]

Section 8. Powers of Congress

Clause 1. Power to Tax and Spend

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

[P. 164, add to end of section:]

As with its other powers, Congress may enact legislation "necessary and proper" to effectuate its purposes in taxing and spending. In upholding a law making it a crime to bribe state and local officials who administer programs that receive federal funds, the Court declared that Congress has authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects under-

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[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* Tillman, *supra*), 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").

mined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."[6] Congress' failure to require proof of a direct connection between the bribery and the federal funds was permissible, the Court concluded, because "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value."[7]

– Conditional Grants-in-Aid

[P. 165, add to n.603:]

This is not to say that Congress may police the effectiveness of its spending only by means of attaching conditions to grants; Congress may also rely on criminal sanctions to penalize graft and corruption that may impede its purposes in spending programs. Sabri v. United States, 541 U.S. 600 (2004).

[P. 166, add to n.608:]

Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (because Individuals with Disabilities Education Act, which was enacted pursuant to the Spending Clause, does not furnish clear notice to states that prevailing parents may recover fees for services rendered by experts in IDEA actions, it does not authorize recovery of such fees).

Clause 3. Commerce Power

POWER TO REGULATE COMMERCE

Definition of Terms

– Necessary and Proper Clause

[P. 175, add to n.665:]

Gonzales v. Raich, 545 U.S. 1 (2005).

[P. 175, add to text after n.665:]

In other cases, the clause may not have been directly cited, but the dictates of Chief Justice Marshall have been used to justify more expansive applications of the commerce power.[8]

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[6] Sabri v. United States, 541 U.S. 600, 605 (2004).
[7] 541 U.S. at 606.
[8] See, *e.g.*, United States v. Darby, 312 U.S. 100, 115-16 (1941).

The Commerce Clause as a Source of National Police Power – Is There an Intrastate Barrier to Congress' Commerce Power.

[P. 212, substitute for second paragraph of section:]

Congress' commerce power has been characterized as having three, or sometimes four, very interrelated principles of decision, some old, some of recent vintage. The Court in 1995 described "three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[9]

[P. 217, add to n.883:]

Lopez did not "purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

[P. 218, add to text at end of section:]

Yet, the ultimate impact of these cases on Congress' power over commerce may be limited. In *Gonzales v. Raich*,[10] 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

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[9] United States v. Lopez, 514 U.S. 549, 558-59 (1995) (citations omitted). Illustrative of the power to legislate to protect the channels and instrumentalities of interstate commerce is *Pierce County v. Guillen*, 537 U.S. 129, 147 (2003), in which the Court upheld a prohibition on the use in state or federal court proceedings of highway data required to be collected by states on the basis 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."

[10] 545 U.S. 1 (2005).

Act (CSA).[11] 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 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.[12] 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,"[13] 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.

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.[14] 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.[15] Justice Scalia, in concurrence, suggests 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.[16]

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[11] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.
[12] 545 U.S. at 19.
[13] 545 U.S. at 25, quoting Webster's Third New International Dictionary 720 (1966).
[14] 545 U.S. at 18, 22.
[15] 545 U.S. at 23-25.
[16] 545 U.S. at 34-35 (Scalia, J., concurring).

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

– Congressional Authorization of Impermissible State Action

[Pp. 228-229, substitute for second paragraph of section:]

The Court applied the "original package" doctrine to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce."[17] Although holding that a state was entitled to prohibit the manufacture and sale of intoxicants within its boundaries,[18] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Ry. Co.*,[19] that, so long as Congress remained silent in the matter, a state lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the importation of liquor from a sister state. This holding was soon followed by another to the effect that, so long as Congress remained silent, a state had no power to prevent the sale in the original package of liquors introduced from another state.[20] Congress soon attempted to overcome the effect of the latter decision by enacting the Wilson Act,[21] which empowered states to regulate imported liquor on the same terms as domestically produced liquor, but the Court interpreted the law narrowly as subjecting imported liquor to local authority only after its resale.[22] Congress did not fully nullify the *Bowman* case until 1913, when it enacted the Webb-Kenyon Act,[23] which clearly authorized states to regulate direct shipments for personal use.

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[17] The Court had developed the "original package" doctrine to restrict application of a state tax on imports from a foreign country in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827). Although Chief Justice Marshall had indicated in dictum in *Brown* that the same rule would apply to imports from sister states, the Court had refused to follow that dictum in *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869).

[18] Mugler v. Kansas, 123 U.S. 623 (1887). Relying on the distinction between manufacture and commerce, the Court soon applied this ruling to authorize states to prohibit manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888).

[19] 125 U.S. 465 (1888).

[20] Leisy v. Hardin, 135 U.S. 100 (1890).

[21] Ch. 728, 26 Stat. 313 (1890), upheld in *In re* Rahrer, 140 U.S. 545 (1891).

[22] Rhodes v. Iowa, 170 U.S. 412 (1898).

[23] Ch. 90, 37 Stat. 699 (1913), sustained in Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). *See also* Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

National Prohibition, imposed by the Eighteenth Amendment, temporarily mooted these conflicts, but they reemerged with repeal of Prohibition by the Twenty-first Amendment. Section 2 of the Twenty-first Amendment prohibits "the importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." Initially the Court interpreted this language to authorize states to discriminate against imported liquor in favor of that produced in-state, but the modern Court has rejected this interpretation, holding instead that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[24]

[P. 231, add to n.954 after initial citation:]

See also Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws).

State Taxation and Regulation: The Modern Law

– Taxation

[Pp. 241, add to text after n.1012:]

The broad inquiry subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state – that is, whether the state has given anything for which it can ask return."[25]

[Pp. 242, add to n.1019:]

See also Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1508 (2008) (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").

[P. 246, add to n.1038:]

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.

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[24] Granholm v. Heald, 544 U.S. 460, 487 (2005). *See also* Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. The Beer Institute, 491 U.S. 324 (1989), and the analysis of section 2 under Discrimination Between Domestic and Imported Products.

[25] Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1505 (2008) (citations and internal quotation marks omitted).

– Regulation

[P. 249, add to n.1051:]

But cf. Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644 (2003) (state prescription drug program providing rebates to participating companies does not regulate prices of out-of-state transactions and does not favor in-state over out-of-state companies).

[P. 250, substitute for the sentence in the text that accompanies n.1056 and delete n.1056:]

In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[26] the Court declined to apply *Carbone* where haulers were required to bring waste to facilities owned and operated by a state-created public benefit corporation instead of to a *private* processing facility, as was the case in *Carbone*. 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. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer . . . ."[27]

In *Department of Revenue of Kentucky v. Davis*,[28] the Court considered a challenge to the long-standing state practice of issuing bonds for public purposes while exempting interest on the

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[26] 127 S. Ct. 1786 (2007).

[27] 127 S. Ct. at 1790. The Commerce Clause test referred to is the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). "Under the *Pike* test, we will uphold a nondiscriminatory statute . . . 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. at 1797 (quoting *Pike*, 397 U.S. at 142). The fact that a state is seeking to protect itself from economic or other difficulties, is not, by itself, sufficient to justify barriers to interstate commerce. Edwards v. California, 314 U.S. 160 (1941) (striking down California effort to bar "Okies" – persons fleeing the Great Plains dust bowl during the Depression). *Cf.* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (without tying it to any particular provision of Constitution, Court finds a protected right of interstate movement). The right of travel is now an aspect of equal protection jurisprudence.

[28] 128 S. Ct. 1801 (2008).

bonds from state taxation.[29] In *Davis*, a challenge was brought against Kentucky for such a tax exemption because it applied only to government bonds that Kentucky issued, and not to government bonds issued by other states. The Court, however, recognizing the long pedigree of such taxation schemes, applied the logic of United Haulers Ass'n, Inc., noting that the issuance of debt securities to pay for public projects is a "quintessentially public function," and that Kentucky's differential tax scheme should not be treated like one that discriminated between privately issued bonds. In what may portend a significant change in dormant commerce clause doctrine, however, the Court declined to evaluate the governmental benefits of Kentucky's tax scheme versus the economic burdens it imposed, holding that, at least in this instance, the "Judicial Branch is not institutionally suited to draw reliable conclusions."

Foreign Commerce and State Powers

[P. 256, substitute for last two sentences of first full paragraph:]

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.[30] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[31]

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[29] This exemption from state taxes is also generally made available to bonds issued by local governmental entities within a state.

[30] 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.

[31] *The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 139-49 (1993).

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

– The Standards Applied

[P. 262, add to n.1109:]

Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted).

[P. 265, add to n.1118:]

But cf. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (interpreting preemption language and saving clause in Federal Boat Safety Act as not precluding a state common law tort action).

[P. 266, add footnote at end of second line of text on the page:]

For a more recent decision applying express preemption language to a variety of state common law claims, see *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (interpreting FIFRA, the federal law governing pesticides).

COMMERCE WITH INDIAN TRIBES

[P. 278, add to n.1189:]

United States v. Lara, 541 U.S. 193, 200 (2004).

[P. 281, add to n.1206:]

Congress may also remove restrictions on tribal sovereignty. The Court has held that, absent authority from federal statute or treaty, tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court also held, in *Duro v. Reina*, 495 U.S. 676 (1990), that a tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reservation; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction. Congress, however, quickly enacted a statute recognizing inherent authority of tribal governments to exercise criminal jurisdiction over non-member Indians, and the Court upheld congressional authority to do so in *United States v. Lara*, 541 U.S. 193 (2004).

Clause 8. Copyrights and Patents

Scope of the Power

[P. 312, substitute for sentence ending with n.1421:]

These English statutes curtailed the royal prerogative in the creation and bestowal of monopolistic privileges, and the Copyright and Patent Clause similarly curtails congressional power with regard both to subject matter and to the purpose and duration of the rights granted.[32]

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[32] Graham v. John Deere Co., 383 U.S. 1, 5, 9 (1966).

[P. 313, convert final sentence of paragraph to a separate paragraph and place it after the following new paragraph to be added at end of section:]

The constitutional limits, however, do not prevent the Court from being highly deferential to congressional exercise of its power. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," the Court has said.[33] "Satisfied" in *Eldred v. Ashcroft* that the Copyright Term Extension Act did not violate the "limited times" prescription, the Court saw the only remaining question as whether the enactment was "a rational exercise of the legislative authority conferred by the Copyright Clause."[34] The Act, the Court concluded, "reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain." Moreover, the limitation on the duration of copyrights and patents is largely unenforceable. The protection period may extend well beyond the life of the author or inventor.[35] Congress may extend the duration of existing copyrights and patents, and in so doing may protect the rights of purchasers and assignees.[36]

Nature and Scope of the Right Secured

[P. 316, substitute for first paragraph of section:]

The leading case on the nature of the rights that Congress is authorized to "secure" under the Copyright and Patent Clause is *Wheaton v. Peters*.[37] Wheaton was the official reporter for the Supreme Court from 1816 to 1827, and Peters was his successor in that role. Wheaton charged Peters with having infringed his copyright in the twelve volumes of "Wheaton's Reports" by reprinting material from Wheaton's first volume in "a volume

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[33] Eldred v. Ashcroft, 537 U.S. 186, 205 (2003) (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984)).

[34] 537 U.S. at 204.

[35] The Court in *Eldred* upheld extension of the term of existing copyrights from life of the author plus 50 years to life of the author plus 70 years. Although the more general issue was not raised, the Court opined that this length of time, extendable by Congress, was "clearly" not a regime of "perpetual" copyrights. The only two dissenting Justices, Stevens and Breyer, challenged this assertion.

[36] Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).

[37] 33 U.S. (8 Pet.) 591 (1834).

called 'Condensed Reports of Cases in the Supreme Court of the United States'";[38] Wheaton based his claim on both common law and a 1790 act of Congress. On the statutory claim, the Court remanded to the trial court for a determination of whether Wheaton had complied with all the requirements of the act.[39] On the common law claim, the Court held for Peters, finding that, under common law, publication divests an author of copyright protection.[40] Wheaton argued that the Constitution should be held to protect his common law copyright, because "the word *secure* . . . clearly indicates an intention, not to originate a right, but to protect one already in existence."[41] The Court found, however, that "the word *secure,* as used in the constitution, could not mean the protection of an acknowledged legal right," but was used "in reference to a future right."[42] Thus, the exclusive right that the Constitution authorizes Congress to "secure" to authors and inventors owes its existence solely to acts of Congress that secure it, from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress sees fit to impose.[43]

[P. 317, add to n.1448:]

Cf. Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd, 545 U.S. 913 (2005) (active encouragement of infringement by distribution of software for sharing of copyrighted music and video files can constitute infringement).

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[38] 33 U.S. (8 Pet.) at 595.

[39] 33 U.S. (8 Pet.) at 667.

[40] 33 U.S. (8 Pet.) at 657-58. The Court noted that the same principle applies to "an individual who has invented a most useful and valuable machine. . . . [I]t has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly." Id.

[41] 33 U.S. (8 Pet.) at 661; Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[42] 33 U.S. (8 Pet.) at 661.

[43] 33 U.S. (8 Pet.) at 662; Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815). A major limitation of copyright law is that "fair use" of a copyrighted work is not an infringement. Fair use can involve such things as quotation for the use of criticism and reproduction for classroom purposes, but it may not supersede the use of the original work. *See* Harper & Row, Publishers v. Nation Enterprises, 471 U.S. 539 (1985) (an unauthorized 300- to 400-word excerpt, published as a news "scoop" of the authorized prepublication excerpt of former President Ford's memoirs and substantially affecting the potential market for the authorized version, was not a fair use within the meaning of § 107 of the Copyright Act, 17 U.S.C. § 107). For fair use in the context of a song parody, *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

Clauses 11, 12, 13, and 14. War; Military Establishment

CONSTITUTIONAL RIGHTS IN WARTIME

The Constitution at Home in Wartime

– Enemy Aliens

[P. 347, add to text at end of section:]

Because this use of military tribunals was sanctioned by Congress, the Court found it unnecessary to decide whether "the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity.'"[44]

Clause 18. Necessary and Proper Clause

Scope of Incidental Powers

[P. 357, substitute for first sentence of section:]

The Necessary and Proper Clause, sometimes called the "coefficient" or "elastic" clause, is an enlargement, not a constriction, of the powers expressly granted to Congress. Chief Justice Marshall's classic opinion in *McCulloch v. Maryland*[45] set the standard in words that reverberate to this day.

Operation of Clause

[P. 358, add to n.1734:]

Congress may also legislate to protect its spending power. Sabri v. United States, 541 U.S. 600 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

Courts and Judicial Proceedings

[P. 361, add to text after n.1759:]

may require the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court,[46]

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[44] Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006). *But see*, id. at 591 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need.").

[45] 17 U.S. (4 Wheat.) 316 (1819).

[46] Jinks v. Richland County, 538 U.S. 456 (2003).

Section 10 – Powers Denied to States

Clause 1. Making Treaties, Coining Money, *Ex Post Facto* Laws, Impairing Contracts

Ex Post Facto Laws

– Scope of the Provision

[P. 382, add to text after n.1912:]

Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe*[47] upholding application of Alaska's "Megan's Law" to sex offenders who were convicted before the law's enactment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords "considerable deference" to legislative intent; if the legislature's purpose was to enact a civil regulatory scheme, then the law can be ex post facto only if there is "the clearest proof" of punitive effect.[48] Here, the Court determined, the legislative intent was civil and non-punitive – to promote public safety by "protecting the public from sex offenders." The Court then identified several "useful guideposts" to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment."[49] The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.[50] Nor is the act "excessive" in

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[47] 538 U.S. 84 (2003).

[48] 538 U.S. at 92.

[49] The law's requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan's Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. 538 U.S. at 98.

[50] 538 U.S. at 102.

relation to its regulatory purpose.[51] Rather, "the means chosen are 'reasonable' in light of the [state's] non-punitive objective" of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.[52]

– Changes in Punishment

[P. 383, substitute for first sentence of section:]

Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of *ex post facto* laws, two of which related to punishment. One such category was laws that inflict punishment "where the party was not, by law, liable to any punishment"; the other was laws that inflict greater punishment than was authorized when the crime was committed.[53]

Illustrative of the first of these punishment categories is "a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecution." Such a law, the Court ruled in *Stogner v. California*,[54] is prohibited as *ex post facto*. Courts that had upheld extension of unexpired statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person "effective amnesty" as being "unfair" in the sense addressed by the *Ex Post Facto Clause*.

Illustrative of the second punishment category are statutes that changed an indeterminate sentence law to require a judge to impose the maximum sentence,[55] that required solitary confinement for prisoners previously sentenced to death,[56] and that

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[51] Excessiveness was alleged to stem both from the law's duration (15 years of notification by those convicted of less serious offenses; lifetime registration by serious offenders) and in terms of the widespread (Internet) distribution of the information.

[52] 538 U.S. at 105. Unlike involuntary civil commitment, where the "magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness. Id. at 103.

[53] 3 U.S. (3 Dall.) 386, 389 (1798).

[54] 539 U.S. 607, 632-33 (2003) (invalidating application of California's law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

[55] Lindsey v. Washington, 301 U.S. 397 (1937). But note the limitation of *Lindsey* in *Dobbert v. Florida*, 432 U.S. 282, 298-301 (1977).

[56] Holden v. Minnesota, 137 U.S. 483, 491 (1890).

allowed a warden to fix, within limits of one week, and keep secret the time of execution.[57]

[57] *In Re* Medley, 134 U.S. 160, 171 (1890).

ARTICLE II

Section 1. The President

Clause 1. Powers and Term of the President.

NATURE AND SCOPE OF PRESIDENTIAL POWER

Executive Power: Theory of the Presidential Office

– The *Youngstown* Case

[P. 442, add to n.40:]

And, in *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Kennedy, in a concurring opinion joined by three other Justices, id. at 638.

Section 2. Powers and Duties of the President

Clause 1. Commander-in-Chiefship; Presidential Advisers; Pardons

COMMANDER-IN-CHIEF

The Cold War and After: Presidential Power to Use Troops Overseas Without Congressional Authorization

– The Power of Congress to Control the President's Discretion

[P. 474, substitute for the beginning of the sentence in text (up to "unless Congress") that follows n.175:]

If the President introduces troops in the first of these three situations, then he must terminate the use of troops within 60 days after his report was submitted or was required to be submitted to Congress,

[P. 475, add to text after n.181:]

By contrast, President George W. Bush sought a resolution from Congress in 2002 to approve the eventual invasion of Iraq before seeking a UN Security Council resolution, all the while denying that express authorization from Congress, or for that matter, the UN Security Council, was necessary to renew hostilities in Iraq. Prior to adjourning for its midterm elections, Congress passed the Authorization for Use of Military Force against

Iraq Resolution of 2002,[1] which it styled as "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." On signing the measure, the President noted that he had sought "an additional resolution of support" from Congress, and expressed appreciation for receiving that support, but stated, "my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution."[2] In the Bush administration's view, the primary benefit of receiving authorization from Congress seems to have been the message of political unity it conveyed to the rest of the world rather than the fulfillment of any constitutional requirements.

Martial Law and Constitutional Limitations

– Articles of War: The Nazi Saboteurs

[P. 483, add to text at end of section:]

In any event, the Court rejected the jurisdictional challenge by one of the saboteurs on the basis of his claim to U.S. citizenship, finding U.S. citizenship wholly irrelevant to the determination of whether a wartime captive is an "enemy belligerent" within the meaning of the law of war.[3]

[P. 483, add new section after "Articles of War: World War II Crimes":]

– Articles of War: Response to the Attacks of September 11, 2001

In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the Authorization for Use of

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[1] P.L. 107-243; 116 Stat. 1498 (2002). The House approved the resolution by a vote of 296-133. The Senate passed the House version of H.J. Res. 114 by a vote of 77-23.

[2] *See* President's Statement on Signing H.J. Res. 114, Oct. 16, 2002, available at [http://usinfo.state.gov/dhr/Archive/2003/Oct/09-906028.html].

[3] *Ex parte* Quirin, 317 U.S. 1, 37-38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."). *See also* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.")

Military Force,[4] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a military action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statutory grounds.[5] However, the Court did find that the government may not detain the petitioner indefinitely for purposes of interrogation, without giving him the opportunity to offer evidence that he is not an enemy combatant.[6]

In *Rasul v. Bush*,[7] the Court rejected an Executive Branch argument that foreign prisoners being held at Guantanamo Bay, Cuba were outside of federal court jurisdiction. The Court distinguished earlier case law arising during World War II that denied *habeas corpus* petitions from German citizens who had been captured and tried overseas by United States military tribunals.[8] In *Rasul*, the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[9] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised

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[4] Pub. L. 107-40, 115 Stat. 224 (2001).

[5] Hamdi v. Rumsfeld, 542 U.S. 507 (2004). There was no opinion of the Court. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II. Justice Souter, joined by Justice Ginsburg, rejected the argument that the Congress had authorized such detentions, while Justice Scalia, joined with Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*.

[6] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney. 542 U.S. at 533, 539.

[7] 542 U.S. 466 (2004).

[8] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[9] The petitioners were Australians and Kuwaitis.

exclusive jurisdiction and control.[10] In addition, the Court found that statutory grounds existed for the extension of *habeas corpus* to these prisoners.[11]

In response to *Rasul*, Congress amended the *habeas* statute to eliminate all federal *habeas* jurisdiction over detainees, whether its basis was statutory or constitutional.[12] This amendment was challenged in *Boumediene v. Bush*[13] as a violation of the Suspension Clause.[14] Although the historical record did not contain significant common-law applications of the writ to foreign nationals who were apprehended and detained overseas, the Court did not find this conclusive in evaluating whether *habeas* applied in this case.[15] Emphasizing a "functional" approach to the issue,[16] the Court considered (1) the citizenship and status of the detainee and the adequacy of the process through which the

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[10] Rasul v. Bush, 542 U.S. at 467.

[11] The Court found that 28 U.S.C. § 2241, which had previously been construed to require the presence of a petitioner in a district court's jurisdiction, was now satisfied by the presence of a jailor-custodian. See Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's *habeas* jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld was not sufficient to satisfy the presence requirement under 28 U.S.C. § 2241). In *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the Court held that the federal *habeas* statute, 28 U.S.C. § 2241, applied to American citizens held by the Multinational Force-Iraq, an international coalition force operating in Iraq and composed of 26 different nations, including the United States. The Court concluded that the *habeas* statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition.

[12] Detainee Treatment Act of 2005, P.L. 109-148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay"). After the Court decided, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that this language of the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, the language was amended by the Military Commissions Act of 2006, P.L. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[13] 128 S. Ct. 2229 (2008).

[14] U.S. Const. Art. I, § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Boumediene*, the government argued only that the Suspension Clause did not apply to the detainees; it did not argue that Congress had acted to suspend *habeas*.

[15] "[G]iven the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on this point." 128 S. Ct. at 2251.

[16] 128 S. Ct. at 2258. "[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism." Id.

status determination was made; (2) the nature of the sites where apprehension and detention took place; and (3) any practical obstacles inherent in resolving the prisoner's entitlement to the writ. As in *Rasul*, the Court distinguished previous case law, noting that the instant detainees disputed their enemy status, that their ability to dispute their status had been limited, that they were held in a location (Guantanamo Bay, Cuba) under the *de facto* jurisdiction of the United States, and that complying with the demands of habeas petitions would not interfere with the government's military mission. Thus, the Court concluded that the Suspension Clause was in full effect regarding these detainees.

Clause 2. Treaties and Appointment of Officers

THE TREATY-MAKING POWER

Treaties as Law of the Land

[P. 494, n.271, add after "(1884)," before period in initial citation:]

(quoted with approval in Medellin v. Texas, 128 S. Ct. 1346, 1357, 1358-59 (2008))

[P. 494, add to text after n.271:]

The meaning of treaties, as of statutes, is determined by the courts. "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."[17] Yet, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement

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[17] Sanchez-Llamas v. Oregon, 548 U.S. 331, 353-54 (2006), quoting Marbury v. Madison, 5 U.S. (1 Cr.) 137, 177 (1803). In *Sanchez-Llamas*, two foreign nationals were arrested in the United States, and, in violation of Article 36 of the Vienna Convention on Consular Relations, their nations' consuls were not notified that they had been detained by authorities in a foreign country (the U.S.). The foreign nationals were convicted in Oregon and Virginia state courts, respectively, and cited the violations of Article 36 in challenging their convictions. The Court did not decide whether Article 36 grants rights that may be invoked by individuals in a judicial proceeding (four justices would have held that it did grant such rights). The reason that the Court did not decide whether Article 36 grants rights to defendants was that it held, by a 6-to-3 vote, that, even if Article 36 does grant rights, the defendants in the two cases before it were not entitled to relief on their claims. It found, specifically, that "suppression of evidence is [not] a proper remedy for a violation of Article 36," and that "an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." Id. at 342.

is given great weight."[18] Decisions of the International Court of Justice (ICJ) interpreting treaties, however, have "*no binding force* except between the parties and in respect of that particular case."[19] ICJ decisions "are therefore entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[20]

Even when an ICJ decision has binding force as between the governments of two nations, it is not necessarily enforceable by the individuals affected. If, for example, the ICJ finds that the United States violated a particular defendant's rights under international law, and such a decision "constitutes an *international* law obligation on the part of the United States," it does not necessarily "constitute binding federal law enforceable in United States courts. . . . [W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms."[21] A memorandum from the President of the United States directing that the United States would "discharge its international obligations" under an ICJ decision interpreting a non-self-executing treaty, "by having State courts give effect to the decision," is not sufficient to make the decision binding on state courts, unless the President's action is authorized by Congress.[22]

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[18] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[19] Sanchez-Llamas v. Oregon, 548 U.S. at 354, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 933 (1945) (emphasis added by the Court).

[20] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

[21] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008) (emphasis in the original, internal quotation marks omitted). As in the case of the foreign nationals in *Sanchez-Llamas*, Medellin's nation's consul had not been notified that he had been detained in the United States. Unlike the foreign nationals in *Sanchez-Llamas*, however, Medellin was named in an ICJ decision that found a violation of Article 36 of the Vienna Convention.

[22] Medellin v. Texas, 128 S. Ct. 1346, 1353 (2008). "[T]he non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts." Id. at 1371. The majority opinion in *Medellin* was written by Chief Justice Roberts. Justice Stevens, concurring, noted that, even though the ICJ decision "is not 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2," it constitutes an international law obligation not only on the part of the United States, but on the part of the State of Texas. Id. at 1374. This, of course, does not make it enforceable against Texas, but Justice Stevens found that "[t]he cost to Texas of complying with [the ICJ decision] would be minimal." Id. at 1375.

(continued...)

– When is a Treaty Self-Executing

[P. 501, at the end of the first sentence in the section, change period to a comma and insert:]

in which case they are enforceable only after the enactment of "legislation to carry them into effect."[23]

[P. 501, in the second sentence in the section, change "citizen" to "litigant"]

[P. 501, three lines from the bottom of the page, after "provision.", substitute for the rest of the paragraph and the first paragraph that begins on p. 502:]

A treaty will not be self-executing, however, "when the terms of the [treaty] stipulation import a contract – when either of the parties engages to perform a particular act. . . ." When this is the case, "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."[24]

Sometimes the nature of a treaty will determine whether it requires legislative execution or "conveys an intention that it be 'self-executing' and is ratified on these terms."[25] One authority states that whether a treaty is self-executing "depends upon whether the obligation is imposed on private individuals or on public authorities. . . ."

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[22] (...continued)

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, writing that "the consent of the United States to the ICJ's jurisdiction[ ] bind[s] the courts no less than would 'an act of the [federal] legislature.'" Id. at 1376. The dissent believed that, to find treaties non-self-executing "can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones." Id. at 1381-82. Moreover, Justice Breyer wrote, the Court's decision "place[s] the fate of an international promise made by the United States in the hands of a single State. . . . And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause." Id. at 1384. On August 5, 2008, the U.S. Supreme Court denied Medellin a stay of execution, and Texas executed him on the same day.

[23] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[24] Foster v. Neilson, 27 U.S. (2 Pet.) at 314.

[25] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Ingartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The Domestic Obligation of Executive Agreements

[P. 527, substitute for first sentence of first full paragraph on the page:]

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[26] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying on the Constitution's vesting of foreign relations power in the national government.

[P. 529, substitute for final paragraph of section:]

Belmont and *Pink* were reinforced in *American Insurance Association v. Garamendi*.[27] In holding that California's Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government's conduct of foreign relations, as expressed in executive agreements, the Court reiterated that "valid executive agreements are fit to preempt state law, just as treaties are."[28] The preemptive reach of executive agreements stems from "the Constitution's allocation of the foreign relations power to the National Government."[29] Because there was a "clear conflict" between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being "well within the Executive's responsibility for foreign affairs"), the state law was preempted.[30]

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[26] *E.g.*, United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. WILLOUGHBY, *supra*, at 589. The State Department held the same view. G. HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 426 (1944).

[27] 539 U.S. 396 (2003). The Court's opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981) was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

[28] 539 U.S. at 416.

[29] 539 U.S. at 413.

[30] 539 U.S. at 420.

[P. 529, add new section after "The Domestic Obligation of Executive Agreements":]

State Laws Affecting Foreign Relations — Dormant Federal Power and Preemption

If the foreign relations power is truly an exclusive federal power, with no role for the states, a logical consequence, the Supreme Court has held, is that some state laws impinging on foreign relations are invalid even in the absence of a relevant federal policy. There is, in effect, a "dormant" foreign relations power. The scope of this power remains undefined, however, and its constitutional basis is debated by scholars.

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities."[31] A hundred years later the Court remained emphatic about federal exclusivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts."[32]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation's foreign policy interests in the absence of an established

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[31] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

[32] United States v. Pink, 315 U.S. 203, 233-34 (1942). Chief Justice Stone and Justice Roberts dissented.

federal policy. In *Zschernig v. Miller*,[33] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confiscation."[34] Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state probate courts in denying payments to persons from Communist countries.[35] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government."[36]

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign governments or to curtail trade with out-of-favor countries.[37] In 1999, the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding

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[33] 389 U.S. 429 (1968).

[34] In *Clark v. Allen*, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

[35] 389 U.S. at 440.

[36] 389 U.S. at 440, 441.

[37] *See, e.g.*, Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Carlos Manuel Vazquez, *Whither* Zschernig? 46 VILL. L. REV. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 149-69 (2d ed. 1996).

applying *Zschernig*.[38] Similarly, in 2003 the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[39]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[40] and grants of power.[41] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court in *Garamendi*, field preemption may be appropriate if a state legislates "simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional responsibility, "but in a way that affects foreign relations."[42] We must await further litigation to see whether the Court employs this distinction.[43]

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[38] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (1999). For the appeals court's application of *Zschernig*, see *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir. 1999).

[39] American Insurance Association v. Garamendi, 539 U.S. at 419 & n.11 (2003).

[40] It is contended, for example, that Article I, § 10's specific prohibitions against states' engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, *supra*, 75 NOTRE DAME L. REV. 341.

[41] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.

[42] 539 U.S. at 419 n.11.

[43] Justice Ginsburg's dissent in *Garamendi*, joined by the other three dissenters, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting HENKIN, *supra* n.34, at 164).

(continued...)

THE EXECUTIVE ESTABLISHMENT

Appointments and Congressional Regulation of Offices – Congressional Regulation of Conduct in Office

[P. 540, substitute for final paragraph of section:]

Until 1993, § 9(a) of the Hatch Act[44] prohibited any person in the executive branch, or any executive branch department or agency, except the President and the Vice President and certain "policy determining" officers, to "take an active part in political management or political campaigns," although employees had been permitted to "express their opinions on all political subjects and candidates." In *United Public Workers v. Mitchell*,[45] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments. The Hatch Act Reform Amendments of 1993, however, substantially liberalized the rules for political activities during off-duty hours for most executive branch employees, subject to certain limitations on off-duty hours activities and express prohibitions against on-the-job partisan political activities.[46]

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[43] (...continued)
But Justice Ginsburg also voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, *supra* n.34, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[44] 53 Stat. 1147, 1148 (1939), then 5 U.S.C. § 7324(a). The 1940 law, § 12(a), 54 Stat. 767-768, applied the same broad ban to employees of federally funded state and local agencies, but this provision was amended in 1974 to restrict state and local government employees in only one respect: running for public office in partisan elections. Act of Oct. 15, 1974, P. L. 93-443, § 401(a), 88 Stat. 1290, 5 U.S.C. § 1502.

[45] 330 U.S. 75 (1947). *See also* Civil Serv. Corp. v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court's expanding free speech jurisprudence, but the act was again sustained. A "little Hatch Act" of a state, applying to its employees, was sustained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[46] P. L. 103-94, § 2(a), 107 Stat. 1001 (1993), 5 U.S.C. §§ 7321-7326. Executive branch employees (except those appointed by the President, by and with the advice and consent of the Senate) who are listed in § 7323(b)(2), which generally include those employed by agencies involved in law enforcement or national security, remain under restrictions similar to the those in the old Hatch Act on taking an active part in political management or political campaigns.

The Presidential Aegis: Demands for Papers

– Private Access to Government Information

[P. 556, add to text at end of section:]

Reynolds dealt with an evidentiary privilege. There are other circumstances, however, in which cases must be "dismissed on the pleadings without ever reaching the question of evidence."[47] In holding that federal courts should refuse to entertain a breach of contract action seeking enforcement of an agreement to compensate someone who performed espionage services during the Civil War, the Court in *Totten v. United States* declared that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[48]

– Prosecutorial and Grand Jury Access to Presidential Documents

[P. 559, add to text at end of section:]

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.[49] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon*,[50] and, in instructing the appeals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[51]

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[47] *Reynolds*, 345 U.S. at 11, n.26.

[48] 92 U.S. 105, 107 (1875). *See also* Tenet v. Doe, 544 U.S. 1, 9 (2005) (reiterating and applying *Totten*'s "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden"). The Court in *Tenet* distinguished *Webster v. Doe* on the basis of "an obvious difference . . . between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy." Id. at 10.

[49] Cheney v. United States District Court, 542 U.S. 367 (2004).

[50] Although the information sought in *Nixon* was important to "the constitutional need for production of relevant evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 542 U.S. at 383, 384.

[51] The Court recognized "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 542 U.S. at 382. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

Power Denied by Congress

[P. 599, add to n.718:]

In *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006), Justice Kennedy, in a concurring opinion joined by three other Justices, endorsed "the three-part scheme used by Justice Jackson" as "[t]he proper framework for assessing whether Executive actions are authorized." The Court in this case found "that the military commission convened [by the President, in Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice]." Id. at 567. Thus, as Justice Kennedy noted, "the President has acted in a field with a history of congressional participation and regulation." Id. at 638.

ARTICLE III

Section 1. Judicial Power, Courts, Judges

JUDICIAL POWER

Finality of Judgment as an Attribute of Judicial Power – Award of Execution

[P. 654, add to n.160:]

Wallace and *Haworth* were cited with approval in *Medimmune, Inc. v. Genetech, Inc.*, 127 S. Ct. 764, 771 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 767).

[P. 654, add new section after "Chief Justice Taney's formulation":]

Judicial Immunity from Suit

Under common law – the Supreme Court has not elevated judicial immunity from suit to a constitutional principle – judges "are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. . . . But responsible they are not to private parties in civil actions for the judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly."[1] Three years later, the Court qualified this exception to judges' immunity: the phrase beginning "unless, perhaps," the Court wrote, was "not necessary to a correct statement of the law, and . . . judges . . . are not liable to civil actions for their judicial acts, even when such acts are in excess

[1] Randall v. Brigham, 74 U.S. 523, 537 (1869). Judicial immunity "is a general principle of the highest importance to the proper administration of justice . . . . Liability . . . would destroy that independence without which no judiciary can be either respectable or useful. . . . Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." Bradley v. Fisher, 80 U.S. 335, 347 (1872).

of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter," with judges subject to liability only in the latter instance.[2]

In *Stump v. Sparkman*, the Court upheld the immunity of a judge who approved a petition from the mother of a 15-year-old girl to have the girl sterilized without her knowledge (she was told that she was to have her appendix removed).[3] In a 5-to-3 opinion, the Court found that there was not the "clear absence of all jurisdiction" that is required to hold a judge civilly liable. The judge had jurisdiction "in all cases at law and in equity whatsoever," except where exclusive jurisdiction is "conferred by law upon some other court, board, or officer," and no statute or case law prohibited the judge from considering a petition for sterilization.[4] The Court also rejected the argument that the judge's approving the petition had not constituted a "judicial act." The Court found "that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity. . . . Judge Stump performed the type of act normally performed only by judges and . . . he did so in his capacity as a [judge]."[5]

Although judges are generally immune from suits for damages, the Court has held that a judge may be enjoined from enforcing a court rule, such as a restriction on lawyer advertising

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[2] Bradley v. Fisher, 80 U.S. 335, 351 (1872). The Court offered a hypothetical example of the distinction. A judge of a probate court who held a criminal trial would act in clear absence of all jurisdiction over the subject matter, whereas a judge of a criminal court who held a criminal trial for an offense that was not illegal would act merely in excess of his jurisdiction. Id. at 352.

[3] 435 U.S. 349 (1978).

[4] 435 U.S. at 357, 358. The defendant was an Indiana state court judge, but the suit was in federal court under 42 U.S.C. § 1983. The Court noted that it had held in *Pierson v. Ray*, 386 U.S. 547 (1967), that there was no indication that, in enacting this statute, Congress had intended to abolish the principle of judicial immunity established in *Bradley v. Fisher*, *supra*.

[5] 435 U.S. at 362. Justice Stewart's dissent, joined by Justices Marshall and Powell, concluded that what Judge Stump did "was beyond the pale of anything that could sensibly be called a judicial act." Id. at 365. Indiana law, Justice Stewart wrote, provided for administrative proceedings for the sterilization of certain people who were institutionalized (which the girl in this case was not), and what Judge Stump did "was in no way an act 'normally performed by a judge.'" Id. at 367.

that violates the First Amendment.[6] Similarly, a state court magistrate may be enjoined from "imposing bail on persons arrested for nonjailable offenses under Virginia law and . . . incarcerating those persons if they could not meet the bail. . . ."[7] But what if the prevailing party, as it did in these two cases, seeks an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976?[8] The Court found that "Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards."[9] In fact, "Congress' intent could hardly be more plain. Judicial immunity is no bar to the award of attorney's fees under 42 U.S.C. § 1988."[10]

ANCILLARY POWERS OF FEDERAL COURTS

Power to Issue Writs: The Act of 1789

– *Habeas Corpus*: Congressional and Judicial Control

[P. 669, substitute for first sentence of section:]

The writ of *habeas corpus* [retain n.241] has a special status because its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2. The writ also has a venerable common law tradition, long antedating its recognition in the Judiciary Act of 1789,[11] as a means "to relieve detention by executive authorities without judicial trial."[12] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts.

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[6] Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980).

[7] Pulliam v. Allen, 466 U.S. 522, 524-25 (1984).

[8] 42 U.S.C. § 1988(b). Under this statute, "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself," and, therefore, the state must "bear the burden of the counsel fees award." Hutto v. Finney, 437 U.S. 678, 700 (1978).

[9] *Consumers Union*, 446 U.S. at 738-39. This is not the case, however, when judges are sued in their legislative capacity for having issued a rule. Id. at 734.

[10] *Pulliam*, 466 U.S. at 544. In 1996, Public Law 104-317, § 309, amended § 1988(b) to preclude the award of attorneys' fees in a suit against a judicial officer unless the officer's action "was clearly in excess of such officer's jurisdiction."

[11] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.

[12] INS v. St. Cyr, 533 U.S. 289, 301 (2001), as quoted in Rasul v. Bush, 542 U.S. 466, 474 (2004).

[P. 671, add to text at the end of the section:]

For practical purposes, the issue appears to have been resolved by *Boumediene v. Bush*,[13] where the Court held that Congress' attempt to eliminate all federal *habeas* jurisdiction over "enemy combatant" detainees held at Guantanamo Bay[14] 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.[15] 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.[16]

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 or (CSRTs) – rather than proceedings before a court of law.[17] The Court also expressed concern that the detentions had, in some cases, lasted as long as six years without significant

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[13] 128 S. Ct. 2229 (2008).

[14] 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, P.L. 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, P.L. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[15] 128 S. Ct. at 2251.

[16] 128 S. Ct. at 2258, 2259.

[17] Under the Detainee Treatment Act, P.L. 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).

judicial oversight.[18] The Court further noted the limitations at the CSRT stage on a detainee's ability to find and present evi dence 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 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.[19]

– *Habeas Corpus*: The Process of the Writ

[P. 671, add to text after n.254:]

The writ acts upon the custodian, not the prisoner, so the issue under the jurisdictional statute is whether the custodian is within the district court's jurisdiction.[20]

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[18] 128 S. Ct. at 2263, 2275.

[19] 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.

[20] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973) (issue is whether "the custodian can be reached by service of process"). *See also* Rasul v. Bush, 542 U.S. 466 (2004) (federal district court for District of Columbia had jurisdiction of *habeas* petitions from prisoners held at U.S. Naval base at Guantanamo Bay, Cuba); Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal district court in New York lacks jurisdiction over prisoner being held in a naval brig in Charleston, South Carolina; the commander of the brig, not the Secretary of Defense, is the immediate custodian and proper respondent).

Section 2. Judicial Power and Jurisdiction

Clause 1. Cases and Controversies; Grants of Jurisdiction

JUDICIAL POWER AND JURISDICTION — CASES AND CONTROVERSIES

Substantial Interest: Standing

– Citizen Suits [change this heading to "Generalized or Widespread Injuries"]

[P. 688, add to n.346, before the period at the end of penultimate sentence:]

; Lance v. Coffman, 127 S. Ct. 1194, 1198 (2007) (per curiam)

[P. 688, add to text after n.346:]

Notwithstanding that a generalized injury that all citizens share is insufficient to confer standing, where a plaintiff alleges that the defendant's action injures him in "a concrete and personal way," "it does not matter how many [other] persons have [also] been injured. . . . Where a harm is concrete, though widely shared, the Court has found injury in fact."[21]

– Taxpayer Suits

[P. 688, add to n.348:]

In *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2559 (2007), the Court added that, "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."

[P. 690, add to n.352:]

The Court again took this approach in *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553, 2569 (2007), finding that "*Flast* itself gave too little weight to [separation-of-powers] concerns."

[P. 690, substitute for the sentence in the text after n.352:]

The Court also refused to create an exception for Commerce

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[21] Massachusetts v. Environmental Protection Agency, 127 S. Ct. 1438, 1453, 1456 (2007) (internal quotation marks omitted). In this case, "EPA maintain[ed] that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle." The Court, however, found that "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'" Id. at 1453, 1455.

Clause violations to the general prohibition on taxpayer standing.[22]

Most recently, a Court plurality held that, even in Establishment Clause cases, there is no taxpayer standing where the expenditure of funds that is challenged was not specifically authorized by Congress, but came from general executive branch appropriations.[23] Where expenditures "were not expressly authorized or mandated by any specific congressional enactment," a lawsuit challenging them "is not directed at an exercise of congressional power and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'"[24]

[P. 690, add to n.353:]

In *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349 (2006), the Court held that a plaintiff's status as a *municipal* taxpayer does not give him standing to challenge a *state* tax credit.

[P. 690, substitute for final sentence of section:]

The taxpayer's action in *Doremus*, the Court wrote, "is not a direct dollars-and-cents injury but is a religious difference."[25] This rationale was similar to the spending program-regulatory program distinction of *Flast*. But, even a dollar-and-cents injury resulting from a state spending program will apparently not constitute a *direct* dollars-and-cents injury. The Court in

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[22] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347-49 (2006) (standing denied to taxpayer claim that state tax credit given to vehicle manufacturer violated the Commerce Clause).

[23] Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553, 2559 (2007). This decision does not affect Establishment Clause cases in which the plaintiff can allege a personal injury. A plaintiff who challenges a government display of a religious object, for example, need not sue as a taxpayer but may have standing "by alleging that he has undertaken a 'special burden' or has altered his behavior to avoid the object that gives him offense. . . . [I]t is enough for standing purposes that a plaintiff allege that he 'must come into direct and unwelcome contact with the religious display to participate fully as [a] citizen[ ] . . . and to fulfill . . . legal obligations.'" Books v. Elkhart County, 410 F.3d 857, 861 (7th Cir. 2005). In *Van Orden v. Perry*, 545 U.S. 677. 682 (2005), the Court, without mentioning standing, noted that the plaintiff "has encountered the Ten Commandments monument during his frequent visits to the [Texas State] Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building."

[24] 127 S. Ct. at 2568 (citations omitted). Justices Scalia and Thomas concurred in the judgment but would have overruled *Flast*. Justice Souter, joined by three other justices, dissented because he saw no logic in the distinction the plurality drew, as the plurality did not and could not have suggested that the taxpayers in *Hein* "have any less stake in the outcome than the taxpayers in *Flast*." Id. at 2584.

[25] 342 U.S. at 434.

Doremus wrote that a taxpayer challenging either a federal or a state statute "must be able to show not only that the statute is invalid but that he has sustained some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[26]

– Constitutional Standards: Injury in Fact, Causation, and Redressability

[P. 692, add to text after n.367:]

Citing this holding, and historical precedent, the Court upheld the standing of an assignee who had promised to remit the proceeds of the litigation to the assignor.[27] The Court noted that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians at litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; and so forth."[28]

[P. 693, add to n.370:]

But see, *Davis v. Federal Election Commission*, 128 S. Ct. 2759, 2769 (2008), in which the Court held that "the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." In this case, a statute provided that, if a political candidate declares that he will "self-finance," then his opponent, if he qualifies, may receive individual contributions beyond the normal limit. A self-financing candidate challenged the statute after he had declared himself to be self-financing, but before his opponent had qualified for the higher contribution limit; the Court found that the self-financing candidate faced "a realistic and impending threat of direct injury" adequate for standing.

– Standing to Assert the Constitutional Rights of Others

[P. 698, add to n.396:]

Caplin & Drysdale was distinguished in *Kowalski v. Tesmer*, 543 U.S. 123, 131 (2004), the Court finding that attorneys seeking to represent hypothetical indigent clients in challenging procedures for appointing appellate counsel had "no relationship at all" with such potential clients, let alone a "close" relationship.

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[26] 342 U.S. at 434, quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); quoted with approval in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006).

[27] Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S. Ct. 2531 (2008) (payphone operators had assigned claims against long-distance carriers to "aggregators" to sue on their behalf). Chief Justice Roberts, in a dissent joined by Justices Scalia, Thomas, and Alito, stated that the aggregators lacked standing because they "have nothing to gain from their lawsuit." Id. at 2549.

[28] 128 S. Ct. at 2543.

The Requirement of a Real Interest

– Declaratory Judgments

[P. 709, add to n.456:]

Wallace was cited with approval in *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 767).

[P. 709, add before the period at the end of n.458:]

(cited with approval in *Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007))

– Retroactivity Versus Prospectivity

[P. 722, add before the period at the end of n.530:]

(cited with approval in *Whorton v. Bockting*, 127 S. Ct. 1173, 1180 (2007))

[P. 722, after the citation to *Penry* in n.533, change the period to a semicolon and add:]

Whorton v. Bockting, 127 S. Ct. 1173, 1181 (2007).

[P. 722, in line 12 of the text, after the period following "will not be applied," add a new footnote:]

The approach in state collateral review proceedings, however, may be different. The Court has indicated that the general rule regarding denial of retroactive application of "new rules" in federal collateral proceeding was principally based on an interpretation of federal statutory law. State collateral review of cases brought under state law may be more generous to the defendant. Danforth v. Minnesota, 128 S. Ct. 1029 (2008).

[P. 722, in line 12 of the text, after the period following "will not be applied," add to text:]

"A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[29]

[P. 722, add to n.534:]

For recent application of the principles, see *Schriro v. Summerlin*, 542 U.S. 348 (2004) (requirement that aggravating factors justifying death penalty be found by the jury was a new procedural rule that does not apply retroactively).

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[29] Whorton v. Bockting, 127 S. Ct. 1173, 1180 (2007).

Political Questions

– The Doctrine Reappears

[P. 734, add to n.605:]

But see Vieth v. Jubelirer, 541 U.S. 267 (2004) (no workable standard has been found for measuring burdens on representational rights imposed by political gerrymandering).

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

– Federal Questions Resulting from Special Jurisdictional Grants

[P. 757, second paragraph of n.722, substitute for "hesitating" on line 4 through "house)" on line 8:]

refusing to apply *Bivens* when "any alternative, existing process for protecting the interest" that is threatened exists, or when "any special factors counselling hesitation" are present. Wilkie v. Robbins, 127 S. Ct. 2588, 2598 (2007). *See also* Chappell v. Wallace, 462 U.S. 296, 298 (1983); Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicki, 487 U.S. 412 (1988); FDIC v. Meyer, 510 U.S. 471 (1994); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001).

Clause 2. Original and Appellate Jurisdiction

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory Reconsidered

– Express Constitutional Restrictions on Congress

[P. 830, delete from "While some" in line 13 of the section, through the end of the section, and substitute the following, which corrects the statement in the main volume that the Portal-to-Portal Act was disapproved by the Court of Appeals:]

The United States Court of Appeals for the Second Circuit sustained the Act.[30] The court noted that the withdrawal of jurisdiction would be ineffective if the extinguishment of the

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[30] Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948). *See also* Seese v. Bethlehem Steel Co., 168 F.2d 58, 65 (4th Cir. 1948). For later dicta, *see* Johnson v. Robison, 415 U.S. 361, 366-67 (1974); Weinberger v. Salfi, 422 U.S. 749, 761-62 (1975); Territory of Guam v. Olsen, 431 U.S. 195, 201-02, 204 (1977); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988); *but see* id. at 611-15 (Justice Scalia dissenting). Note the relevance of *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

claims as a substantive matter were invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[31] The Court, however, found that the Portal-to-Portal Act "did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals . . . any rights . . . which rested upon private contracts they had made. Nor is the Portal-to-Portal Act a violation of Article III of the Constitution or an encroachment upon the separate power of the judiciary."[32]

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

– Res Judicata

[P. 842, add to text at end of section:]

Closely related is the *Rooker-Feldman* doctrine, holding that federal subject-matter jurisdiction of federal district courts does not extend to review of state court judgments.[33] The Supreme Court, not federal district courts, has such appellate jurisdiction. The doctrine thus prevents losers in state court from obtaining district court review, but "does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions."[34]

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[31] 169 F.2d at 257.

[32] 169 F.2d at 261-62.

[33] The doctrine derives its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[34] Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) (*Rooker-Feldman* has no application when federal court proceedings have been initiated prior to state court proceedings; preclusion law governs in that situation.)

Conflicts of Jurisdiction: Federal Court Interference with State Courts

– *Habeas Corpus*: Scope of the Writ

[P. 855, add to the end of n.1296:]

This sentence was quoted again in *Whorton v. Bockting*, 127 S. Ct. 1173, 1181 (2007).

[P. 858, add to n.1312:]

In *House v. Bell*, 547 U.S. 518, 554-55 (2006), the Court declined to resolve the issue that in *Herrera* it had assumed without deciding: that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *See* Amendment 8, Limitations on *Habeas Corpus* Review of Capital Sentences.

ARTICLE IV

Section 1. Full Faith and Credit

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

[P. 896, substitute for entire section:]

Although the language of section one suggests that the same respect should be accorded to "public acts" that is accorded to "judicial proceedings" ("full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"), and the Court has occasionally relied on this parity of treatment,[1] the Court has usually differentiated "the credit owed to laws (legislative measures and common law) and to judgments."[2] The current understanding is that the Full Faith and Credit Clause is "exacting" with respect to final judgments of courts, but "is less demanding with respect to choice of laws."[3]

The Court has explained that where a statute or policy of the forum state is set up as a defense to a suit brought under the statute of another state or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each state to subordinate their own statutes to those of others, but by

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[1] *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (statutes); and Smithsonian Institution v. St. John, 214 U.S. 19 (1909) (state constitutional provision).

[2] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998), quoted in Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003). Justice Nelson in the *Dred Scott* case drew an analogy to international law, concluding that states, as well as nations, judge for themselves the rules governing property and persons within their territories. Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857). "One State cannot exempt property from taxation in another," the Court concluded in *Bonaparte v. Tax Court*, 104 U.S. 592 (1882), holding that no provision of the Constitution, including the Full Faith and Credit Clause, enabled a law exempting from taxation certain debts of the enacting state to prevent another state (the state in which the creditor resided) from taxing the debts. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589-96 (1839); Kryger v. Wilson, 242 U.S. 171 (1916); and Bond v. Hume, 243 U.S. 15 (1917).

[3] Baker v. General Motors Corp., 522 U.S. at 232.

weighing the governmental interests of each jurisdiction.[4] That is, the Full Faith and Credit Clause, in its design to transform the states from independent sovereigns into a single unified Nation, directs that a state, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other states and avoid infringement upon their sovereignty. But because the forum state is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.[5] In order for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.[6] Once that threshold is met, the Court will not weigh the competing interests. "[T]he question of which sovereign interest should be deemed more weighty is not one that can be easily answered," the Court explained, "declin[ing] to embark on the constitutional course of balancing coordinate States' competing interests to resolve conflicts of laws under the Full Faith and Credit Clause."[7]

Section 2. Interstate Comity

Clause 1. State Citizenship: Privileges and Immunities

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

Origin and Purpose

[P. 912, add to text at end of section:]

A violation can occur whether or not a statute explicitly discrimi-

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[4] Alaska Packers Ass'n. v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932). When, in a state court, the validity of an act of the legislature of another state is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the Full Faith and Credit Clause. *See also* Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914), citing Glenn v. Garth, 147 U.S. 360 (1893), Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900); Allen v. Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R.R. v. Miller, 221 U.S. 408 (1911); National Mut. B. & L. Ass'n v. Brahan, 193 U.S. 635 (1904); Johnson v. New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93 (1917).

[5] *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[6] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

[7] Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 498, 499 (2003).

nates against out-of-state interests.[8]

[8] "[A]bsence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a] claim." Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 67 (2003).

ARTICLE V

AMENDMENT OF THE CONSTITUTION

Proposing a Constitutional Amendment

– Proposals by Congress

[P. 941, substitute for n.20:]

In *Hollingsworth v.Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Court rejected a challenge to the Eleventh Amendment based on the argument that it had not been submitted to the President for approval or veto. The Court' s brief opinion merely determined that the Eleventh Amendment was "constitutionally adopted." Id. at 382. Apparently during oral argument, Justice Chase opined that "[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution." Id. at 381. *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), for extensive analysis of what *Hollingsworth*'s delphic pronouncement could mean. Whatever the Court decided in *Hollingsworth*, it has since treated the issue as settled. *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 . . .").

FIRST AMENDMENT

RELIGION

Establishment of Religion

– Governmental Encouragement of Religion in Public Schools: Prayers and Bible Readings

[P. 1047, add to n.163:]

An opportunity to flesh out this distinction was lost when the Court dismissed for lack of standing an Establishment Clause challenge to public school recitation of the Pledge of Allegiance with the words "under God." Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

– Religious Displays on Government Property

[P. 1058, add to text at end of section:]

Displays of the Ten Commandments on government property occasioned two decisions in 2005. As in *Allegheny County*, a closely divided Court determined that one display violated the Establishment Clause and one did not. And again, context and imputed purpose made the difference. The Court struck down display of the Ten Commandments in courthouses in two Kentucky counties,[1] but held that a display on the grounds of the Texas State Capitol was permissible.[2] The displays in the Kentucky courthouses originally "stood alone, not part of an arguably secular display."[3] Moreover, the history of the displays revealed "a predominantly religious purpose" that had not been eliminated by steps taken to give the appearance of secular objectives.[4]

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[1] McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

[2] Van Orden v. Perry, 545 U.S. 677 (2005).

[3] 545 U.S. at 868. The Court in its previous Ten Commandments case, *Stone v. Graham*, 449 U.S. 39, 41 (1980) (invalidating display in public school classrooms) had concluded that the Ten Commandments are "undeniably a sacred text," and the 2005 Court accepted that characterization. *McCreary*, 545 U.S. at 859.

[4] 545 U.S. at 881. An "indisputable" religious purpose was evident in the resolutions authorizing a second display, and the Court characterized statements of purpose accompanying authorization of the third displays as "only . . . a litigating position." 545 U.S. at 870, 871.

There was no opinion of the Court in *Van Orden*. Justice Breyer, the swing vote in the two cases,[5] distinguished the Texas Capitol grounds display from the Kentucky courthouse displays. In some contexts, the Ten Commandments can convey a moral and historical message as well as a religious one, the Justice explained. Although it was "a borderline case" turning on "a practical matter of degree," the capitol display served "a primarily nonreligious purpose."[6] The monument displaying the Ten Commandments was one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular organization; and it had been in place, unchallenged, for 40 years. Under the circumstances, Justice Breyer thought it unlikely that the monument will be understood to represent an attempt by government to favor religion.[7]

FREE EXERCISE OF RELIGION

[P. 1060, add to text after n.234:]

"There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference."[8]

[P. 1061, add to n.236:]

Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding a provision of the Religious Land Use and Institutionalized Persons Act of 2000 that prohibits governments from imposing a "substantial burden on the religious exercise" of an institutionalized person unless the burden furthers a "compelling governmental interest").

[P. 1061, add to text at end of section:]

Government need not, however, offer the same accommodations to secular entities that it extends to religious practitioners in order to facilitate their religious exercise; "[r]eligious accommoda-

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[5] Only Justice Breyer voted to invalidate the courthouse displays and uphold the capitol grounds display. The other eight Justices were split evenly, four (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) voting to uphold both displays, and four (Justices Stevens, O'Connor, Souter, and Ginsburg) voting to invalidate both.

[6] 545 U.S. at 700, 704, 703.

[7] 545 U.S. at 702.

[8] Walz v. Tax Comm'n, 397 U.S. at 669. *See also* Locke v. Davey, 540 U.S. 712, 718 (2004); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

tions . . . need not 'come packaged with benefits to secular entities.'"[9]

"Play in the joints" can work both ways, the Court ruled in upholding a state's exclusion of theology students from a college scholarship program.[10] Although the state could have included theology students in its scholarship program without offending the Establishment Clause, its choice not to fund religious training did not offend the Free Exercise Clause even though that choice singled out theology students for exclusion.[11] Refusal to fund religious training, the Court observed, was "far milder" than restrictions on religious practices that have been held to offend the Free Exercise Clause.[12]

Free Exercise Exemption from General Governmental Requirements

[P. 1066, add to n.264:]

In 2004, the Court rejected for lack of standing an Establishment Clause challenge to recitation of the Pledge of Allegiance in public schools. Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

[P. 1075, substitute for final paragraph of section:]

Boerne did not close the books on *Smith*, however, or even on RFRA. Although *Boerne* held that RFRA was not a valid exercise of Fourteenth Amendment enforcement power as applied to restrict states, it remained an open issue whether RFRA may be applied to the federal government, and whether its requirements could be imposed pursuant to other powers. Several lower courts answered these questions affirmatively.[13]

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[9] Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (quoting Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987)).

[10] Locke v. Davey, 540 U.S. 712 (2004).

[11] 540 U.S. at 720-21. Excluding theology students but not students training for other professions was permissible, the Court explained, because "[t]raining someone to lead a congregation is an essentially religious endeavor," and the Constitution's special treatment of religion finds "no counterpart with respect to other callings or professions." Id. at 721.

[12] 540 U.S. at 720-21 (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law aimed at restricting ritual of a single religious group); McDaniel v. Paty, 435 U.S. 618 (1978) (law denying ministers the right to serve as delegates to a constitutional convention); and Sherbert v. Verner, 374 U.S. 398 (1963) (among the cases prohibiting denial of benefits to Sabbatarians)).

[13] *See*, *e.g.*, In re Young, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (RFRA is a valid exercise of Congress' bankruptcy powers as applied to insulate a debtor's church tithes from recovery by the bankruptcy trustee); O'Bryan v. Bureau of

(continued...)

Congress responded to *Boerne* by enacting a new law purporting to rest on its commerce and spending powers. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[14] imposes the same strict scrutiny test struck down in *Boerne* but limits its application to certain land use regulations and to religious exercise by persons in state institutions.[15] In *Cutter v. Wilkinson*,[16] the Court upheld RLUIPA's prisoner provision against a facial challenge under the Establishment Clause, but it did not rule on congressional power to enact RLUIPA. The Court held that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices."[17] Rather, the provision "fits within the corridor" between the Free Exercise and Establishment Clauses, and is "compatible with the [latter] because it alleviates exceptional government-created burdens on private religious exercise."[18]

FREEDOM OF EXPRESSION — SPEECH AND PRESS

The Doctrine of Prior Restraint

– Obscenity and Prior Restraint

[P. 1090, add to n.394 after citation to Fort Wayne Books:]

City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 784 (2004) ("Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria . . . and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type");

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[13] (...continued)
Prisons, 349 F.3d 399 (7th Cir. 2003) (RFRA may be applied to require the Bureau of Prisons to accommodate religious exercise by prisoners); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (RFRA applies to Bureau of Prisons).

[14] Pub. L. 106-274, 114 Stat. 804 (2000); 42 U.S.C. §§ 2000cc *et seq.*

[15] The Act requires that state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's exercise of religion be measured by a strict scrutiny test, and applies the same strict scrutiny test for any substantial burdens imposed on the exercise of religion by persons institutionalized in state or locally run prisons, mental hospitals, juvenile detention facilities, and nursing homes. Both provisions apply if the burden is imposed in a program that receives federal financial assistance, or if the burden or its removal would affect commerce.

[16] 544 U.S. 709 (2005).

[17] 544 U.S. at 714.

[18] 544 U.S. at 720.

Subsequent Punishment: Clear and Present Danger and Other Tests

[P. 1107, change heading to "Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech Restrictions"]

[P. 1108, add to text immediately before comma preceding n.481:]

and indecency

[P. 1108, add to n.481:]

Reno v. ACLU, 521 U.S. 844, 870-874 (1997). In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court held that a "decency" criterion for the awarding of grants, which "in a criminal statute or regulatory scheme . . . could raise substantial vagueness concerns," was not unconstitutionally vague in the context of a condition on public subsidy for speech.

[P. 1108, add to n.484:]

But see Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (facial challenge to burden on right of association rejected "where the statute has a 'plainly legitimate sweep'").

[P. 1108, substitute for rest of section after n.484:]

But, even in a First Amendment situation, the Court has written, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do now swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation. . . . Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[19]

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[19] Virginia v. Hicks, 539 U.S. 113, 119-20, 124 (2003) (italics in original; citations omitted) (upholding, as not addressed to speech, an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose for being on the premises"). *Virginia v. Hicks* cited *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which, in the majority opinion and in Justice Brennan's dissent, id. at 621, contains extensive discussion of the overbreadth doctrine. Other restrictive decisions are *Arnett v. Kennedy*, 416 U.S. 134, 158-64 (1974); *Parker v. Levy*, 417 U.S. 733, 757-61 (1974); and *New York v. Ferber*, 458 U.S. 747, 766-74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, (continued...)

Out of a concern that is closely related to that behind the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to do so, "[i]f the First Amendment means anything, it means that regulating speech must be a last – not first – resort."[20] Thus, the Court applies "strict scrutiny" to content-based regulations of fully protected speech; this means that it requires that such regulations "promote a compelling interest" and use "the least restrictive means to further the articulated interest."[21]

With respect to speech restrictions to which the Court does not apply strict scrutiny, the Court applies intermediate scrutiny; *i.e.*, scrutiny that is "midway between the 'strict scrutiny' demanded for content-based regulation of speech and the 'rational basis' standard that is applied – under the Equal Protection Clause – to government regulation of nonspeech activities."[22] Inter-mediate scrutiny requires that the governmental interest be "significant" or "substantial" or "important" (but not necessarily "compelling"), and it requires that the restriction be narrowly tailored (but not necessarily the least restrictive means to advance the governmental interest). Speech restrictions to which the Court does not apply strict scrutiny include those that are not content-based (time, place, or manner restrictions; incidental restrictions) and those that restrict categories of speech to which the Court accords less than full First Amendment protection (campaign contributions; commercial speech).[23] Note that time,

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[19] (...continued)
815-18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932-34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633-39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874-879 (1997) (statute banning "indecent" material on the Internet).

[20] Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002).

[21] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[22] Madsen v. Women's Health Center, Inc., 512 U.S. 753, 790 (1994) (parentheses omitted). The Court, however, applied a rational basis standard to uphold a state statute that banned the sale of sexually explicit material to minors. Ginsberg v. New York, 390 U.S. 629, 641 (1968).

[23] *E.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) (time, place, and manner restriction upheld as "narrowly tailored to serve a significant government interest, and (continued...)

place, and manner restrictions, or incidental restrictions, may be content-based, but they will not receive strict scrutiny if they "are *justified* without reference to the content of the speech."[24] Examples are bans on nude dancing, and zoning restrictions on pornographic theaters or bookstores, both of which receive intermediate scrutiny on the ground that they are "aimed at combating crime and other negative secondary effects," and not at the content of speech.[25]

The Court uses tests closely related to one another in these instances in which it does not apply strict scrutiny. It has indicated that the test for determining the constitutionality of an incidental restriction on speech "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,"[26] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context."[27]

In addition, the Supreme Court generally requires – even when applying less than strict scrutiny – that, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these

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[23] (...continued)
leav[ing] open ample alternative channels of communication"); Ward v. Rock Against Racism, 491 U.S. 781, 798-799 (1989) (incidental restriction upheld as "promot[ing] a substantial governmental interest that would be achieved less effectively absent the regulation"); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (campaign contribution ceiling "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom"); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (commercial speech restrictions need not be "absolutely the least severe that will achieve the desired end," but must exhibit a "'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but reasonable . . .") (internal quotation mark and citation omitted)). *But see* Thompson v. Western States Medical Center, 535 U.S. 357, 371 (2002) (commercial speech restriction struck down as "more extensive than necessary to serve" the government's interests).

[24] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (emphasis in original).

[25] Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (upholding ban on nude dancing); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding zoning of "adult motion picture theaters"). Zoning and nude dancing cases are discussed below under "Non-obscene But Sexually Explicit and Indecent Expression."

[26] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[27] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

harms in a direct and material way."[28] The Court has held, however, that to sustain a statute denying minors access to sexually explicit material "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[29]

In certain other contexts, the Court has relied on "common sense" rather than requiring the government to demonstrate that a recited harm was real and not merely conjectural. For example, it held that a rule prohibiting high school coaches from recruiting middle school athletes did not violate the First Amendment, finding that it needed "no empirical data to credit [the] common-sense conclusion that hard-sell [speech] tactics directed at middle school students could lead to exploitation. . . ."[30] On the use of common sense in free speech cases, Justice Souter wrote: "It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established . . . . But we

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[28] Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (federal "must-carry" provisions, which require cable television systems to devote a portion of their channels to the transmission of local broadcast stations, upheld as a content-neutral, incidental restriction on speech, not subject to strict scrutiny). The Court has applied the same principle in weighing the constitutionality of two other speech restrictions to which it does not apply strict scrutiny: restrictions on commercial speech, Edenfield v. Fane, 507 U.S. 761, 770-771 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real"), and restrictions on campaign contributions, Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden").

[29] Ginsberg v. New York, 390 U.S. 629, 641 (1968) (upholding ban on sale to minors of "girlie" magazines, and noting that, although "studies all agree that a causal link [between 'minors' reading and seeing sexual material' and an impairment in their 'ethical and moral development'] has not been demonstrated, they are equally agreed that a causal link has not been disproved either," id. at 641-42). In a case involving a federal statute that restricted "signal bleed" of sexually explicit programming on cable television, a federal district court wrote, "We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved." Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp. 2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000). In a case upholding a statute that, to shield minors from "indecent" material, limited the hours that such material may be broadcast on radio and television, a federal court of appeals wrote, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . ." Action for Children's Television v. FCC, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). A dissenting opinion complained, "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful – indeed, the nature of the alleged 'harm' is never explained." Id. at 671 (Edwards, C.J., dissenting).

[30] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2495-96 (2007).

must be careful about substituting common assumptions for evidence when the evidence is as readily available as public statistics and municipal property evaluations, lest we find out when the evidence is gathered that the assumptions are highly debatable."[31]

Freedom of Belief

– Flag Salute Cases

[P. 1111, change heading to "Flag Salutes and Other Compelled Speech"]

[P. 1111, add to n.501:]

The First Amendment is not violated when the government compels financial contributions to fund *government* speech, even if the contributions are raised through a targeted assessment rather than through general taxes. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

[P. 1112, add to text at end of section:]

Other governmental efforts to compel speech have also been held by the Supreme Court to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[32] a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their records,[33] an Ohio statute that prohibited the distribution of anonymous campaign literature,[34] and a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message – in this case support for gay rights – that the organizers did not wish to convey.[35]

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[31] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 459 (2002) (Souter, J., dissenting).

[32] Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who has retained 85 percent of gross receipts from donors, but falsely represented that "a significant amount of each dollar donated would be paid over to" a charitable organization, could be sued for fraud.

[33] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), a Court plurality held that a state could not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees.

[34] McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

[35] Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557 (1995).

By contrast, the Supreme Court has found no First Amendment violation when government compels disclosures in commercial speech, or when it compels the labeling of foreign political propaganda. Regarding compelled disclosures in commercial speech, the Court held that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right."[36] Regarding compelled labeling of foreign political propaganda, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The Court found that "Congress did not prohibit, edit, or restrain the distribution of advocacy materials. . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[37]

Right of Association

[P. 1116, add before period at the end of n.530:]

, and see the comparison of *Ohralik* and *Bates* in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 127 S. Ct. 2489, 2494 (2007) ("solicitation ban was more akin to a conduct regulation than a speech restriction")

[P. 1120, substitute for n.556:]

530 U.S. at 653. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006), the Court held that the Solomon Amendment's forcing law schools to allow military recruiters on campus does not violate the schools' freedom of expressive association because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Rumsfeld* is discussed below under "Government and the Power of the Purse."

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[36] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985).
[37] Meese v. Keene, 481 U.S. 465, 480 (1987).

– Political Association

[P. 1121, add to n.561:]

California Democratic Party v. Jones, 530 U.S. 567, 577 (2000) (requirement of a "blanket" primary, in which all registered voters, regardless of political affiliation, may participate, unconstitutionally "forces political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."); Clingman v. Beaver, 544 U.S. 581 (2005) (Oklahoma statute that allowed only registered members of a political party, and registered independents, to vote in the party's primary does not violate freedom of association; Oklahoma's "semiclosed primary system" distinguished from Connecticut's closed primary that was struck down in *Tashjian*).

[P. 1121, add to text after n.561:]

If people have a First Amendment right to associate with others to form a political party, then it follows that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform. These rights are circumscribed, however, when the State gives a party a role in the election process – as . . . by giving certain parties the right to have their candidates appear on the general-election ballot. Then, for example, the party's racially discriminatory action may become state action that violates the Fifteenth Amendment. And then also the State acquires a legitimate governmental interest in assuring the fairness of the party's nominating process, enabling it to prescribe what that process must be."[38]

A political party's First Amendment right to limit its membership as it wishes does not render invalid a state statute that allows a candidate to designate his party preference on a ballot, even when the candidate "is unaffiliated with, or even

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[38] New York State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 797-98 (2008) (citations omitted). In *Lopez Torres*, the Court upheld a state statute that required political parties to select judicial candidates at a convention of delegates chosen by party members in a primary election, rather than to select candidates in direct primary elections. The statute was challenged by party members who had not been selected and who claimed "that the convention process that follows the delegate election does not give them a realistic chance to secure the party's nomination." Id. at 799. The Court rejected their challenge, holding that, although a state may require "party-candidate selection through processes more favorable to insurgents, such as primaries," id. at 799, the Constitution does not demand that a state do so. "Party conventions, with their attendant 'smoke-filled rooms' and domination by party leaders, have long been an accepted manner of selecting party candidates." Id. at 799. The plaintiffs had an associational right to join the party but not to have a certain degree of influence in the party. Id. at 798.

repugnant to, the party" he designates.[39] This is because the statute in question "never refers to the candidates as nominees of any party, nor does it treat them as such"; it merely allows them to indicate their party preference.[40] The Court acknowledged that "it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties," but "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot."[41] If the form of the ballot used in a particular election is such as to confuse voters, then an as-applied challenge to the statute may be appropriate, but a facial challenge, the Court held, is not.[42]

– Conflict Between Organization and Members

[P. 1125, add to text after n.583:]

In *Davenport v. Washington Education Ass'n*,[43] the Court noted that, although *Chicago Teachers Union v. Hudson* had "set forth various procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes,"[44] it "never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require. To the contrary, we have described *Hudson* as 'outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its

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[39] Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1189 (2008). This was a 7-to-2 decision written by Justice Thomas, with Justices Scalia and Kennedy dissenting.

[40] 128 S. Ct. at 1192.

[41] 128 S. Ct. at 1193. The Court saw "simply no basis to presume that a well-informed electorate will interpret a candidate's party preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." Id.

[42] A ballot could avoid confusion by, for example, "includ[ing] prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." 128 S. Ct. at 1194. Justice Scalia, joined by Justice Kennedy in dissent, wrote that "[a]n individual's endorsement of a party shapes the voter's view of what the party stands for," and that it is "quite impossible for the ballot to satisfy a reasonable voter that the candidate is 'not associated' with the party for which he has expressed a preference." Id. at 1200.

[43] 127 S. Ct. 2372 (2007).

[44] 127 S. Ct. at 2377.

requirements under *Abood*."[45] Thus, the Court held in *Davenport* that the State of Washington could prohibit "expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents."[46] And, the Court added that "Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely."[47]

Particular Government Regulations That Restrict Expression – Government as Employer: Free Expression Generally

[P. 1148, add to text after n.699:]

In *City of San Diego v. Roe*,[48] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression does not qualify as a matter of public concern . . . and *Pickering* balancing does not come into play."[49] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[50] was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and functions of his employer."[51] Therefore, the Court had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [*i.e.*, *Pickering* or *NTEU*]."[52] This leaves uncertain whether, had the officer's expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there

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[45] 127 S. Ct. at 2379 (citations omitted).
[46] 127 S. Ct. at 2378.
[47] 127 S. Ct. at 2378 (citations omitted).
[48] 543 U.S. 77 (2004) (per curiam).
[49] 543 U.S. at 84.
[50] 513 U.S. 454 (1995) (discussed under "Government as Employer: Political and Other Outside Activities," *supra*).
[51] 543 U.S. at 84.
[52] 543 U.S. at 80.

is no protection – *Pickering* balancing is not to be applied – "when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[53] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[54] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[55] Rather, the "controlling factor" was that his expressions were made pursuant to his duties."[56] Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

[P. 1149, add footnote after "restraint." on line 8:]

In *Connick*, the Court noted that it did not suggest "that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." Rather, it was beyond First Amendment protection "absent the most unusual of circumstances." 461 U.S. at 147. In *Ceballos*, however, the Court, citing

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[53] 547 U.S. 410, 421 (2006).

[54] 547 U.S. at 421. However, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." Id. at 419. Such necessity, however, may be based on a "common-sense conclusion" rather than on "empirical data." Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2495 (2007).

[55] The Court cited *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979), for these points. In *Givhan*, the Court had upheld the First Amendment right of a public school teacher to complain to the school principal about "employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect." Id. at 413. The difference between *Givhan* and *Ceballos* was apparently that Givhan's complaints were not made pursuant to her job duties, whereas Ceballos' were. Therefore, Givhan spoke as a citizen whereas Ceballos spoke as a government employee. See *Ceballos*, 547 U.S. at 420-21.

[56] 547 U.S. at 421.

Connick at 147, wrote that, if an employee did not speak as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418.

– Government as Educator

[P. 1154, add to text after n.725:]

In *Morse v. Frederick*,[57] the Court held that a school could punish a pupil for displaying a banner that said, "BONG HiTS 4 JESUS," because these words could reasonably be interpreted as "promoting illegal drug use."[58] The Court indicated that it might have reached a different result if the banner had addressed the issue of "the criminalization of drug use or possession."[59] Justice Alito, joined by Justice Kennedy, wrote a concurring opinion stating that they had joined the majority opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[60] As *Morse v. Frederick* was a 5-to-4 decision, Justices Alito and Kennedy's votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

– Government as Regulator of the Electoral Process: Elections

[P. 1156, add to text after first full paragraph on page, and change beginning of second paragraph as indicated:]

The Court in *Buckley* recognized that political contributions "serve[ ] to affiliate a person with a candidate" and "enable[ ] like-minded persons to pool their resources in furtherance of common political goals." Contribution ceilings, therefore, "limit one important means of associating with a candidate or committee . . . ."[61] Yet "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs

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[57] 127 S. Ct. 2618 (2007).
[58] 127 S. Ct. at 2624.
[59] 127 S. Ct. at 2625.
[60] 127 S. Ct. at 2636.
[61] 424 U.S. at 22.

means closely drawn to avoid unnecessary abridgment of associational freedoms."[62]

Applying this standard, the *Buckley* Court sustained the contribution limitation as imposing . . . .

[P. 1158, add to text after n.743:]

The government not only may not limit the amount that a candidate may spend out of his own resources, but, if a candidate spends more than a particular amount, the government may not penalize the candidate by authorizing the candidate's opponent to receive individual contributions at higher than the normal limit. In *Davis v. Federal Election Commission*, the Court struck down, as lacking a compelling governmental interest, a federal statute that provided that, if a "self-financing" candidate for the House of Representatives spends more than a specified amount, then his opponent may accept more individual contributions than otherwise permitted. The statute, the Court wrote, imposed "a special and potentially significant burden" on a candidate "who robustly exercises [his] First Amendment right."[63] Citing *Buckley*, the Court stated that a burden "on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption." This is because "reliance on personal funds *reduces* the threat of corruption, and therefore . . . discouraging the use of personal funds [ ] disserves the anticorruption interest."[64] Citing *Buckley* again, the Court added that the governmental interest in equalizing the financial resources of candidates does not provide a justification for restricting expenditures, and, in fact, to restrict expenditures "has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office. . . . Different candidates have differ-

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[62] 424 U.S. at 25 (internal quotation marks omitted).

[63] 128 S. Ct. 2759, 2771, 2772 (2008). The statute was § 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 109, 2 U.S.C. § 441a-1(a), which was part of the so-called "Millionaire's Amendment."

[64] 128 S. Ct. at 2773 (emphasis in original). Justice Stevens, in the part of his dissenting opinion joined by Justices Souter, Ginsburg, and Breyer, found that the Millionaire's Amendment does not cause self-funding candidates "any First Amendment injury whatsoever. The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard. . . . Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles." Id. at 2780.

ent strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to the outcome of an election."[65]

[P. 1162, add to text at end of section:]

In *FEC v. Beaumont*,[66] the Court held that the federal law that bars corporations from contributing directly to candidates for federal office may constitutionally be applied to nonprofit advocacy corporations. Corporations may make such contributions only through PACs, and the Court in *Beaumont* wrote that, in *National Right to Work*, it had "specifically rejected the argument . . . that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations."[67] Though nonprofit advocacy corporations, the Court held in *Massachusetts Citizens for Life*, have a First Amendment right to make independent expenditures, the same is not true for direct contributions to candidates.

In *McConnell v. Federal Election Commission*,[68] the Court upheld against facial constitutional challenges key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). A majority opinion coauthored by Justices Stevens and O'Connor upheld two major provisions of BCRA: (1) the prohibition on "national party committees and their agents from soliciting, receiving, directing, or spending any soft money,"[69] which is money donated for the purpose of influencing state or local elections, or for "mixed-purpose activities – including get-out-the-vote drives and generic party advertising,"[70] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance

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[65] 128 S. Ct. at 2773-74. The Court also struck down the disclosure requirements in § 319(b) of BCRA because they "were designed to implement the asymmetrical contribution limits provided for in § 319(a), and . . . § 319(a) violates the First Amendment." Id. at 2775.

[66] 539 U.S. 146 (2003).

[67] 539 U.S. at 157.

[68] 540 U.S. 93 (2003).

[69] 540 U.S. at 133.

[70] 540 U.S. at 123.

"electioneering communications,"[71] which BCRA defines as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal Office," made within 60 days before a general election or 30 days before a primary election. Electioneering communications thus include both "express advocacy and so-called issue advocacy."[72]

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits."[73] and found it "closely drawn to match a sufficiently important interest."[74] The Court's decision to use less rigorous scrutiny, it wrote, "reflects more than the limited burdens they [*i.e.*, the contribution restrictions] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits – interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"[75]

As for the prohibition on corporations and labor unions' using their general treasury funds to finance electioneering communications, the Court applied strict scrutiny, but found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals."[76] These corrosive and distorting effects result both from express advocacy and from so-called issue advocacy. The Court also noted that, because corporations and unions "remain free to organize and administer segregated funds, or PACs," for electioneering communications, the provision was not a complete ban on expression.[77] In response to the argument that the justifications for a ban on express advocacy did not apply to issue advocacy, the Court found that the "argument fails to the extent that the issue ads broadcast during the 30- and 60-day

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[71] 540 U.S. at 204.
[72] 540 U.S. at 190.
[73] 540 U.S. at 141.
[74] 540 U.S. at 136 (internal quotation marks omitted).
[75] 540 U.S. at 136.
[76] 540 U.S. at 205.
[77] 540 U.S. at 204.

periods preceding federal primary and general elections are the functional equivalent of express advocacy."[78]

The limitations on electioneering communication, however, soon faced renewed scrutiny by the Court. In *Wisconsin Right to Life, Inc. v. Federal Election Comm'n* (WRTL I),[79] the Court vacated a lower court decision that had denied plaintiffs the opportunity to bring an as-applied challenge to BCRA's regulation of electioneering communications. Subsequently, in *Federal Election Commission v. Wisconsin Right to Life* (WRTL II),[80] the Court considered what standard should be used for such a challenge. Chief Justice Roberts, in the controlling opinion,[81] rejected the suggestion that an issue ad broadcast during the specified periods before elections should be considered the "functional equivalent" of express advocacy if the "intent and effect" of the ad was to influence the voter's decision in an election.[82] Rather, Chief Justice Robert's opinion held that an issue ad is the functional equivalent of express advocacy only if the ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[83]

In *Randall v. Sorrell*, a plurality of the Court struck down a Vermont campaign finance statute's limitations on both expenditures and contributions.[84] As for the statute's expenditure limitations, the plurality found *Buckley* to control and saw no reason to overrule it and no adequate basis upon which to distinguish it. As for the statute's contribution limitations, the plural-

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[78] 540 U.S. at 206.

[79] 546 U.S. 410 (2006).

[80] 127 S. Ct. 2652 (2007).

[81] Only Justice Alito joined Parts III and IV of Chief Justice Robert's opinion, which addressed the issue of as-applied challenges to BCRA. Justices Scalia (joined by Kennedy and Thomas) concurred in the judgment, but would have overturned *McConnell* and struck down BCRA's limits on issue advocacy on its face.

[82] The suggestion was made that an "intent and effect" standard had been endorsed by the Court in *McConnell*, which stated that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. While acknowledging that an evaluation of the "intent and effect" had been relevant to the rejection of a facial challenge, Chief Justice Robert's opinion in WRTL II denied that such a standard had been endorsed for as-applied challenges. 127 S. Ct. at 2664-66.

[83] 127 S. Ct. at 2667.

[84] 548 U.S. 230 (2006). Justice Breyer wrote the plurality opinion, with only Chief Justice Roberts joining it in full. Justice Alito joined the opinion as to the contribution limitations but not as to the expenditure limitations. Justice Alito and three other Justices concurred in the judgment as to the limitations on both expenditures and contributions, and three Justices dissented.

ity, following *Buckley*, considered whether the "contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny."[85] The plurality found that they were.[86] Vermont's limit of $200 per gubernatorial election "(with significantly lower limits for contributions to candidates for State Senate and House of Representatives) . . . are well below the limits this Court upheld in *Buckley*," and "are the lowest in the Nation."[87] But the plurality struck down Vermont's contribution limits "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections."[88]

– Government as Investigator: Reporter's Privilege

[P. 1165, substitute for n.783:]

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell, despite having joined the majority opinion, also submitted a concurring opinion in which he suggested a privilege might be available if, in a particular case, "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. Justice Stewart's dissenting opinion in *Branzburg* referred to Justice Powell's concurring opinion as "enigmatic." Id. at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Powell] wrote separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." In re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

"[C]ourts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context." Association of the Bar of the City of New York, The Federal Common Law of Journalists' Privilege: A Position Paper (2005) at 4-5 [http://www.abcny.org/pdf /report/White%20paper%20on%20reporters%20privilege.pdf] (citing examples).

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[85] 548 U.S. at 248 (citation omitted).

[86] Although, as here, limits on contributions may be so low as to violate the First Amendment, "there is no constitutional basis for attacking contribution limits on the ground that they are too high. Congress has no constitutional obligation to limit contributions at all . . . ." Davis v. Federal Election Commission, 128 S. Ct. 2759, 2771 (2008) (dictum).

[87] 548 U.S. at 249 (citation omitted). The plurality noted that, "in terms of real dollars (*i.e.*, adjusting for inflation)," they were lower still. Id. at 250.

[88] 548 U.S. at 253.

[P. 1165, substitute for paragraph in text that begins "The Court":]

The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[89] Although efforts in Congress have failed, 49 states have done so – 33 (plus the District of Columbia) by statute and 16 by court decision, with Wyoming the sole holdout.[90] As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[91] The federal courts have not resolved whether the common law provides a journalists' privilege.[92]

– Government as Administrator of Prisons

[P. 1171, add to n.814:]

In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court applied *Turner* to uphold various restrictions on visitation by children and by former inmates, and on all visitation except attorneys and members of the clergy for inmates with two or more substance-abuse violations; an inmate subject to the latter restriction could apply for reinstatement of visitation privileges after two years. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." Id. at 137.

[P. 1171: substitute in text for material between n.814 and n.817:]

Four factors "are relevant in determining the reasonableness of a regulation at issue."[93] "First, is there a valid, rational connection between the prison regulation and the legitimate governmental

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[89] 408 U.S. at 706.

[90] *E.g.*, Cal. Evid. Code § 1070; N.J. Rev. Stat. §§ 2A:84A-21, -21a, -29. The reported cases evince judicial hesitancy to give effect to these statutes. *See*, *e.g.*, Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Rosato v. Superior Court, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976). The greatest difficulty these laws experience, however, is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See* Matter of Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.* New York Times v. New Jersey, 439 U.S. 997 (1978). *See also*, New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[91] Rule 501 also provides that, in civil actions and proceedings brought in federal court under state law, the availability of a privilege shall be determined in accordance with state law.

[92] *See*, *e.g.*, In re: Grand Jury Subpoena. Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006) (U.S. Court of Appeals for the District of Columbia "is not of one mind on the existence of a common law privilege").

[93] 482 U.S. at 89.

interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?"[94] Two years after *Turner v. Safley*, in *Thornburgh v. Abbott*, the Court restricted *Procunier v. Martinez* to the regulation of *outgoing* correspondence, finding that the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[95]

In *Beard v. Banks*, a plurality of the Supreme Court upheld "a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates."[96] These inmates were housed in Pennsylvania's Long Term Segregation Unit and one of the prison's penological rationales for its policy, which the plurality found to satisfy the four *Turner* factors, was to motivate better behavior on the part of the prisoners by providing them with an incentive to move back to the regular prison population.[97] Applying the four *Turner* factors to this rationale, the plurality found that (1) there was a logical connection between depriving inmates of newspapers and magazines and providing an incentive to improve behavior; (2) the Policy provided no alternatives to the deprivation of newspapers and magazines, but this was "not 'conclusive' of the reasonableness of the Policy"; (3) the impact of accommodating the asserted constitutional right would be negative; and (4) no alternative would "fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests."[98] The plurality believed that its "real task in this case is not balancing these

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[94] Beard v. Banks, 548 U.S. 521, 529 (2006) (citations and internal quotation marks omitted; this quotation quotes language from *Turner v. Safley*, 482 U.S. at 89-90).

[95] 490 U.S. 401, 411-14 (1989). *Thornburgh v. Abbott* noted that, if regulations deny prisoners publications on the basis of their content, but the grounds on which the regulations do so is content-neutral, *e.g.*, to protect prison security), then the regulations will be deemed neutral. Id. at 415-16.

[96] 548 U.S. 521, 524-25 (2006). This was a 4-2-2 decision, with Justice Alito, who had written the court of appeals decision, not participating.

[97] 548 U.S. at 531.

[98] 548 U.S. 531-32.

factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation" between the Policy and legitimate penological objections, as *Turner* requires.[99] The plurality concluded that he had. Justices Thomas and Scalia concurred in the result but would do away with *Turner* factors because they believe that "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivation – *provided only that those deprivations are consistent with the Eighth Amendment*."[100]

– Government and Power of the Purse

[P. 1176, add to text at end of section:]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[101] The plurality considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring public libraries (public schools were not involved in the case) to limit their freedom of speech if they accept federal funds. The plurality, citing *Rust v. Sullivan*, found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized."[102] The plurality distinguished *Legal Services Corporation v. Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them *against* the Government, and there is no comparable assumption that they must be free of any condi-

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[99] 548 U.S. at 533.

[100] 548 U.S. at 537 (Thomas, J., concurring), quoting Overton v. Bazzetta, 539 U.S. at 139 (Thomas, J., concurring) (emphasis originally in *Overton*).

[101] 539 U.S. 194, 199 (2003).

[102] 539 U.S. at 211.

tions that their benefactors might attach to the use of donated funds or other assistance."[103]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides that, in the Court's summary, "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[104] FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding. The Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."[105] The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do* – afford equal access to military recruiters – not what they may or may not *say*."[106] The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech."[107] Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation."[108]

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[103] 539 U.S. at 213 (emphasis in original). Other grounds for the plurality decision are discussed under "Non-obscene But Sexually Explicit and Indecent Expression" and "Internet as Public Forum."

[104] 547 U.S. 47, 51 (2006).

[105] 547 U.S. at 60. The Court stated that Congress' authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. Id. at 58.

[106] 547 U.S. at 60.

[107] 547 U.S. at 64, 65.

[108] 547 U.S. at 67.

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. . . . This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. . . . [It] is plainly incidental to the Solomon Amendment's regulation of conduct."[109] As for forcing one speaker to host or accommodate another, "[t]he compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[110] By contrast, the Court wrote, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[111] Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept a homosexual scoutmaster, and that the Supreme Court struck down as violating the Boy Scouts' "right of expressive association."[112] Recruiters, unlike the scoutmaster, are "outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's expressive association."[113]

Government Regulation of Communications Industries

– Commercial Speech

[P. 1179, add to text after n.856:]

Similarly, the Court upheld a rule prohibiting high school coaches from recruiting middle school athletes, finding that "the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader."[114]

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[109] 547 U.S. at 61, 62.
[110] 547 U.S. at 63.
[111] 547 U.S. at 65.
[112] 547 U.S. at 68, quoting Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).
[113] 547 U.S. at 69.
[114] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2494-95 (2007).

[P. 1179, add to text after n.858:]

A ban on personal solicitation is "justified only in situations 'inherently conducive to overreaching and other forms of misconduct.'"[115]

[P. 1179, add to n.862:]

In *Nike, Inc. v. Kasky*, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certiorari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike's statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed "'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." Id. at 657 (Stevens, J., concurring). Nike subsequently settled the suit.

– Radio and Television

[P. 1192, delete final sentence in text and add new footnote at the end of what will become the final sentence in the text:]

438 U.S. at 750. Subsequently, the FCC began to apply its indecency standard to fleeting uses of expletives in non-sexual and non-excretory contexts. The U.S. Court of Appeals for the Second Circuit held, however, that, because "the FCC has failed to articulate a reasoned basis for this change in policy," the policy was arbitrary and capricious under the Administrative Procedure Act. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 447 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). Having decided the case on statutory grounds, the court did not have to reach the constitutional question, but it added that it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster." Id. at 462. *See also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008) (invalidating, on non-constitutional grounds, a fine against CBS for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during a Super Bowl halftime show). Decisions regarding legislation to ban "indecent" expression in contexts other than broadcast and cable media are discussed below under "Non-obscene But Sexually Explicit and Indecent Expression."

Government Restraint of Content of Expression

– Group Libel, Hate Speech

[P. 1206, add to text at end of section:]

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or

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[115] Edenfield v. Fane, 507 U.S. at 774, quoting In re R.M.J., 455 U.S. at 203, and quoted in Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 127 S. Ct. 2489, 2494 (2007).

group of persons.[116] Such a prohibition does not discriminate on the basis of a defendant's beliefs – "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . . . The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ."[117]

– Child Pornography

[P. 1231, substitute for n.1142:]

535 U.S. at 255. Following *Ashcroft v. Free Speech Coalition*, Congress enacted the PROTECT Act, Pub. L. 108-21, 117 Stat. 650 (2003), which, despite the decision in that case, continued to prohibit computer-generated child pornography (but not other types of child pornography produced without an actual minor). 18 U.S.C. § 2256(8). In *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008), the Court, without addressing the PROTECT Act's new definition, cited *Ashcroft v. Free Speech Coalition* with approval.

[P. 1231, add to text after n.1142:]

In *United States v. Williams*,[118] the Supreme Court upheld a federal statute that prohibits knowingly advertising, promoting, presenting, distributing, or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe, that the material" is child pornography that is obscene or that depicts an actual minor (*i.e.*, is child pornography that is not constitutionally protected).[119] Under the provision, in other words, "an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute."[120] The Court found that these activities are not constitutionally protected because "[o]ffers to engage in illegal transactions [as opposed to abstract advocacy of illegality] are categorically excluded from First Amendment protection," even "when the offeror is mistaken about the factual predicate of

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[116] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. 538 U.S. at 365-66.

[117] 538 U.S. at 362-63.

[118] 128 S. Ct. 1830 (2008).

[119] 18 U.S.C. § 2252A(a)(3)(B).

[120] 128 S. Ct. at 1839.

his offer," such as when the child pornography that one offers to buy or sell does not exist or is constitutionally protected.[121]

– Non-obscene but Sexually Explicit and Indecent Expression

[P. 1234. add to text after n.1254:]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source."[122] Subsequently, the district court found COPA to violate the First Amendment and issued a permanent injunction against its enforcement.[123]

In *United States v. American Library Association*, a four-Justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child

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[121] 128 S. Ct. at 1841, 1842, 1843. Justice Souter, in a dissenting opinion joined by Justice Ginsburg, agreed that "Congress may criminalize proposals unrelated to any extant image," but disagreed with respect to "proposals made with regard to specific, existing [constitutionally protected] representations." Id. at 1849. Justice Souter believed that, "if the Act stands when applied to identifiable, extant [constitutionally protected] pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally . . . ." Id. at 1854. Justice Scalia's opinion for the majority replied that this "is simply not true . . . . Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography. . . . There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." Id. at 1844-45.

[122] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 684. In addition, Breyer asserted, "filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision." Id. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." Id. at 669.

[123] American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

pornography, and to prevent minors from obtaining access to material that is harmful to them."[124] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires."[125] Does CIPA, in other words, effectively violate library *patrons*' rights? The plurality concluded that it does not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[126]

The plurality acknowledged "the tendency of filtering software to 'overblock' – that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[127] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[128]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance – in other words, does it violate public *libraries*' rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[129]

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[124] 539 U.S. 194, 199 (2003).

[125] 539 U.S. at 203.

[126] 539 U.S. at 205.

[127] 539 U.S. at 208.

[128] 539 U.S. at 209. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." Id. at 215. Justice Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." Id. at 233.

[129] 539 U.S. at 212.

Speech Plus – The Constitutional Law of Leafleting, Picketing, and Demonstrating

– The Public Forum

[P. 1245, substitute for final paragraph of section:]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court found that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[130] The plurality therefore did not apply "strict scrutiny" in upholding the Children's Internet Protection Act, which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."[131] The plurality found that Internet access in public libraries is not a "traditional" public forum because "[w]e have 'rejected the view that traditional public forum status extends beyond its historical confines.'"[132] And Internet access at public libraries is not a "designated" public forum because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[133]

Nevertheless, although Internet access in public libraries is not a public forum, and particular Web sites, like particular newspapers, would not constitute public fora, the Internet as a whole might be viewed as a public forum, despite its lack of a historic tradition. The Supreme Court has not explicitly held that the Internet as a whole is a public forum, but, in *Reno v. ACLU*, which struck down the Communications Decency Act's prohibition of "indecent" material on the Internet, the Court

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[130] 539 U.S. 194, 205 (2003).
[131] 539 U.S. at 199.
[132] 539 U.S. at 206.
[133] 539 U.S. at 206 (citation omitted).

noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organi zation with a computer connected to the Internet can 'publish' information."[134]

– Door-to-Door Solicitation

[P. 1262, add to n.1312:]

In *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

[134] A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes*, 523 U.S. at 679 ("reject[ing] the view that traditional public forum status extends beyond its historic confines" [to a public television station]) *with Reno v. ACLU*, 521 U.S. 844, 851-53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web)." Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternate citations to *Forbes* and *Reno* omitted). In *Putnam Pit*, the city denied a private Web site's request that the city's Web site establish a hyperlink to it, even though the city's Web site had established hyperlinks to other private Web sites. The court of appeals found that the city's Web site was a nonpublic forum, but that even nonpublic fora must be viewpoint neutral, so it remanded the case for trial on the question of whether the city's denial of a hyperlink had discriminated on the basis of viewpoint.

SECOND AMENDMENT

BEARING ARMS

In General

[P. 1275, add at the end of the section:]

It was not until 2008 that the Supreme Court definitively came down on the side of an "individual rights" theory. Relying on new scholarship regarding the origins of the Amendment,[1] the Court in *District of Columbia v. Heller*[2] confirmed what had been a growing consensus of legal scholars – that the rights of the Second Amendment adhered to individuals. The Court reached this conclusion after a textual analysis of the Amendment,[3] an examination of the historical use of prefatory phrases in statutes, and a detailed exploration of the 18th century meaning of phrases found in the Amendment. Although accepting that the historical and contemporaneous use of the phrase "keep and bear Arms" often arose in connection with military activities, the Court noted that its use was not limited to those contexts.[4] Further, the Court found that the phrase "well regulated Militia" referred not to formally organized state or federal militias, but to the pool of "able-bodied men" who were available for conscription.[5] Finally, the Court reviewed contemporaneous state constitutions, post-enactment commentary, and subsequent case law to conclude that the purpose of the right to keep and bear arms extended beyond the context of militia service to include self-defense.

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[1] E. Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); R. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004); E. Volokh, *"Necessary to the Security of a Free State,"* 83 NOTRE DAME L. REV. 1 (2007); *What Did "Bear Arms" Mean in the Second Amendment?*, 6 GEORGETOWN J. L. & PUB. POLICY (2008).

[2] 128 S. Ct. 2783 (2008).

[3] The "right of the people," for instance, was found in other places in the Constitution to speak to individual rights, not to collective rights (those that can only be exercised by participation in a corporate body). 128 S. Ct. at 2790-91.

[4] 128 S. Ct. at 2791-97.

[5] 128 S. Ct. at 2799-2800. Similarly, the phrase "security of a free state" was found to refer not to the defense of a particular state, but to the protection of the national polity. 128 S. Ct. at 2800-01.

Using this "individual rights theory," the Court struck down a District of Columbia law that banned virtually all handguns, and required that any other type of firearm in a home be dissembled or bound by a trigger lock at all times. The Court rejected the argument that handguns could be banned as long as other guns (such as long-guns) were available, noting that, for a variety of reasons, handguns are the "most popular weapon chosen by Americans for self-defense in the home."[6] Similarly, the requirement that all firearms be rendered inoperable at all times was found to limit the "core lawful purpose of self-defense." However, the Court specifically stated (albeit in *dicta*) that the Second Amendment did not limit prohibitions on the possession of firearms by felons and the mentally ill, penalties for carrying firearms in schools and government buildings, or laws regulating the sales of guns. The Court also noted that there was a historical tradition of prohibiting the carrying of "dangerous and unusual weapons" that would not be affected by its decision. The Court, however, declined to establish the standard by which future gun regulations would be evaluated.[7] And, more importantly, because the District of Columbia is a federal enclave, the Court did not have occasion to address whether it would reconsider its prior decisions that the Second Amendment does not apply to the states.

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[6] 128 S. Ct. at 2818.

[7] 128 S. Ct. at 2817 n.27 (discussing non-application of rational basis review). See id. at 2850-51 (Breyer, J., dissenting).

FOURTH AMENDMENT

SEARCH AND SEIZURE

History and Scope of the Amendment

– Scope of the Amendment

[P. 1285, add to n.22:]

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (warrantless entry into a home when police have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury).

– The Interest Protected

[P. 1291, add to n.53 after citation to Steagald v. United States:]

Kirk v. Louisiana, 536 U.S. 635 (2002) (per curiam).

– Arrests and Other Detentions

[P. 1292, add to n.61 after citation to Terry v. Ohio:]

Kaupp v. Texas, 538 U.S. 626 (2003).

[P. 1293, add to n.61:]

Scott v. Harris, 127 S. Ct. 1769 (2007) (police officer's ramming fleeing motorist's car from behind in attempt to stop him).

[P. 1293, add new footnote after "person," in second line on page:]

The justification must be made to a neutral magistrate, not to the arrestee. There is no constitutional requirement that an officer inform an arrestee of the reason for his arrest. Devenpeck v. Alford, 543 U.S. 146, 155 (2004) (the offense for which there is probable cause to arrest need not be closely related to the offense stated by the officer at the time of arrest).

[P. 1293, add to n.62:]

Los Angeles County v. Rettele, 127 S. Ct. 1989 (2007) (where deputies executing a search warrant did not know that the house being searched had recently been sold, it was reasonable to hold new homeowners, who had been sleeping in the nude, at gunpoint for one to two minutes without allowing them to dress or cover themselves, even though the deputies knew that the homeowners were of a different race from the suspects named in the warrant).

[P. 1293, add to text at the end of the only full paragraph on the page:]

Even when an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was

based on probable cause.[1]

[P. 1294, add to n.69 after citation to Taylor v. Alabama:]

Kaupp v. Texas, 538 U.S. 626 (2003).

Searches and Seizures Pursuant to Warrant

– Probable Cause

[P. 1301, add to n.101:]

An "anticipatory" warrant does not violate the Fourth Amendment as long as there is probable cause to believe that the condition precedent to execution of the search warrant will occur and that, once it has occurred, "there is a fair probability that contraband or evidence of a crime will be found in a specified place." United States v. Grubbs, 547 U.S. 90, 95 (2006), quoting Illinois v. Gates, 462 U.S. 213, 238 (1983). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.'" 547 U.S. at 94.

– Particularity

[P. 1304, add to text at end of section:]

The purpose of the particularity requirement extends beyond prevention of general searches; it also assures the person whose property is being searched of the lawful authority of the executing officer and of the limits of his power to search. It follows, therefore, that the warrant itself must describe with particularity the items to be seized, or that such itemization must appear in documents incorporated by reference in the warrant and actually shown to the person whose property is to be searched.[2]

– Execution of Warrants

[P. 1311, add to text after n.168:]

Similarly, if officers choose to knock and announce before searching for drugs, circumstances may justify forced entry if there is not a prompt response.[3]

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[1] Virginia v. Moore, 128 S. Ct. 1598 (2008).

[2] Groh v. Ramirez, 540 U.S. 551 (2004) (a search based on a warrant that did not describe the items to be seized was "plainly invalid"; particularity contained in supporting documents not cross-referenced by the warrant and not accompanying the warrant is insufficient). United States v. Grubbs, 547 U.S. 90, 97, 99 (2006) (because the language of the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized[,]' . . . the Fourth Amendment does not require that the triggering condition for an anticipatory warrant be set forth in the warrant itself."

[3] United States v. Banks, 540 U.S. 31 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search

(continued...)

[P. 1312, add to n.173:]

But see Maryland v. Pringle, 540 U.S. 366 (2003) (distinguishing *Ybarra* on basis that passengers in car often have "common enterprise," and noting that the tip in *Di Re* implicated only the driver).

[P. 1312, add to n.175:]

In *Los Angeles County v. Rettele*, 127 S. Ct. 1989 (2007), the Court found no Fourth Amendment violation where deputies did not know that the suspects had sold the house that deputies had a warrant to search; deputies entered the house and found new owners, of a different race from the suspects, sleeping in the nude; and deputies held new owners at gunpoint for one to two minutes without allowing them to dress or cover themselves. As for the difference in race, the Court noted that, "[w]hen the deputies ordered [Caucasian] respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house." Id. at 1992. As for not allowing the new owners to dress or cover themselves, the Court quoted its statement in *Michigan v. Summers* that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." Id. at 1993 (quoting 452 U.S. at 702-03).

[P. 1312, add to text after n.175:]

For the same reasons, officers may use "reasonable force," including handcuffs, to effectuate a detention.[4]

Valid Searches and Seizures Without Warrants

– Detention Short of Arrest: Stop-and-Frisk

[P. 1315, add to text after first sentence of paragraph that begins on page, and begin new paragraph with second sentence, as indicated:]

The Court provided a partial answer in 2004, when it upheld a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[5] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[6]

After *Terry*, the standard for stops . . . .

[P. 1318, add to n.208:]

See also United States v. Drayton, 536 U.S. 194 (2002), applying *Bostick* to uphold a bus search in which one officer stationed himself in the front of the bus and one in the rear, while a third officer worked his way from rear to front, questioning passengers individually. Under these circumstances, and following the arrest of his traveling companion, the

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[3] (...continued)
warrant," and waited 15-20 seconds with no response).

[4] Muehler v. Mena, 544 U.S. 93, 98-99 (2005) (also upholding questioning the handcuffed detainee about her immigration status).

[5] Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).

[6] 542 U.S. at 186.

defendant had consented to the search of his person.

[P. 1319, add to n.213:]

Cf. Illinois v. Caballes, 543 U.S. 405 (2005) (a canine sniff around the perimeter of a car following a routine traffic stop does not offend the Fourth Amendment if the duration of the stop is justified by the traffic offense).

[P. 1319, add to text after n.216:]

The Court has even upheld a search incident to an illegal (albeit not unconstitutional) arrest.[7]

– Vehicular Searches

[P. 1324, add to n.244 after parenthetical that ends with "Mexican ancestry":]

But cf. United States v. Arvizu, 534 U.S. 266 (2002) (reasonable suspicion justified stop by border agents of vehicle traveling on unpaved backroads in an apparent effort to evade a border patrol checkpoint on the highway).

[P. 1324, add to text after n.245:]

If police stop a vehicle, then the vehicle's passengers as well as its driver are deemed to have been seized from the moment the car comes to a halt, and the passengers as well as the driver may challenge the constitutionality of the stop.[8]

[P. 1325, add to n.247:]

See also United States v. Flores-Montano, 541 U.S. 149 (2004) (upholding a search at the border involving disassembly of a vehicle's fuel tank).

[P. 1325, add to n.248:]

Edmond was distinguished in *Illinois v. Lidster*, 540 U.S. 419 (2004), upholding use of a checkpoint to ask motorists for help in solving a recent hit-and-run accident that had resulted in death. The public interest in solving the crime was deemed "grave," while the interference with personal liberty was deemed minimal.

[P. 1325, add to n.250:]

And, because there also is no legitimate privacy interest in possessing contraband, and because properly conducted canine sniffs are "generally likely, to reveal only the presence of contraband," police may conduct a canine sniff around the perimeter of a vehicle stopped for a traffic offense. Illinois v. Caballes, 543 U.S. 405, 409 (2005).

[P. 1325, add to n.252 after citation to New York v. Belton:]

Thornton v. United States, 541 U.S. 615 (2004) (the *Belton* rule applies regardless of whether the arrestee exited the car at the officer's direction, or whether he did so prior to confrontation);

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[7] Virginia v. Moore, 128 S. Ct. 1598 (2008) (holding that, where an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was based on probable cause).

[8] Brendlin v. California, 127 S. Ct. 2400, 2410 (2007).

[P. 1326, add to end of sentence in text containing n.258:]

, or unless there is individualized suspicion of criminal activity by the passengers.[9]

– Consent Searches

[P. 1328, add to n. 271:]

United States v. Drayton, 536 U.S. 194, 207 (2002) (totality of circumstances indicated that bus passenger consented to search even though officer did not explicitly state that passenger was free to refuse permission).

[P. 1329, add to text at end of section:]

If, however, one occupant consents to a search of shared premises, but a physically present co-occupant expressly objects to the search, the search is unreasonable.[10]

– Border Searches

[P. 1330, add to n.283 after citation to United States v. Cortez:]

, and *United States v. Arvizu*, 534 U.S. 266 (2002)

– Prisons and Regulation of Probation

[P. 1333, change heading to "Prisons and Regulation of Probation and Parole"]

[P. 1334, add to text at end of section:]

A warrant is also not required if the purpose of a search of a probationer is investigate a crime rather than to supervise probation.[11]

"[O]n the 'continuum' of state-imposed punishments . . . ,

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[9] Maryland v. Pringle, 540 U.S. 366 (2003) (probable cause to arrest passengers based on officers finding $783 in glove compartment and cocaine hidden beneath back seat armrest, and on driver and passengers all denying ownership of the cocaine).

[10] Georgia v. Randolph, 547 U.S. 103 (2006) (warrantless search of a defendant's residence based on his estranged wife's consent was unreasonable and invalid as applied to a physically present defendant who expressly refused to permit entry). The Court in *Randolph* admitted that it was "drawing a fine line," id. at 121, between situations where the defendant is present and expressly refuses consent, and that of *United States v. Matlock*, 415 U.S. 164, 171 (1974), and *Illinois v. Rodriguez*, 497 U.S. 177 (1990), where the defendants were nearby but were not asked for their permission. In a dissenting opinion, Chief Justice Roberts observed that the majority's ruling "provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room." Id. at 127.

[11] United States v. Knights, 534 U.S. 112 (2005) (probationary status informs both sides of the reasonableness balance).

parolees have [even] fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[12] The Fourth Amendment, therefore, is not violated by a warrantless search of a parolee that is predicated upon a parole condition to which a prisoner agreed to observe during the balance of his sentence.[13]

– Drug Testing

[P. 1336, add to text after n.322:]

Seven years later, the Court in *Board of Education v. Earls*[14] extended *Vernonia* to uphold a school system's drug testing of all junior high and high school students who participated in extracurricular activities. The lowered expectation of privacy that athletes have "was not essential" to the decision in *Vernonia*, Justice Thomas wrote for a 5-4 Court majority.[15] Rather, that decision "depended primarily upon the school's custodial responsibility and authority."[16] Another distinction was that, although there was some evidence of drug use among the district's students, there was no evidence of a significant problem, as there had been in *Vernonia*. Rather, the Court referred to "the nationwide epidemic of drug use," and stated that there is no "threshold level" of drug use that need be present.[17] Because the students subjected to testing in *Earls* had the choice of not participating in extra-curricular activities rather than submitting to drug testing, the case stops short of holding that public school authorities may test all junior and senior high school students for drugs. Thus, although the Court's rationale seems broad enough to permit across-the-board testing,[18] Justice Breyer's concurrence, emphasizing among other points that "the testing program avoids

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[12] Samson v. California, 547 U.S. 843, 850 (2006) (internal quotation marks altered).

[13] 547 U.S. at 852. The parole condition at issue in *Samson* required prisoners to "agree in writing to be subject to a search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Id. at 846, quoting Cal. Penal Code Ann. § 3067(a).

[14] 536 U.S. 822 (2002).

[15] 536 U.S. at 831.

[16] 536 U.S. at 831.

[17] 536 U.S. at 836.

[18] Drug testing was said to be a "reasonable" means of protecting the school board's "important interest in preventing and deterring drug use among its students," and the decision in *Vernonia* was said to depend "primarily upon the school's custodial responsibility and authority." 536 U.S. at 838, 831.

subjecting the entire school to testing,"[19] raises some doubt on this score. The Court also left another basis for limiting the ruling's sweep by asserting that "regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren."[20]

Enforcing the Fourth Amendment: The Exclusionary Rule

– Alternatives to the Exclusionary Rule

[P. 1344, add to the end of n.356, before the period:]

(cited with approval in *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007), in which a police officer's ramming a fleeing motorist's car from behind in an attempt to stop him was found reasonable)

[P. 1344, add to n.361 after citation to Saucier v. Katz:]

See also Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (because cases create a "hazy border between excessive and acceptable force," an officer's misunderstanding as to her authority to shoot a suspect attempting to flee in a vehicle was not unreasonable).

– Narrowing Application of the Exclusionary Rule

[P. 1354, add to text after n.409:]

In addition, a violation of the "knock-and-announce" procedure that police officers must follow to announce their presence before entering a residence with a lawful warrant[21] does not require suppression of the evidence gathered pursuant to the warrant.[22]

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[19] Concurring Justice Breyer pointed out that the testing program "preserves an option for a conscientious objector," who can pay a price of nonparticipation that is "serious, but less severe than expulsion." 536 U.S. at 841. Dissenting Justice Ginsburg pointed out that extracurricular activities are "part of the school's educational program" even though they are in a sense "voluntary." "Voluntary participation in athletics has a distinctly different dimension" because it "expose[s] students to physical risks that schools have a duty to mitigate." Id. at 845, 846.

[20] 536 U.S. at 831-32. The best the Court could do to support this statement was to assert that "some of these clubs and activities require occasional off-campus travel and communal undress," to point out that all extracurricular activities "have their own rules and requirements," and to quote from general language in *Vernonia*. Id. Dissenting Justice Ginsburg pointed out that these situations requiring a change of clothes on occasional out-of-town trips are "hardly equivalent to the routine communal undress associated with athletics." Id. at 848.

[21] The "knock and announce" requirement is codified at 18 U.S.C. § 3109, and the Court has held that the rule is also part of the Fourth Amendment reasonableness inquiry. Wilson v. Arkansas, 514 U.S. 927 (1995).

[22] Hudson v. Michigan, 547 U.S. 586 (2006). Writing for the majority, Justice Scalia explained that the exclusionary rule was inappropriate because the purpose of the knock-and-announce requirement was to protect human life, property, and the home-owner's privacy and dignity; the requirement has never protected an individual's interest in preventing seizure of evidence described in a warrant. Id. at 594. Furthermore, the Court believed that the "substantial social costs" of applying the exclusionary rule would

(continued...)

[22] (...continued)
outweigh the benefits of deterring knock-and-announce violations by applying it. Id. The Court also reasoned that other means of deterrence, such as civil remedies, were available and effective, and that police forces have become increasingly professional and respectful of constitutional rights in the past half-century. Id. at 599. Justice Kennedy wrote a concurring opinion emphasizing that "the continued operation of the exclusionary rule . . . is not in doubt." Id. at 603. In dissent, Justice Breyer asserted that the majority's decision "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection." Id. at 605.

FIFTH AMENDMENT

DOUBLE JEOPARDY

Development and Scope

[P. 1370, delete period in text before n.58 and add:]

, and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.[1]

Reprosecution Following Conviction

– Sentence Increases

[P. 1385, add to n.134:]

But see Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (state may seek the death penalty in a retrial when defendant appealed following discharge of the sentencing jury under a statute authorizing discharge based on the court's "opinion that further deliberation would not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

Reprosecution Following Acquittal

– Acquittal by the Trial Judge

[P. 1379, substitute for first paragraph of section:]

When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.[2] There is no possibility of retrial for the same offense.[3] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be

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[1] United States v. Lara, 541 U.S. 193 (2004) (federal prosecution for assaulting a federal officer after tribal conviction for "violence to a policeman"). The Court concluded that Congress has power to recognize tribal sovereignty to prosecute non-member Indians, that Congress had done so, and that consequently the tribal prosecution was an exercise of tribal sovereignty, not an exercise of delegated federal power on which a finding of double jeopardy could be based.

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

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

able to appeal or the judge may be able to reconsider.[4] The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[5] Thus, an appeal by the government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the government had not proved facts constituting the offense.[6] Even if, as happened in *Sanabria v. United States*,[7] the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.[8]

SELF-INCRIMINATION

Development and Scope

[P. 1396, change period in text before n.185 to comma and add in text after n.185:]

, and there can be no valid claim if there is no criminal prosecution.[9]

[P. 1399, add to n.203:]

See also Fry v. Pliler, 127 S. Ct. 2321, 2324 (2007) (the "substantial and injurious effect standard" is to be applied in federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*").

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

[5] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[6] 430 U.S. at 570-76. *See also* United States v. Scott, 437 U.S. 82, 87-92 (1978); Smalis v. Pennsylvania, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

[7] 437 U.S. 54 (1978).

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

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

Confessions: Police Interrogation, Due Process, and Self-Incrimination

– Miranda v. Arizona

[P. 1425, add to n.340:]

Yarborough v. Alvarado, 541 U.S. 652 (2004) (state court determination that teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal *habeas* review).

[P. 1429, add to n.363:]

Elstad was distinguished in *Missouri v. Seibert*, 542 U.S. 600 (2004), however, when the failure to warn prior to the initial questioning was a deliberate attempt to circumvent *Miranda* by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

[P. 1429, add to n.365:]

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

[P. 1429, substitute for clause in text containing n.367:]

On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[10]

DUE PROCESS

Procedural Due Process

– Aliens: Entry and Deportation

[P. 1443, add as first sentence of section:]

The Court has frequently said that Congress exercises "sovereign" or "plenary" power over the substance of immigration law, and this power is at its greatest when it comes to exclusion of aliens.[11]

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

[11] *See* discussion under Art. I, § 8, cl. 4, "The Power of Congress to Exclude Aliens."

[P. 1444, add as first sentence of only paragraph beginning on page:]

Procedural due process rights are more in evidence when it comes to deportation or other proceedings brought against aliens already within the country.

[P. 1445, add to text after n.444:]

In *Demore v. Kim*,[12] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of removability, the Court reaffirmed Congress' broad powers over aliens. "[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[13]

– Judicial Review of Administrative or Military Proceedings

[P. 1446, add to text after only full paragraph on page:]

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld*.[14] During a military action in Afghanistan,[15] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to detain Hamdi as an "enemy combatant," and to deny him meaningful access to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[16] However, the Court ruled that the Government may not

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[12] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.

[13] 538 U.S. at 528. There was disagreement among the Justices as to whether existing procedures afforded the alien an opportunity for individualized determination of danger to society and risk of flight.

[14] 542 U.S. 507 (2004).

[15] In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force," Pub. L. 107-40, 115 Stat. 224 (2001), which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

[16] There was no opinion of the Court in *Hamdi*. Rather, a plurality opinion, authored by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) relied on the statutory "Authorization for Use of Military Force" to support the detention. Justice Thomas also found that the Executive Branch had the

(continued...)

detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision maker, and must be allowed to consult an attorney.[17]

NATIONAL EMINENT DOMAIN POWER

Public Use

[P. 1464, add new footnote on line 3 after "determination.":]

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

[P. 1465, add to text after n.575:]

Subsequently, the Court put forward an added indicium of "public use": whether the government purpose could be validly achieved by tax or user fee.[18]

[P. 1466, add new footnote at end of sentence beginning "For 'public use'":]

Most recently, the Court equated public use with "public purpose." Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[P. 1466, add to text at end of section:]

The expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.[19] There, a five-justice majority upheld as a public use the private-to-private transfer of land for purposes of economic development, at least in the context of a well-considered, areawide redevelopment plan adopted by a municipality to

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[16] (...continued)
power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[17] 542 U.S. 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsburg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. Id. at 553 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*, and thus would have required a criminal prosecution of the petitioner. Id. at 554 (dissenting).

[18] Brown v. Legal Found. of Washington, 538 U.S. 216, 232 (2003). *But see* id. at 242 n.2 (Justice Scalia dissenting).

[19] 545 U.S. 469 (2005).

invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to the legislative judgment as to public needs. At the same time, the Court cautioned that private-to-private condemnations of individual properties, not part of an "integrated development plan . . . raise a suspicion that a private purpose [is] afoot."[20] A vigorous four-justice dissent countered that localities will always be able to manufacture a plausible public purpose, so that the majority opinion leaves the vast majority of private parcels subject to condemnation when a higher-valued use is desired.[21] Backing off from the Court's past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters referred to the "errant language" of these decisions, which was "unnecessary" to their holdings.[22]

Just Compensation

[P. 1467, add to n.584 after first citation:]

The owner's loss, not the taker's gain, is the measure of such compensation. Brown v. Legal Found. of Washington, 538 U.S. 216, 236 (2003).

When Property is Taken

– Regulatory Takings

[P. 1483, substitute for n.683:]

Tahoe-Sierra, 535 U.S. at 323. *Tahoe-Sierra*'s sharp physical-regulatory dichotomy is hard to reconcile with dicta in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

[Pp. 1485-86, substitute for paragraph that begins on page 1485 and for first paragraph that begins on page 1486:]

The first prong of the *Agins* test, asking whether land use controls "substantially advance legitimate governmental interests," has now been erased from takings jurisprudence, after a quarter-century run. The proper concern of regulatory takings

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[20] 545 U.S. at 487.

[21] Written by Justice O'Connor, and joined by Justices Scalia and Thomas, and Chief Justice Rehnquist.

[22] 545 U.S. at 501.

law, said *Lingle v. Chevron U.S.A. Inc.*,[23] is the magnitude, character, and distribution of the burdens that a regulation imposes on property rights. In "stark contrast," the "substantially advances" test addresses the means-end efficacy of a regulation, more in the nature of a due process inquiry.[24] As such, it is not a valid takings test.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. A two-part test has emerged. The first part debuted in *Nollan v. California Coastal Commission*,[25] and holds that in order not to be a taking, an exaction condition on a development permit approval (requiring, for example, that a portion of a tract to be subdivided be dedicated for public roads) must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of extortion."[26] The second part of the exaction-takings test, announced in *Dolan v. City of Tigard*,[27] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner, and the impact of the property owner's proposed development on the community – at least in the context of adjudicated (rather than legislated) conditions.

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the

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[23] 544 U.S. 528 (2005).

[24] 544 U.S. at 542.

[25] 483 U.S. 825 (1987).

[26] 483 U.S. at 837. Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (*e.g.*, congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

[27] 512 U.S. 374 (1994).

government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[28] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. Still unclear, however, is whether the Court meant to place outside *Dolan* exactions of a purely monetary nature, in contrast with the physically invasive dedication conditions involved in *Nollan* and *Dolan*.[29]

The announcement following *Penn Central* of the above *per se* rules in *Loretto* (physical occupations), *Agins* and *Lucas* (total elimination of economic use), and *Nollan*/*Dolan* (exaction conditions) prompted speculation that the Court was replacing its ad hoc *Penn Central* approach with a more categorical takings jurisprudence. Such speculation was put to rest, however, by three decisions from 2001 to 2005 expressing distaste for categorical regulatory takings analysis. These decisions endorse *Penn Central* as the dominant mode of analysis for inverse condemnation claims, confining the Court's *per se* rules to the "relatively narrow" physical occupation and total wipeout circumstances, and the "special context" of exactions.[30]

[P. 1490, add to text at end of section:]

The requirement that state remedies be exhausted before bringing a federal taking claim to federal court has occasioned countless dismissals of takings claims brought initially in federal court, while at the same time posing a bar under doctrines of preclusion to filing first in state court, per *Williamson County*, then relitigating in federal court. The effect in many cases is to keep federal takings claims out of federal court entirely – a consequence the plaintiffs' bar has long argued could not have been intended by the Court. In *San Remo Hotel, L.P. v. City and County of San Francisco*,[31] the Court unanimously declined to

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[28] 526 U.S. 687 (1999).

[29] A strong hint that monetary exactions are indeed outside *Nollan*/*Dolan* was provided in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005), explaining that these decisions were grounded on the doctrine of unconstitutional conditions as applied to *easement* conditions that would have been *per se physical* takings if condemned directly.

[30] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). The other two decisions are *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

[31] 545 U.S. 323 (2005).

create an exception to the federal full faith and credit statute[32] that would allow relitigation of federal takings claims in federal court. Nor, said the Court, may an *England* reservation of the federal taking claim in state court[33] be used to require a federal court to review the reserved claim, regardless of what issues the state court may have decided. While concurring in the judgment, four justices asserted that the state-exhaustion prong of *Williamson County* "may have been mistaken."[34]

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[32] 28 U.S.C. § 1738. The statute commands that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ." The statute has been held to encompass the doctrines of claim and issue preclusion.

[33] *See* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964).

[34] 545 U.S. at 348 (Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas).

SIXTH AMENDMENT

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

– The Attributes and Function of the Jury

[P. 1505, add to text at end of section:]

Subsequently, the Court held that, just as failing to prove materiality to the jury beyond a reasonable doubt can be harmless error, so can failing to prove a sentencing factor to the jury beyond a reasonable doubt. "Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes."[1]

– Criminal Proceedings to Which the Guarantee Applies

[P.1506, add to text at end of first full paragraph:]

The Court has consistently, held, however, that a jury is not required for purposes of determining whether a defendant is insane or mentally retarded and consequently not eligible for the death penalty.[2]

[P. 1506-1507, substitute for final two paragraphs of section:]

Within the context of a criminal trial, what factual issues are submitted to the jury has traditionally been determined by whether the fact to be established is an element of a crime or instead is a sentencing factor.[3] Under this approach, the right to a jury extends to the finding of all facts establishing the elements

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[1] Washington v. Recuenco, 548 U.S. 212, 220 (2006). *Apprendi* is discussed in the next section.

[2] Ford v. Wainwright, 477 U.S. 399, 416-417 (1986); Atkins v. Virginia, 536 U.S. 304, 317 (2002); Schriro v. Smith, 546 U.S. 6, 7 (2005). *See* Eighth Amendment, "Limitations on Capital Punishment: Diminished Capacity," *infra.*

[3] In *Washington v. Recuenco*, however, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element [of a crime] to the jury, is not structural error," entitling the defendant to automatic reversal, but can be harmless error. 548 U.S. 212, 222 (2006).

of a crime, but sentencing factors may be evaluated by a judge.[4] Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[5]

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[6] "The relevant inquiry is one not of form, but of effect."[7] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum," the Court concluded, "must be submitted to a jury, and proved beyond a reasonable doubt."[8] The one exception the *Apprendi* Court recognized was for sentencing enhancements based on recidivism.[9] Subsequently, the Court refused to apply *Apprendi*'s

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[4] In *James v. United States*, 127 S. Ct. 1586 (2007), the Court found no Sixth Amendment issue raised when it considered "the *elements of the offense* . . . without inquiring into the specific conduct of this particular offender." Id. at 1594 (emphasis in original). The question before the Court was whether, under federal law, attempted burglary, as defined by Florida law, "presents a serious potential risk of physical injury to another" and therefore constitutes a "violent felony," subjecting the defendant to a longer sentence. Id. at 1591. In answering this question, the Court employed the "categorical approach" of looking only to the statutory definition and not considering the "particular facts disclosed by the record of conviction." Id. at 1593-94. Thus, "the Court [was] engaging in statutory interpretation, not judicial factfinding," and "[s]uch analysis raises no Sixth Amendment issue." Id. at 1600.

[5] For instance, the Court held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in the main text under "Proof, Burden of Proof, and Presumptions."

[6] 530 U.S. 466, 490 (2000).

[7] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).

[8] 530 U.S. at 490.

[9] 530 U.S. at 490. Enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, and a judge may find the existence of previous valid convictions even if the result is a significant increase in the maximum sentence available.

(continued...)

principles to judicial factfinding that supports imposition of mandatory minimum sentences.[10]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations. In *Ring v. Arizona*,[11] the Court, overruling precedent,[12] applied *Apprendi* to invalidate an Arizona law that authorized imposition of the death penalty only if the judge made a factual determination as to the existence of any of several aggravating factors. Although Arizona required that the judge's findings as to aggravating factors be made beyond a reasonable doubt, and not merely by a preponderance of the evidence, the Court ruled that those findings must be made by a jury.[13]

In *Blakely v. Washington*,[14] the Court sent shockwaves through federal as well as state sentencing systems when it applied *Apprendi* to invalidate a sentence imposed under Washington State's sentencing statute. Blakely, who pled guilty to an offense for which the "standard range" under the state's sentenc-

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[9] (...continued)
Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States is subject to a maximum sentence of two years, but upon proof of a felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has the burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[10] Prior to its decision in *Apprendi*, the Court had held that factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, *McMillan* was subsequently reaffirmed in *Harris v. United States*, 536 U.S. 545, 568-69 (2002). Five Justices in *Harris* thought that factfinding required for imposition of mandatory minimums fell within *Apprendi*'s reasoning, but one of the five, Justice Breyer, concurred in the judgment on practical grounds despite his recognition that *McMillan* was not "easily" distinguishable "in terms of logic." 536 U.S. at 569. Justice Thomas' dissenting opinion, id. at 572, joined by Justices Stevens, Souter, and Ginsburg, elaborated on the logical inconsistency, and suggested that the Court's deference to Congress' choice to treat mandatory minimums as sentencing factors made avoidance of *Apprendi* a matter of "clever statutory drafting." Id. at 579.

[11] 536 U.S. 584 (2002).

[12] Walton v. Arizona, 497 U.S. 639 (1990). The Court's decision in *Ring* also appears to overrule a number of previous decisions on the same issue, such as *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989) (per curiam), and undercuts the reasoning of another. *See* Clemons v. Mississippi, 494 U.S. 738 (1990) (appellate court may reweigh aggravating and mitigating factors and uphold imposition of death penalty even though jury relied on an invalid aggravating factor).

[13] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609. The Court rejected Arizona's request that it recognize an exception for capital sentencing in order not to interfere with elaborate sentencing procedures designed to comply with the Eighth Amendment. Id. at 605-07.

[14] 542 U.S. 296 (2004).

ing law was 49 to 53 months, was sentenced to 90 months based on the judge's determination – not derived from facts admitted in the guilty plea – that the offense had been committed with "deliberate cruelty," a basis for an "upward departure" under the statute. The 90-month sentence was thus within a statutory maximum, but the Court made "clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[15]

In *United States v. Booker*,[16] the Court held that the same principles limit sentences that courts may impose under the federal Sentencing Guidelines. As the Court restated the principle in *Booker,* "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[17] Attempts to distinguish *Blakely* were rejected. Because the Sentencing Reform Act made application of the Guidelines "mandatory and binding on all judges,"[18] the Court concluded that the fact that the Guidelines were developed by the Sentencing Commission rather than by Congress "lacks constitutional significance.[19] The mandatory nature of the Guidelines was also important to the Court's formulation of a remedy.[20] Rather than engrafting a jury trial requirement onto the Sentencing Reform Act, the Court instead invalidated two of its provisions, one making application of the Guidelines mandatory, and one requiring *de novo* review for appeals of departures from the mandatory Guidelines, and held that the remainder of the Act

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[15] 542 U.S. at 303-304 (italics in original; citations omitted).

[16] 543 U.S. 220 (2005).

[17] 543 U.S. at 244.

[18] 543 U.S. at 233.

[19] 543 U.S. at 237. Relying on *Mistretta v. United States*, 488 U.S. 361 (1989), the Court also rejected a separation-of-powers argument. Id. at 754-55.

[20] There were two distinct opinions of the Court in *Booker*. The first, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg (the same Justices who comprised the five-Justice *Blakely* majority), applied *Blakely* to find a Sixth Amendment violation; the other, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg (the *Blakely* dissenters joined by Justice Ginsburg), set forth the remedy.

could remain intact.[21] As the Court explained, this remedy "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well."[22]

In *Cunningham v. California*,[23] the Court considered whether California's determinate state sentencing law, yet another style of legislative effort intended to regularize criminal sentencing, survived the *Booker-Blakely* line of cases. That law required that the trial judge in the case sentence the defendant to 12 years in prison unless the judge found one or more additional "circumstances in aggravation," in which case the sentence would be 16 years. Although such aggravating circumstances could include specific factual findings made by a judge under a "preponderance of the evidence" standard in apparent violation of *Booker* and *Blakely*, the court was also free to consider "additional criteria reasonably related to the decision being made."[24] The defendant argued that this latter provision of the Rule was consistent with a still-undeveloped holding by the Court in *Booker* that even the now-advisory federal sentencing guidelines would remain subject to appellate review to determine "reasonableness."[25] The Court rejected this argument, finding that the discretion afforded the trial court by the California law did not eliminate the unconstitutional requirement that the court make the factual findings that imposed a higher prison term.[26]

In *Rita v. United States*, the Court upheld the application, by federal courts of appeals, of the presumption "that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence."[27] Even if "the presumption increases the likelihood that the judge, not the jury,

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[21] 543 U.S. at 259. The Court substituted a "reasonableness" standard for the *de novo* review standard. Id. at 262.

[22] 543 U.S. at 245-246 (statutory citations omitted).

[23] 127 S. Ct. 856 (2007).

[24] 127 S. Ct. at 863, quoting California Rules 4.420(b), 4.408(a).

[25] In *Booker*, the Court substituted a "reasonableness" standard for the statutory *de novo* appellate review standard that it struck down. 543 U.S. at 262.

[26] "The reasonableness requirement that *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." 127 S. Ct. at 870. The Court also rejected the argument that the discretion given to the judge made the California system "advisory" and thus consistent with the remedy established in *Booker*. Id.

[27] 127 S. Ct. 2456, 2459 (2007).

will find 'sentencing facts,'" the Court wrote, it "does not violate the Sixth Amendment. This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence. Nor do they prohibit the sentencing judge from taking account of the Sentencing Commission's factual findings or recommended sentences. See *Cunningham v. California* . . . . The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede). . . . A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the judge to impose that sentence. Still less does it *forbid* he sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone."[28]

In *United States v. Gall*,[29] the Court held that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard."[30] The Court rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range," and also rejected "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." These approaches,

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[28] 127 S. Ct. at 2465-66 (emphasis in original). The Court added: "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. . . . [A]ppellate courts may not presume that every variance from the advisory Guidelines is unreasonable. . . . Several courts of appeals have also rejected a presumption of unreasonableness. . . . However, a number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance. . . . We will consider that approach next Term in *United States v. Gall*, No. 06-7949." Id. at 2467.

[29] 128 S. Ct. 586 (2007) (upholding a sentence of probation where the Guidelines had recommended imprisonment).

[30] 128 S. Ct. at 591. "As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the 'starting point and the initial benchmark.'" Kimbrough v. United States, 128 S. Ct. 558 (2007) (upholding lower-than-Guidelines sentence for trafficker in crack cocaine, where sentence "is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses"). A district court judge may determine "that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 128 S. Ct. at 564.

the Court said, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[31]

Impartial Jury

[P. 1511, add to text after n.110:]

In *Uttecht v. Brown*,[32] the Court summed up four principles that it derived from *Witherspoon* and *Witt* [cited in the main volume at n.105]: "First a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts."[33]

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[31] 128 S. Ct. at 595. Justice Alito, dissenting, wrote, "we should not forget [that] . . . *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury. . . . It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap between the Sixth Amendment and the Court' opinion should be enough to show that the *Blakely-Booker* line of cases has gone astray." Id. at 605 (Alito, J., dissenting).

[32] 127 S. Ct. 2218 (2007).

[33] 127 S. Ct. at 2224 (citations omitted). Deference was the focus of *Uttecht v. Brown*, as the Court, by a 5-to-4 vote, reversed the Ninth Circuit and affirmed a death sentence, finding that the Ninth Circuit had neglected to accord the deference it owed to the trial court's finding that a juror was not substantially impaired. The Court concluded: "Courts reviewing claims of *Witherspoon-Witt* error . . . , especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." Id. at 2231. The reason that federal courts of appeals owe special deference when considering *habeas* petitions is that the Antiterrorism and Effective Death Penalty Act of 1996 "provide[s] additional, and binding, directions to accord deference." Id. at 2224. The dissent, written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, noted that the juror whose exclusion for cause was challenged had "repeatedly confirmed" that, despite his "general reservations" about the death penalty, he would be able to vote for it. Id. at 2240. Even under the standard of review imposed by the Antiterrorism and Effective

(continued...)

CONFRONTATION

[P. 1522, substitute for both paragraphs on page:]

In *Ohio v. Roberts*,[34] a Court majority adopted the reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[35] Over the course of 24 years, *Roberts* was applied, narrowed,[36] and finally overruled in *Crawford v. Washington*.[37] The Court in *Crawford* rejected reliance on "particularized guarantees of trustworthiness" as inconsistent with the requirements of the Confrontation Clause. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[38] Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test had been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[39] "Where testimonial

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[33] (...continued)
Death Penalty Act of 1996, "[w]hile such testimony might justify a peremptory challenge, until today not one of the many cases decided in the wake of *Witherspoon v. Illinois* has suggested that such a view would support a challenge for cause. . . . In its opinion, the Court blindly accepts the state court's conclusory statement that [the juror's] views would have 'substantially impaired' his ability to follow the court's instructions without examining what that term means in practice and under our precedents." Id. at 2240 (citation to *Witherspoon* omitted).

[34] 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The state's sole effort to locate her was to deliver a series of subpoenas to her parents' home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id. at 74-77.

[35] "[O]nce a witness is shown to be unavailable . . . , the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). The Court indicated that reliability could be inferred without more if the evidence falls within a firmly rooted hearsay exception.

[36] Applying *Roberts*, the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in *United States v. Inadi*, 475 U.S. 387 (1986), which held that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. *See also* White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822-23 (1990) (insufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

[37] 541 U.S. 36 (2004).

[38] 541 U.S. at 60-61.

[39] 541 U.S. at 63.

statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[40]

Crawford represented a decisive turning point by clearly stating the basic principles to be used in Confrontation Clause analysis. "Testimonial evidence" may be admitted against a criminal defendant only if the declarant is available for cross-examination at trial, or, if the declarant is unavailable even though the government has made reasonable efforts to procure his presence, the defendant has had a prior opportunity to cross-examine as to the content of the statement.[41] Under the Confrontation Clause, the only exceptions that the Court has acknowledged are the two that existed under common law at the time of the founding: "declarations made by a speaker who was both on the brink of death and aware that he was dying," and "statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[42] The second of these exceptions applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[43] Thus, in a trial for murder, the question arose whether statements made by the victim to a police officer three weeks before she was murdered, that the defendant had threatened her, could be admitted. The state court had admitted them on the basis that the defendant's having murdered the victim had made the victim unavailable to testify, but the Supreme Court reversed, holding that, unless the testimony had been confronted or fell within the dying declaration exception, it could not be admitted "on the basis of a prior *judicial* assessment that the defendant is guilty as charged," for to admit it on that basis it would "not sit well with the right to trial by jury."[44]

In *Davis v. Washington*,[45] the Court began to explore the parameters of *Crawford* by considering when a police interrogation is "testimonial"for purposes of the Confrontation Clause.

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[40] 541 U.S. at 68-69.

[41] 541 U.S. at 54, 59. Although the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it indicated that the term covers "at a minimum" prior testimony at a preliminary hearing, at a former trial, or before a grand jury, and statements made during police interrogation. Id. at 68.

[42] Giles v. California, 128 S. Ct. 2678, 2682, 2683 (2008).

[43] 128 S. Ct. at 2683.

[44] 128 S. Ct. at 2686.

[45] 547 U.S. 813 (2006).

Davis involved a 911 call in which a women described being assaulted by a former boyfriend. A tape of that call was admitted as evidence of a felony violation of a domestic no-contact order, despite the fact that the women in question did not testify. Although again declining to establish all the parameters of when a response to police interrogation is testimonial, the Court held that statements to the police are nontestimonial when made under circumstances that "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[46] Statements made after such an emergency has ended, however, would be treated as testimonial and could not be introduced into evidence.[47]

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

– Johnson v. Zerbst

[P. 1528, add to n.208:]

A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 541 U.S. 77 (2004) (holding that warnings by trial judge detailing risks of waiving right to counsel are not constitutionally required before accepting guilty plea from uncounseled defendant).

– Protection of the Right to Retained Counsel

[P. 1531, add to text after n.229:]

Where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant.[48] Further, because such a denial is not a "trial error" (a constitutional error that occurs during presentation of a case to the jury), but a "structural defect" (a constitutional error that affects the framework of the trial),[49] the Court had held that the decision is not

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[46] 547 U.S. at 822.

[47] 547 U.S. at 828-29. Thus, where police responding to a domestic violence report interrogated a woman in the living room while her husband was being questioned in the kitchen, there was no present threat to the woman, so such information as was solicited was testimonial. Id. at 830 (facts of *Hammon v. Indiana*, considered together with *Davis*).

[48] United States v. Gonzalez-Lopez, 548 U.S. 140, 144-45 (2006).

[49] Arizona v. Fulminante, 499 U.S. 279, 307-310 (1991).

subject to a "harmless error" analysis.[50]

– Effective Assistance of Counsel

[P. 1535, add new footnote after "virtually unchallengeable," in sentence ending with n.252:]

Strickland, 466 U.S. at 690. *See also* Yarborough v. Gentry, 540 U.S. 1 (2003) (deference to attorney's choice of tactics for closing argument).

[P. 1535, substitute for n.252:]

Strickland, 466 U.S. at 691. *See also* Woodford v. Visciotti, 537 U.S. 19 (2002) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors). *See also* Schriro v. Landrigan, 127 S. Ct. 1933 (2007) (federal district court was within its discretion to conclude that attorney's failure to present mitigating evidence made no difference in sentencing). *But see* Wiggins v. Smith, 539 U.S. 510 (2003) (attorney's failure to pursue defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable); and Rompilla v. Beard, 545 U.S. 374 (2005) (attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate).

[P. 1535, change period in text before n.252 to comma and add to text after n.252:]

and decisions selecting which issues to raise on appeal.[51]

[P. 1536, add to n.260:]

In *Wright v. Van Patten*, 128 S. Ct. 743 (2008) (per curiam), the Supreme Court noted that it has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that *Cronic* should apply. The fact that the Court has never ruled on the question means that "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law,'" and, as a consequence, under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), the defendant is not entitled to *habeas* relief. Id. at 748 (quoting *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006), as to which see "Limitations on *Habeas Corpus* Review of Capital Sentences" under Eighth Amendment).

[P. 1536, substitute for n.261:]

Cronic, 466 U.S. at 659 n.26.

[P. 1536, change the period in text before n.261 to a comma, and add after new comma:]

and consequently most claims of inadequate representation are to

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[50] *Gonzalez-Lopez*, 548 U.S. at 148-49. The Court noted that an important component of the finding that denial of the right to choose one's own counsel was a "structural defect" was the difficulty of assessing the effect of such denial on a trial's outcome. Id. at 149 n.4.

[51] There is no obligation to present on appeal all nonfrivolous issues requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983) (appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

be measured by the *Strickland* standard.[52]

– Self-Representation

[P. 1536, add to n.262 after initial citation:]

An invitation to overrule *Faretta* because it leads to unfair trials was declined in *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008).

[P. 1536, add to n.262 before sentence beginning with "Related":]

The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 546 U.S. 9 (2005) (per curiam).

[P. 1537, add footnote at end of the sentence that ends on third line of the page:]

The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, 128 S. Ct. 2379 (2008). Mental competence to stand trial, however, is sufficient to ensure the right to waive the right to counsel in order to plead guilty. Godinez v. Moran, 509 U.S. 389, 398 (1993).

Right to Assistance of Counsel in Nontrial Situations

– Judicial Proceedings Before Trial

[P. 1537: insert at the beginning of the section:]

Even a preliminary hearing where no government prosecutor is present can trigger the right to counsel.[53] "[A] criminal defendant's defendant's initial appearance before a judicial officer, where he learns the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment

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[52] *Strickland* and *Cronic* were decided the same day, and the Court's opinion in each cited the other. See *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 666 n.41. The *Cronic* presumption of prejudice may be appropriate when counsel's "overall performance" is brought into question, whereas *Strickland* is generally the appropriate test for "claims based on specified [counsel] errors." *Cronic*, 466 U.S. at 666 n.41. The narrow reach of *Cronic* has been illustrated by subsequent decisions. Not constituting *per se* ineffective assistance is a defense counsel's failure to file a notice of appeal, or in some circumstances even to consult with the defendant about an appeal. Roe v. Flores-Ortega, 528 U.S. 470 (2000). *But see* Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam). *See also* Florida v. Nixon, 543 U.S. 175 (2004) (no presumption of prejudice when a defendant has failed to consent to a tenable strategy counsel has adequately disclosed to and discussed with him). A standard somewhat different from *Cronic* and *Strickland* governs claims of attorney conflict of interest. See discussion of *Cuyler v. Sullivan* under "Protection of Right to Retained Counsel," *supra.*

[53] Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) (right to appointed counsel attaches even if no public prosecutor, as distinct from a police officer, is aware of that initial proceeding or involved in its conduct).

right to counsel."[54] "Attachment," however, may signify "nothing more than the beginning of the defendant's prosecution [and] . . . not mark the beginning of a substantive entitlement to the assistance of counsel."[55] Thus, counsel need only be appointed "as far in advance of trial, and as far in advance of any pretrial 'critical stage,' as necessary to guarantee effective assistance at trial."[56]

– Custodial Interrogation

[P. 1539, add new footnote at end of paragraph continued from page 1538:]

The different issues in Fifth and Sixth Amendment cases were recently summarized in *Fellers v. United States*, 540 U.S. 519 (2004), holding that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

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[54] 128 S. Ct. at 2592.

[55] 128 S. Ct. at 2592 (Alito, J., concurring). Justice Alito's concurrence, joined by Chief Justice Roberts and Justice Scalia, was not necessary for the majority opinion in *Rothgery*, but the majority noted that it had not decided "whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this." Id.

[56] 128 S. Ct. at 2595 (Alito, J. concurring).

SEVENTH AMENDMENT

TRIAL BY JURY IN CIVIL CASES

Application of the Amendment

– Procedures Limiting Jury's Role

[P. 1557, add to text after n.61:]

> "In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment."[1] Thus, in order to screen out frivolous complaints or defenses, Congress "has power to prescribe what must be pleaded to state the claim, just as it has the power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of – including the pleading and proof requirements for . . . private actions."[2] A "heightened pleading rule simply 'prescribes the means of making an issue,' and . . . , when '[t]he issue [is] made as prescribed, the right of trial by jury accrues.'"[3]

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[1] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2512, n.8 (2007).

[2] 127 S. Ct. at 2512.

[3] 127 S. Ct. at 2512 (quoting Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902)).

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENTS

Application and Scope

[P. 1572, add to text after n.53:]

In *Baze v. Rees*,[1] a Court plurality upheld capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and that severe pain will result. The plurality found that, although "subjecting individuals to a risk of future harm – not simply actually inflicting pain – can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'"[2] The presence of an "unnecessary" or "untoward" risk of harm that can be eliminated by adopting alternative procedures, the plurality found, is insufficient to render the three-drug protocol unconstitutional. Instead, for the protocol to be unconstitutional, an "alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[3]

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[1] 128 S. Ct. 1520 (2008).

[2] 128 S. Ct. at 1530-31. The plurality opinion was written by Chief Justice Roberts and joined by Justices Kennedy and Alito. There were five concurring opinions (one of them by Justice Alito) and a dissenting opinion by Justice Ginsburg, joined by Justice Souter.

[3] 128 S. Ct. at 1532. Justice Thomas, joined by Justice Scalia, would have found that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." Id. at 1556. Justice Ginsburg, joined by Justice Souter in dissent, would have found that a method of execution violates the Eighth Amendment if it "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain." Id. at 1567. Justice Breyer agreed with the Eighth Amendment standard that Justice Ginsburg would have applied, but he concurred with the plurality because he could not find sufficient evidence that the three-drug protocol violated that standard. Id. at 1563. Thus, while Justices Scalia and Thomas' standard would result in Eighth Amendment violations in fewer situations than the plurality's would, Justices Ginsburg, Souter, and Breyer's standard would result in violations in more situations that the plurality's would. Justice Stevens remained neutral as to the appropriate standard. Although concluding

(continued...)

Capital Punishment

[P. 1574, delete closed parenthesis at the end of n.62 and add to n.62:]

and announcing that, "[f]rom this day forward, I no longer shall tinker with the machinery of death," id. at 1145). Justice Stevens has also concluded that the death penalty violates the Eighth Amendment, but, because of his wish "to respect precedents that remain a part of our law," does not constitute an automatic vote against challenged death sentences. Baze v. Rees, 128 S. Ct. 1520, 1552 (2008) (finding the death penalty to violate the Eighth Amendment but concurring with the Court plurality that Kentucky's lethal injection protocol does not violate the Eighth Amendment).

– General Validity and Guiding Principles

[P. 1576, n.74, insert after citation to Coker v. Georgia:]

Kennedy v. Louisiana, 128 S. Ct. 2461 (2008) (rape of an eight-year-old child);

[P. 1577, n.74, substitute for "18 U.S.C. § 1472":]

49 U.S.C. § 46502

[P. 1577, add to n.74:]

But the treason statute also constitutes a crime against the state, which may be significant. In *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008), in overturning a death sentence imposed for the rape of a child, the Court wrote, "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."

– Implementation of Procedural Requirements

[P. 1581, add to n.91:]

Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[P. 1583, add to n.99:]

Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 548 U.S. 163, 173 (2006).

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[3] (...continued)

that capital punishment itself violates the Eighth Amendment, he found that, under existing precedents, "whether as interpreted by the Chief Justice or Justice Ginsburg," the petitioners failed to prove that the protocol violated the Eighth Amendment. Id. at 1552.

[P. 1585, insert before the final sentence (which begins "*But cf.*") of n.110 (which begins on p. 1584):]

Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007) (jury must be permitted to consider the defendant's evidence of childhood neglect and mental illness damage outside of the context of assessment of future dangerousness); Brewer v. Quarterman, 127 S. Ct. 1706 (2007) (same).

[P. 1585, add to n.114:]

Nor did a court offend the Constitution by instructing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime," without specifying that such circumstance need not be a circumstance *of the crime*, but could include "some likelihood of future good conduct." This was because the jurors had heard "extensive for ward-looking evidence," and it was improbable that they would believe themselves barred from considering it. Ayers v. Belmontes, 127 S. Ct. 469, 475, 476 (2006).

[P. 1586, add to text after paragraph carried over from page 1585:]

What is the effect on a death sentence if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor, to be weighed against mitigating factors, in determining whether a defendant who has been found eligible for the death penalty should receive it) is found invalid? In *Brown v. Sanders*, the Court announced "the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."[4]

[P. 1586, add to text after first full paragraph:]

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not

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[4] 546 U.S. 212, 220 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." Id. at 217. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." Id. Prior to *Brown v. Sanders*, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." Id.

present at the scene of the crime."[5] Although "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[6] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime," and "thereby attacks a previously determined matter in a proceeding [*i.e.*, sentencing] at which, in principle, that matter is not at issue."[7]

– Limitations on Capital Punishment: Proportionality

[P. 1587, insert new paragraph at the beginning of the section:]

The Court has also considered whether, based on the nature of the underlying offense (or, as explored in the next topic, the capacity of the defendant), the imposition of capital punishment may be inappropriate in particular cases. "[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail." The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[8] However, the "Court has . . . made it clear that '[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.'"[9]

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[5] 546 U.S. 517, 523 (2006).

[6] 546 U.S. at 524, 526 (Court's emphasis deleted in part).

[7] 546 U.S. at 526.

[8] Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008).

[9] 128 S. Ct. at 2675 (Alito, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991)).

[P. 1588, substitute for the first word on the page ("The"):]

In *Kennedy v. Louisiana*,[10] the Court held that this was true even when the rape victim was a child.[11] In *Coker*, the

[P. 1588, add to text after n.131:]

In *Kennedy v. Louisiana*, the Court found that both "evolving standards of decency" and "a national consensus" preclude the death penalty for a person who rapes a child.[12]

–Limitations on Capital Punishment: Diminished Capacity

[P. 1590, add to text after n.138:]

In *Panetti v. Quarterman*,[13] the Court considered two of the issues raised, but not clearly answered, in *Ford*: what definition of insanity should be used in capital punishment cases, and what process must be afforded to the defendant to prove his incapacity. Although the court below had found that it was sufficient to establish competency that a defendant know that he is to be executed and the reason why, the Court in *Panetti* rejected these criteria, and sent the case back to the lower court for it to consider whether the defendant had a rational understanding of the reasons the state gave for an execution, and how that reflected on his competency.[14] The Court also found that the failure of the state to provide the defendant an adequate opportunity to

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[10] 128 S. Ct. 2641 (2008). Justice Kennedy's opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Scalia and Thomas joined.

[11] The Court noted, however, that "[o]ur concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." 128 S. Ct. at 2659.

[12] 128 S. Ct. 2641, 2649, 2653. The Court noted that, since *Gregg*, it had "spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure." Id. at 2661.

[13] 127 S. Ct. 2842 (2007).

[14] In *Panetti*, the defendant, despite apparent mental problems, was found to understand both his imminent execution and the fact that the State of Texas intended to execute him for having murdered his mother-in-law and father-in-law. It was argued, however, that defendant, suffering from delusions, believed that the stated reason for his execution was a "sham" and that the state wanted to execute him "to stop him from preaching."

respond to the findings of two court-appointed mental health experts violated due process.[15]

[P. 1590, add to n.139:]

See also Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[P. 1591, add to text after n.143:]

In *Atkins*, the Court wrote, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[16] In *Schriro v. Smith*, the Court again quoted this language, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim."[17] States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge."[18]

[P. 1591, substitute for first two sentences of first full paragraph:]

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme that permitted capital punishment to be imposed for crimes committed before age 16, but upheld other statutes authorizing capital punishment for crimes committed by 16- and 17-year-olds.

[P. 1591, substitute for rest of paragraph in text following n.148:]

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing the mentally retarded with what it saw as a lack of consensus regarding execution of juvenile offenders over age 15,[19] less than three years later the Court held that such a consensus had

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[15] 127 S. Ct. at 2858.
[16] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright.
[17] 546 U.S. 6, 7 (2005) (per curiam).
[18] 546 U.S. at 7.
[19] 536 U.S. at 314, n.18.

developed. The Court's decision in *Roper v. Simmons*[20] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age 16 or 17 when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, 30 states prohibited execution of juveniles: 12 that prohibited the death penalty altogether, and 18 that excluded juveniles from its reach. This meant that 20 states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the 10 years immediately preceding *Simmons*. Although the pace of change was slower than had been the case with execution of the mentally retarded, the consistent direction of change toward abolition was deemed more important.[21]

As in *Atkins*, the *Simmons* Court relied on its "own independent judgment" in addition to its finding of consensus among the states.[22] Three general differences between juveniles and adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and ill-considered actions and decisions." Juveniles are also more susceptible than adults to "negative influences" and peer pres-

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[20] 543 U.S. 551 (2005). The case was decided by 5-4 vote. Justice Kennedy wrote the Court's opinion, and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor, who had joined the Court's 6-3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas.

[21] Dissenting in *Simmons*, Justice O'Connor disputed the consistency of the trend, pointing out that since *Stanford* two states had passed laws reaffirming the permissibility of executing 16- and 17-year-old offenders. 543 U.S. at 596.

[22] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S. at 394-96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play along with their analysis of consensus on the issue of executing the mentally retarded.

sure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed."[23] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed.[24] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[25]

The *Simmons* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty."[26] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[27]

– Limitations on *Habeas Corpus* Review of Capital Sentences

[P. 1594, delete everything after the citation in n.161, and add a new footnote at end of the second sentence (which ends with "applies") of the paragraph in the text:]

The "new rule" limitation was suggested in a plurality opinion in *Teague*, and a Court majority in *Penry* and later cases adopted it. In *Danforth v. Minnesota*, 128 S. Ct. 1029, 1033 (2008), the Court held that *Teague* does not "constrain[ ] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion."

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[23] 543 U.S. at 569, 570.

[24] 543 U.S. at 570.

[25] 543 U.S. at 572-573. Strongly disagreeing, Justice O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." Id. at 600.

[26] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," id. at 575).

[27] Citing as precedent Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317, n.21; Enmund v. Florida, 458 U.S. 782, 796-97, n.22 (1982); Thompson v. Oklahoma, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

[P. 1594, add to n.162 after initial citation:]

In *Whorton v. Bockting*, 127 S. Ct. 1173, 1180 (2007), the Court stated that the two exceptions – the situations in which "[a] new rule applies retroactively in a collateral proceeding" – are when "(1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *See also* Saffle v. Parks, 494 U.S. 484, 494, 495 (1990). The second exception was at issue in *Sawyer v. Smith*, 497 U.S. 227 (1990), in which the Court held the exception inapplicable to the *Caldwell v. Mississippi* rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury's role in capital sentencing as merely recommendatory. It is "not enough," the Court in *Sawyer* explained, "that a new rule is aimed at improving the accuracy of a trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." Id. at 242.

[P. 1595, add to n.167:]

Accord, House v. Bell, 547 U.S. 518, 554-55 (2006) (defendant failed to meet *Herrera* standard but nevertheless put forward enough evidence of innocence to meet the less onerous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), which "held that prisoners asserting innocence as a gateway to [*habeas* relief for claims forfeited under state law] must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 2076-2077, quoting Schlup v. Delo, 513 U.S. at 327.) The Court here distinguished "freestanding" claims under *Herrera* from "gateway" claims under *Schlup*, the difference apparently being that success on a freestanding claim results in the overturning of a conviction, whereas success on a gateway claim results in a remand to the trial court to hear the claim. *See also* Article III, "*Habeas Corpus*: Scope of the Writ."

[P. 1596, add to text after n.172:]

Further, the "substantial and injurious effect standard" is to be applied in federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*. . . ."[28]

[P. 1596, add to text after n.176:]

In *Carey v. Musladin*,[29] Court noted that it had previously held that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes,"[30] but that it had never ruled on the effect on a defendant's fair trial rights of *spectator* conduct. In *Carey*, the spectator conduct that allegedly affected the defendant's right to a fair trial consisted of members of the victim's family wearing buttons with the victim's photograph. Given the lack of holdings from the Court on the question of

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[28] Fry v. Pliler, 127 S. Ct. 2321, 2324 (2007).
[29] 127 S. Ct. 649 (2006).
[30] Estelle v. Williams, 425 U.S. 501, 512 (1976).

spectator conduct, the Court in *Carey* found that "it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law" in denying the defendant relief.[31] Consequently, the Antiterrorism and Effective Death Penalty Act of 1996 precluded *habeas* relief. Similarly, because the Supreme Court has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that the *Cronic* standard for ineffective assistance of counsel should apply, the Court again could not say "that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[32]

Proportionality

[P. 1601, add to text at end of section:]

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at $399 apiece.[33] A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the "rare case" of "gross disproportional[ity]."[34] The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[35] and Justice Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle."[36] Not surprisingly, the Court also rejected a *habeas corpus* challenge to California's "three-strikes" law for

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[31] 127 S. Ct. at 654 (quoting from 28 U.S.C. § 2254(d)(1)).

[32] Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam), quoting *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), defendant not entitled to *habeas* relief).

[33] Ewing v. California, 538 U.S. 11 (2003).

[34] 538 U.S. at 29-30.

[35] 538 U.S. at 31.

[36] 538 U.S. at 32. The dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. *See* 538 U.S. at 32, n.1 (opinion of Justice Stevens).

failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."[37] Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."[38]

Prisons and Punishment

[P. 1601, add to n.200:]

See also Overton v. Bazzetta, 539 U.S. 126 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

[P. 1601, add to n.201:]

In *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam), the Court overturned a lower court's dismissal, on procedural grounds, of a prisoner's claim of having been denied medical treatment, with life-threatening consequences. Justice Thomas, however, dissented on the ground "that the Eighth Amendment's prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence. . . . But even applying the Court's flawed Eighth Amendment jurisprudence, I would draw the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment." Id. at 2200-2201 (internal quotation marks omitted).

[P. 1602, add to n.204:]

In upholding capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and consequently result in severe pain, a Court plurality found that, although "subjecting individuals to a risk of future harm – not simply actually inflicting pain – can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Baze v. Rees, 128 S. Ct. 1520, 1530-31 (2008) (emphasis added by the Court). This case is also discussed, *supra*, under Eighth Amendment, "Application and Scope."

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[37] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive 25-year-to-life sentences on a 37-year-old convicted of two petty thefts with a prior conviction.

[38] 538 U.S. at 72.

TENTH AMENDMENT

RESERVED POWERS

Effect of Provision on Federal Powers

– Federal Regulations Affecting State Activities and Instrumentalities

[P. 1620, add to n.71:]

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . ." Id. at 156 (quoted with approval in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1573 (2007), which held that a national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law).

ELEVENTH AMENDMENT

STATE SOVEREIGN IMMUNITY

Suits Against States

[P. 1636, add to text at end of section:]

In some of these cases, the state's immunity is either waived or abrogated by Congress. In other cases, the 11th Amendment does not apply because the procedural posture is such that the Court does not view the suit as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the *res*, or property in dispute, is in fact the legal target of a dispute.[1]

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular *res*, the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. "The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[2] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state educational institutions,[3] the court held that the sovereign immunity of the state was not infringed despite the fact that the issue was "ancillary" to a bankruptcy

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[1] *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446-48 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a state does not infringe the state's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507-08 (1998) (despite state claims to title of a ship-wrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign).

[2] Central Virginia Community College v. Katz, 546 U.S. 356, 362-63 (2006).

[3] A "preferential transfer" was defined as the transfer of a property interest from an insolvent debtor to a creditor, which occurred on or within 90 days before the filing of a bankruptcy petition, and which exceeds what the creditor would have been entitled to receive under such bankruptcy filing. 11 U.S.C. § 547(b).

court's *in rem* jurisdiction.[4]

[P. 1639, add to n.80 after citation to Mt. Healthy City Bd. of Education v. Doyle:]

; Northern Insurance Company of New York v. Chatham County, 547 U.S. 189, 193 (2006)

– Congressional Withdrawal of Immunity

[P. 1639, add to n.85:]

See also Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

Suits Against State Officials

[P. 1648, add new footnote at end of first paragraph:]

In *Frew v. Hawkins*, 540 U.S. 431 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst*, arguing that unless an actual violation of federal law had been found by a court, such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the 11th Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. *Id.* at 442.

[4] 546 U.S. at 373.

FOURTEENTH AMENDMENT

Section 1. Rights Guaranteed

DUE PROCESS OF LAW

Definitions

– "Liberty"

[P. 1682, add to n.57:]

But see Chavez v. Martinez, 538 U.S. 760 (2003) (case remanded to federal circuit court to determine whether coercive questioning of severely injured suspect gave rise to a compensable violation of due process).

Fundamental Rights (Noneconomic Substantive Due Process)

– Development of the Right of Privacy

[P. 1767, Substitute for portion of paragraph following n.552:]

However, in *Bowers v. Hardwick*,[1] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples.[2] Then, in *Lawrence v. Texas*,[3] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

– Abortion

[P. 1778, add new footnote at the end of the final paragraph in the section:]

As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, *see* Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).

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[1] 478 U.S. 186 (1986).

[2] The Court upheld the statute only as applied to the plaintiff, who was a homosexual, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at 192-93. In a dissent, Justice Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court – whether there is a general right to privacy and autonomy in matters of sexual intimacy. Id. at 199-203 (Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens) .

[3] 539 U.S. 558 (2003) (overruling *Bowers*).

[P. 1778, add to text at end of section:]

Only seven years later, however, the Supreme Court decided *Gonzales v. Carhart*,[4] which, while not formally overruling *Stenberg*, appeared to signal a change in how it would analyze limitations on abortion procedures. Of perhaps the greatest significance is that *Gonzales* was the first case in which the Court upheld a statutory prohibition on a particular method of abortion. In *Gonzales*, the Court, by a 5-4 vote,[5] upheld a federal criminal statute that prohibited an overt act to "kill" a fetus where it had been intentionally "deliver[ed] . . . [so that] in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother."[6] The Court distinguished this federal statute from the Nebraska statute that it had struck down in *Stenberg*, holding that the federal statute applied only to the intentional performance of the less-common "intact dilation and excavation." The Court found that the federal statute was not unconstitutionally vague because it provided "anatomical landmarks" that provided doctors with a reasonable opportunity to know what conduct it prohibited.[7] Further, the scienter requirement (that delivery of the fetus to these landmarks before fetal demise be intentional) was found to alleviate vagueness concerns.[8]

In a departure from the reasoning of *Stenberg*, the Court held that the failure of the federal statute to provide a health exception[9] was justified by congressional findings that such a procedure was not necessary to protect the health of a mother. Noting that the Court has given "state and federal legislatures

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[4] 127 S. Ct. 1610 (2007).

[5] Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, while Justice Ginsburg authored a dissenting opinion, which was joined by Justices Steven, Souter and Breyer. Justice Thomas also filed a concurring opinion, joined by Justice Scalia, calling for overruling *Casey* and *Roe*.

[6] 18 U.S.C. § 1531(b)(1)(A). The penalty imposed on a physician for a violation of the statute was fines and/or imprisonment for not more than 2 years. In addition, the physician could be subject to a civil suit by the father (or maternal grandparents, where the mother is a minor) for money damages for all injuries, psychological and physical, occasioned by the violation of this section, and statutory damages equal to three times the cost of the partial-birth abortion.

[7] 127 S. Ct. at 1627.

[8] 127 S. Ct. at 1629-31.

[9] As in *Stenberg*, the statute provided an exception for threats to the life of a woman.

wide discretion to pass legislation in areas where there is medical and scientific uncertainty," the Court held that, at least in the context of a facial challenge, such an exception was not needed where "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[10] The Court did, however, leave open the possibility that as-applied challenges could still be made in individual cases.[11]

As in *Stenberg*, the prohibition considered in *Gonzales* extended to the performance of an abortion before the fetus was viable, thus directly raising the question of whether the statute imposed an "undue burden" on the right to obtain an abortion. Unlike the statute in *Stenberg*, however, the ban in *Gonzales* was limited to the far less common "intact dilation and excavation" procedure, and consequently did not impose the same burden as the Nebraska statute. The Court also found that there was a "rational basis" for the limitation, including governmental interests in the expression of "respect for the dignity of human life," "protecting the integrity and ethics of the medical profession," and the creation of a "dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[12]

– Privacy After Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?

[P. 1784, substitute for final sentence of paragraph carried over from p. 1783:]

Although *Bowers* has since been overruled by *Lawrence v. Texas*[13] based on precepts of personal autonomy, the latter case did not appear to signal the resurrection of the doctrine of protecting activities occurring in private places.

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[10] 127 S. Ct. at 1636. Arguably, this holding overruled *Stenberg* insofar as *Stenberg* had allowed a facial challenge to the failure of Nebraska to provide a health exception to its prohibition on intact dilation and excavation abortions. 530 U.S. at 929-38.

[11] 127 S. Ct. at 1639.

[12] 127 S. Ct. at 1633-34.

[13] 539 U.S. 558 (2003).

[P. 1784, substitute for second full paragraph and all remaining paragraphs within the topic:]

Despite the limiting language of *Roe*, the concept of privacy still retains sufficient strength to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services International*,[14] recognition of the "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[15] The Court significantly extended the *Griswold-Baird* line of cases so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to protect only that interest or interests.

For a time, the limits of the privacy doctrine were contained by the 1986 case of *Bowers v. Hardwick,*[16] where the Court by a

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[14] 431 U.S. 678 (1977).

[15] 431 U.S. at 684-91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the state. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the state presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691-99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

[16] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens,

(continued...)

5-4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[17] and also rejected the more comprehensive claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[18] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[19] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[20] Interestingly, Justice Blackmun, in dissent, was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[21]

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[16] (...continued)
joined by Justices Brennan and Marshall, added a separate dissenting opinion.

[17] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190-91.

[18] Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases. 478 U.S. at 191. The Court concluded that there was no "fundamental right [of] homosexuals to engage in acts of consensual sodomy" because homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191-92.

[19] 478 U.S. at 191-92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[20] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195-96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217-18) suggested that these crimes are readily distinguishable.

[21] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See* id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204-06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to
(continued...)

Yet, *Lawrence v. Texas*,[22] by overruling *Bowers*, brought the outer limits of noneconomic substantive due process into question by once again using the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[23]

Although it quarreled with the Court's finding in *Bowers v. Hardwick* that the proscription against homosexual behavior had "ancient roots," the *Lawrence* Court did not attempt to establish that such behavior was in fact historically condoned. This raises the question as to what limiting principles are available in evaluating future arguments based on personal autonomy. While the Court does seem to recognize that a State may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects,"[24] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[25] Thus, the parameters for regulation of sexual conduct remain unclear.

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[26] Analysis of this question is hampered, however, because

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[21] (...continued)
"family, marriage, motherhood, procreation, and child rearing." 478 U.S. at 190. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[22] 539 U.S. 558 (2003).

[23] 539 U.S. at 567.

[24] 539 U.S. at 567.

[25] The Court noted with approval Justice Stevens' dissenting opinion in *Bowers v. Hardwick* stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577-78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

[26] The Court reserved this question in *Carey*, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no (continued...)

the Court has still not explained what about the particular facets of human relationships – marriage, family, procreation – gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[27] little elucidates the answers.[28]

Despite the Court's decision in *Lawrence*, there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of "privacy" or under the more limited "liberty" set out in *Roe*. There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is also now accepted as a "liberty" protected under the due process clauses, however, the analytical significance of denominating the particular right or interest as an element of privacy seems open to question.

PROCEDURAL DUE PROCESS: CIVIL

Generally

– The Requirements of Due Process

[P. 1796, add to text after n.697:]

This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available.[29]

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[26] (...continued)
barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[27] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, 431 U.S. at 684-85.

[28] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests – compelling interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is not its social significance, but is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). That this limitation has not been honored with respect to equal protection analysis or due process analysis can be easily discerned. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

[29] Jones v. Flowers, 547 U.S. 220, 235 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have (continued...)

The Procedure Which is Due Process

– The Property Interest

[P. 1804, add to text after n.747:]

The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*,[30] the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently mandatory arrest statutes.[31] Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[32]

– The Liberty Interest

[P. 1807, add new footnote to end of second paragraph:]

In *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 6-7 (2003), holding that the state's posting on the Internet of accurate information regarding convicted sex offenders did not violate their due process rights, the Court stated that *Paul v. Davis* "held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."

[P. 1809, add to n.770:]

Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship").

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[29] (...continued)
taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.)

[30] 545 U.S. 748 (2005).

[31] 545 U.S. at 759. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. Such indeterminancy is not the "hallmark of a duty that is mandatory." Id. at 763.

[32] 545 U.S. at 764-65.

– When Process is Due

[P. 1815, add to text after n.801:]

A delay in processing a claim for recovery of money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David*,[33] a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected – the temporary loss of the use of the money – could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

Jurisdiction

– Notice: Service of Process

[P. 1834, add to the beginning of n.903:]

Thus, in Jones v. Flowers, 547 U.S. 220 (2006), the Court held that, after a state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed," the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so.

Power of the States to Regulate Procedure

– Costs, Damages, and Penalties

[P. 1838, add to n.932 after citation to BMW v. Gore:]

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (applying *BMW v. Gore* guideposts to hold that a $145 million judgment for refusing to settle an insurance claim was excessive, in part because it included consideration of conduct occurring in other states as well as conduct bearing no relation to the plaintiffs' harm).

[P. 1838, add to n.933:]

The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424 (2003).

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[33] 538 U.S. 715 (2003).

[P. 1838, add to text after n.933:]

In addition, the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . ."[34]

PROCEDURAL DUE PROCESS – CRIMINAL

The Elements of Due Process

– Fair Trial

[P. 1855, in n.1025, insert before period preceding penultimate sentence (which begins "Similarly"):]

; Middleton v. McNeil, 541 U.S. 43 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear)

[P. 1856, add to the end of n.1028:]

Carey v. Musladin, 127 S. Ct. 649 (2006) (effect on defendant's fair-trial rights of private-actor courtroom conduct – in this case, members of victim's family wearing buttons with the victim's photograph – has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes *habeas* relief; see Amendment 8, Limitations on Habeas Corpus Review of Capital Sentences).

[P. 1856, add to text after n.1028:]

The use of visible physical restraints, such as shackles, leg irons or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*,[35] the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need."[36] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings."[37] Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in

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[34] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (punitive damages award overturned because trial court had allowed jury to consider the effect of defendant's conduct on smokers who were not parties to the lawsuit).

[35] 544 U.S. 622 (2005).

[36] 544 U.S. at 626. In *Illinois v. Allen*, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort."

[37] 544 U.S. at 630, 631 (internal quotation marks omitted).

special circumstances, such as where a judge has made particu larized findings that security or flight risk requires it, can such restraints be used.

[P. 1856, add to n.1030, before period preceding final sentence:]

; Holmes v. South Carolina, 547 U.S. 319 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability)

– Prosecutorial Misconduct

[P. 1857, add to n.1037:]

Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

[P. 1858, add new footnote after the words "prosecutor withheld it" four lines from bottom of page:]

A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283-84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

[P. 1859, add to n.1044:]

Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

[P. 1859, add to text after n.1049:]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' . . . '[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.'"[38]

[P. 1859, add to n.1049:]

See also Banks v. Dretke, 540 U.S. 668, 692-94 (2004) (failure of prosecution to correct perjured statement that witness had not been coached and to disclose that separate witness was a paid government informant established prejudice for purposes of *habeas corpus* review).

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[38] Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006) (per curiam), quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995).

– Proof, Burden of Proof, and Presumptions

[P. 1861, add new footnote following "constitute the crime charged" in first sentence of first full paragraph of text:]

Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process.

[P. 1862, add to n.1063:]

See also Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of *mens rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

[P. 1862, add to text after n.1064:]

Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[39] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark,* the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[40]

– The Problem of the Incompetent or Insane Defendant or Convict

[P. 1865, add to n.1076:]

The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understand-

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[39] 548 U.S. 735 (2006).
[40] 548 U.S. at 770, 774.

ing – and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, *supra*.

[P. 1865, add to text after n.1078:]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining criminal responsibility.[41] The Court has identified several tests that are used by states in varying combinations to address the issue: the M'Naghten test (cognitive incapacity or moral incapacity),[42] volitional incapacity,[43] and the irresistible-impulse test.[44] "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."[45]

[P. 1866, add to text after n.1085:]

The Court, however, left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[46]

In *Atkins v. Virginia*, the Court held that the Eighth Amendment also prohibits the state from executing a person who is mentally retarded, and added, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the

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[41] Clark v. Arizona, 548 U.S. 735 (2006).

[42] *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), states that "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[43] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible").

[44] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife – if the killing was the product of mental disease in him – he is not guilty; he is innocent – as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance").

[45] *Clark*, 548 U.S. 752. In *Clark*, the Court considered an Arizona statute, based on the *M'Naghten* case, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 753.

[46] 477 U.S. at 416-17.

task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[47]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*,[48] the Court had found that an individual has a significant "liberty interest" in avoiding the unwanted administration of antipsychotic drugs. In *Sell v. United States*,[49] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case.[50] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

– Guilty Pleas

[P. 1868, substitute for final sentence of n.1092:]

However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

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[47] 536 U.S. at 317 (citation omitted) (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). The Court quoted this language again in *Schriro v. Smith*, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." 546 U.S. 6, 7 (2005) (per curiam). States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." *Id.*

[48] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

[49] 539 U.S. 166 (2003).

[50] For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government's interest in prosecution. 539 U.S. at 180.

– Rights of Prisoners

[P. 1874, add to n.1132:]

There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509-13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).

[P. 1875, add to n.1136:]

See Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over whom a prisoner's parental rights have been terminated, and all regular visitation for a period following a prisoner's violation of substance abuse rules).

[P. 1875, add new footnote to end of fifth sentence of first full paragraph:]

For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135.

[P. 1877, add new paragraph to text after n.1148, consisting of the following sentence followed by the material through n.1149:]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[51]

EQUAL PROTECTION OF THE LAWS

Scope and Application

– State Action

[P. 1893, add to n.1223:]

But see City of Cuyahoga Falls v. Buckeye Community Hope Found., 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

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[51] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 219-20.

Equal Protection: Judging Classifications by Law

– Traditional Standards: Restrained Review

[P. 1906, in fifth line of section, substitute for the period after "well":]

, including so-called "class-of-one" challenges.[52]

TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWERS

Taxation

– Classification for Purposes of Taxation

[P. 1923, add to n.1390 after the paragraph on "Electricity":]

Gambling: slot machines on excursion river boats are taxed at a maximum rate of 20 percent, while slot machines at a racetrack are taxed at a maximum rate of 36 percent. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[P. 1924, add before period at end of n.1391:]

; Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003)

EQUAL PROTECTION AND RACE

Juries

[P. 1958, add new footnote at end of first sentence of second full paragraph:]

476 U.S. 79, 96 (1986). Establishing a *prima facie* case can be done through a "wide variety of evidence, so long as the sum of proffered facts gives rise to an inference of discriminatory purpose." Id. at 93-94. A state, however, cannot require that a defendant prove a *prima facie* case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

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[52] The Supreme Court has recognized successful equal protection claims brought by a class-of-one, where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for that difference. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (village's demand for an easement as a condition of connecting the plaintiff's property to the municipal water supply was irrational and wholly arbitrary). However, the class-of-one theory, which applies with respect to legislative and regulatory action, does not apply in the public employment context. Engquist v. Oregon Department of Agriculture, 128 S. Ct. 2146, 2149 (2008) (allegation that plaintiff was fired not because she was a member of an identified class but simply for "arbitrary, vindictive, and malicious reasons" does not state an equal protection claim). In *Engquist*, the Court noted that "the government as employer indeed has far broader powers than does the government as sovereign," id. at 2151 (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994)), and that it is a "common-sense realization" that government offices could not function if every employment decision became a constitutional matter. Id. at 2151, 2156.

[P. 1958, add to text after n.1594:]

In fact, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[53] Such a rebuttal having been offered, "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'"[54] "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous," but, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent.[55]

Permissible Remedial Utilization of Racial Classifications

[P. 1970, add to text at end of section:]

By applying strict scrutiny, the Court was in essence

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[53] Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a *habeas corpus* action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." Id. at 337-38. Justice Breyer, joined by Justice Souter, concurred but suggested "that legal life without peremptories is no longer unthinkable" and "that we should reconsider *Batson*'s test and the peremptory challenge system as a whole." Id. at 344.

[54] Rice v. Collins, 546 U.S. at 338 (citations omitted). "[O]nce it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution." Snyder v. Louisiana,128 S. Ct. 1203, 1212 (2008) (citation omitted).

[55] Snyder v. Louisiana, 128 S. Ct. 1203, 1207 (2008) (Supreme Court found prosecution's race-neutral explanation for its peremptory challenge of a black juror to be implausible, and found explanation's "implausibility . . . reinforced by prosecution's acceptance of white jurors" whom prosecution could have challenged for the same reason that it claimed to have challenged the black juror, id. at 1211). In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Court found discrimination in the use of peremptory strikes based on numerous factors, including the high ratio of minorities struck from the venire panel (of 20 blacks, nine were excused for cause and ten were peremptorily struck). Other factors the Court considered were the fact that the race-neutral reasons given for the peremptory strikes of black panelists "appeared equally on point as to some white jurors who served," id. at 241; the prosecution used "jury shuffling" (rearranging the order of panel members to be seated and questioned) twice when blacks were at the front of the line; the prosecutor asked different questions of black and white panel members; and there was evidence of a long-standing policy of excluding blacks from juries.

affirming Justice Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether the Court would endorse Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger*[56] and *Gratz v. Bollinger*.[57]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in his file (*e.g.*, grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (*e.g.*, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." While the policy did not limit diversity to "ethnic and racial" classifications, it did seek a "critical mass" of minorities so that those students would not feel isolated.[58]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who otherwise might not have been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[59] As the university did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the university's policy was

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[56] 539 U.S. 306 (2003).
[57] 539 U.S. 244 (2003).
[58] 539 U.S. at 323-26.
[59] 539 U.S. at 335.

narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.

The law school's admission policy, however, can be contrasted with the university's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the Law School. Applicants with scores over 100 were usually admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was the fact that an applicant was entitled to 20 points based solely upon membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[60]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's opinion in *Bakke*. While Justice Powell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[61] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an underrepresented minority group, the policy effectively admitted every qualified minority applicant. While acknowledging that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve the university's asserted compelling interest in diversity.[62]

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be

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[60] 539 U.S. at 272-73.
[61] 438 U.S. at 317.
[62] 438 U.S. at 284-85.

constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[63] the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be "de facto" racial imbalance in the schools, used "racial tiebreakers" to determine school assignments.[64] As in *Bakke*, numerous opinions by a fractured Court[65] led to an uncertain resolution of the issue.

In an opinion by Chief Justice Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.[66] Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating "de facto" racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Kennedy, while finding that the school plans at issue were unconstitutional because they were not

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[63] 127 S. Ct. 2738 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson County Board of Education*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

[64] In Seattle, students could choose among 10 high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district's overall white/nonwhite racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school's black enrollment to fall below 15 percent or exceed 50 percent. Id. at 2749.

[65] Chief Judge Robert's opinion, joined fully by Justices Scalia, Thomas and Alito, announced the judgment of the Court, while Justice Kennedy, who joined portions of the Chief Justice's opinion, filed an opinion concurring in part and concurring in the judgment. Justice Thomas filed a concurring opinion, while Justice Stevens and Justice Breyer (joined by Justice Steven, Souter and Ginsburg) authored dissents.

[66] 127 S. Ct. at 2753-54. The Court also noted that, in *Grutter*, the Court had relied upon "considerations unique to institutions of higher education." Id. at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

narrowly tailored,[67] suggested in separate concurrence that relieving "racial isolation" could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications "as a last resort" if other means failed.[68] As Justice Kennedy's concurrence appears to represent a narrower basis for the judgment of the Court than does Justice Robert's opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.[69]

THE NEW EQUAL PROTECTION

Fundamental Interests: The Political Process

– Voter Qualifications

[P. 1997, add a new footnote at the end of the first paragraph of the section:]

See also Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2007) (per curiam) (vacating an injunction against "requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day," id. at 6, but expressing no opinion on the constitutionality of the requirement).

[P. 1998, add to text after n.1776:]

By contrast, the Court upheld a statute that required voters to present a government-issued photo identification in order to vote, as the state had not "required voters to pay a tax or a fee to obtain a new photo identification." The Court added that, although obtaining a government-issued photo identification is an "inconvenience" to voters, it "surely does not qualify as a substantial burden."[70]

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[67] In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Kennedy focused on a lack of clarity in the administration and application of Kentucky's plan and the use of the "crude racial categories" of "white" and "non-white" (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790-91.

[68] 127 S. Ct. at 2760-61. Some other means suggested by Justice Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

[69] Marks v. United States, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.").

[70] Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1621 (2008) (plurality). See Fourteenth Amendment, "Voting," *infra.*

– Apportionment and Districting

[P. 2012, add to text after n.1841:]

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were generally unsuccessful. Then, when the Supreme Court revisited the issue in 2004, it all but closed the door on such challenges. In *Vieth v. Jubelirer*,[71] a four-Justice plurality would have overturned *Davis v. Bandemer*'s holding that challenges to political gerrymandering are justiciable, but five Justices disagreed. The plurality argued that partisan considerations are an intrinsic part of establishing districts,[72] that no judicially discernable or manageable standards exist to evaluate unlawful partisan gerrymandering,[73] and that the power to address the issue of political gerrymandering resides in Congress.[74]

Of the five Justices who believed that challenges to political gerrymandering are justiciable, four dissented, but Justice Kennedy concurred with the four-Justice plurality's holding, thereby upholding Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. Justice Kennedy agreed that the lack" of any agreed upon model of fair and effective representation" or "substantive principles of fairness in districting" left the Court with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."[75] But, though he concurred in the holding, Justice Kennedy held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale were found" to evaluate partisan redistricting. *Davis v. Bandemer* was thus preserved.[76]

In *League of United Latin American Citizens v. Perry*, a

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[71] 541 U.S. 267 (2004).

[72] 541 U.S. at 285-86.

[73] 541 U.S. at 281-90.

[74] 541 U.S. at 271 (noting that Article I, § 4 provides that Congress may alter state laws regarding the manner of holding elections for Senators and Representatives).

[75] 541 U.S. at 307-08 (Justice Kennedy, concurring).

[76] 541 U.S. at 306 (Justice Kennedy, concurring). Although Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposed on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.

widely splintered Supreme Court plurality largely upheld a Texas congressional redistricting plan that the state legislature had drawn mid-decade, seemingly with the sole purpose of achieving a Republican congressional majority.[77] The plurality did not revisit the justiciability question, but examined "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[78] The plurality was "skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." For one thing, although "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, . . . partisan aims did not guide every line it drew."[79] Apart from that, the "sole-motivation theory" fails to show what is necessary to identify an unconstitutional act of partisan gerrymandering: "a burden, as measured by a reliable standard, on the complainants' representational rights."[80] Moreover, "[t]he sole-intent standard . . . is no more compelling when it is linked to . . . mid-decennial legislation. . . . [T]here is nothing inherently suspect about a legislature's decision to replace a mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders."[81] The plurality also found "that mid-decade redistricting for exclusively partisan purposes" did not in this case "violate[ ] the one-person, one-vote requirement."[82] Because ordinary mid-decade districting plans do not necessarily violate the one-person, one-vote requirement, the only thing out of the ordinary with respect to the Texas plan was that it was motivated solely by partisan considerations, and the plurality had already rejected the sole-motivation theory.[83] *League of United Latin American Citizens v. Perry* thus left earlier Court precedent essentially unchanged. Claims of unconstitutional partisan

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[77] 548 U.S. 399, 417 (2006). The design of one congressional district was held to violate the Voting Rights Act because it diluted the voting power of Latinos. Id. at 423-443.

[78] 548 U.S. at 414.

[79] 548 U.S. at 418, 417.

[80] 548 U.S. at 418.

[81] 548 U.S. at 419.

[82] 548 U.S. at 420-21.

[83] 548 U.S. at 422.

gerrymandering are justiciable, but a reliable measure of what constitutes unconstitutional partisan gerrymandering remains to be found.

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

– Voting

[P. 2028, add to text after n.1917:]

In *Crawford v. Marion County Election Board*,[84] however, a Court plurality held that a state may require citizens to present a government-issued photo identification in order to vote. Although Justice Stevens' plurality opinion acknowledged "the burden imposed on voters who cannot afford . . . a birth certificate" (but added that it was "not possible to quantify . . . the magnitude of the burden on this narrow class of voters"), it noted that the state had not "required voters to pay a tax or a fee to obtain a new photo identification," and that "the photo-identification cards issued by Indiana's BMV are also free."[85] Justice Stevens also noted that a burden on voting rights, "[h]owever slight . . . must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation,'[86] and he found three state interests that were sufficiently weighty: election modernization (*i.e.*, complying with federal statutes that require or permit the use of state motor vehicle driver's license applications to serve various purposes connected with voter registration), deterring and detecting voter fraud, and safeguarding voter confidence. Justice Stevens' opinion, therefore, rejected a facial challenge to the statute,[87] finding that, even though it was "fair to infer that partisan considerations may have played a significant role in the decision to enact" the statute, the statute was "supported by valid neutral justifications."[88] Justice Scalia, in his concurring opinion,

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[84] 128 S. Ct. 1610 (2008). Justice Stevens' plurality opinion was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia wrote a concurring opinion that was joined by Justices Thomas and Alito, and Justices Souter, Ginsburg, and Breyer dissented.

[85] 128 S. Ct. at 1622, 1621.

[86] 128 S. Ct. at 1616.

[87] "A facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1623 (internal quotation marks omitted).

[88] 128 S. Ct. at 1624. "[A]ll of the Republicans in the [Indiana] General Assembly voted in favor of [the statute] and the Democrats were unanimous in opposing it." Id. at

(continued...)

would not only have upheld the statute on its face, but would have ruled out as-applied challenges as well, on the ground that "[t]he Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation," and, "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional."[89] Justice Souter, in his dissenting opinion, found the statute unconstitutional because "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. . . . The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old."[90]

Section 5. Enforcement

Generally

[P. 2037, delete sole full paragraph (to be inserted in next section)]

State Action

[P. 2041, in text after n.1978, insert sole full paragraph deleted from p. 2037]

Congressional Definition of Fourteenth Amendment Rights

[P. 2047, add to text at end of section:]

The Court's most recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs*,[91] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees can take up to

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[88] (...continued)
1623.

[89] 128 S. Ct. at 1625, 1626.

[90] 128 S. Ct. at 1627, 1643 (citations omitted).

[91] 538 U.S. 721 (2003).

twelve weeks of unpaid leave to care for a close relative with a serious health condition. Noting that the Fourteenth Amendment could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than men were provided paternity leave.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test[92] . . . it was easier for Congress to show a pattern of state constitutional violations."[93] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a congruent and proportional response to the gender stereotype.

Applying the same approach, the Court in *Tennessee v. Lane*[94] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act (ADA) provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[95] but since disability is not a suspect class, the application of Title II against states would seem suspect under the reasoning of *Garrett*.[96] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be

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[92] Statutory classifications that distinguish between males and females are subject to heightened scrutiny, *Craig v. Boren*, 429 U.S. 190, 197-199 (1976); they must be substantially related to the achievement of important governmental objectives, *United States v. Virginia*, 518 U.S. 515, 533 (1996).

[93] 538 U.S. at 736.

[94] 541 U.S. 509 (2004).

[95] 42 U.S.C. § 12132.

[96] 531 U.S. 356 (2001).

a fundamental right subject to heightened scrutiny under the Due Process Clause.[97]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a "congruent and proportional" response to a congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[98] However, as pointed out by both the majority and by Justice Rehnquist in dissent, the deprivations relied upon by the majority were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[99] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage and voting, and on limitations of access to public services beyond the use of courts.[100]

Congress' authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[101] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the state of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could

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[97] *See*, *e.g.*, Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[98] 541 U.S. at 531, 524.

[99] 541 U.S. at 541-542 (Rehnquist, C.J., dissenting).

[100] 541 U.S. at 524-525. Justice Rehnquist, in dissent, disputed Congress' reliance on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. Id. at 542-43. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as *South Carolina v. Katzenbach*, 383 U.S. 301, 312-15 (1966).

[101] 546 U.S. 151 (2006).

be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[102]

[102] "While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158 (citations omitted).

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

[This entry should follow # 135 in the main volume:]

Act of Oct. 27, 1986 (Pub. L. 99-570, § 1366), 100 Stat. 3207-35, 18 U.S.C. § 981(a)(1).

Statute requiring full civil forfeiture of money transported out of the United States without amounts in excess of $10,000 being reported violates the Excessive Fines Clause of the Eighth Amendment when $357,144 was required to be forfeited.

United States v. Bajakajian, 524 U.S. 321 (1998).
Justices concurring: Thomas, Stevens, Souter, Ginsburg, Breyer.
Justices dissenting: Kennedy, Rehnquist, C.J., O'Connor, Scalia.

159. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, §§ 213, 318; 2 U.S.C. §§ 315(d)(4),441k.

Section 213 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' right to make unlimited independent expenditures. Section 318 of BCRA, which amended FECA to prohibit persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors.

McConnell v. FEC, 540 U.S. 93 (2003).

160. Act of April 30, 2003, Pub. L. 108-21, §§ 401(a)(1), 401(d)(2),117 Stat. 667, 670; 18 U.S.C. §§ 3553(b)(1), 3742(e).

Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory, and one that sets forth standards governing appeals of departures from the mandatory Guidelines, are invalidated. The Sixth Amendment right to jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.

United States v. Booker, 543 U.S. 220 (2005).
Justices concurring: Breyer, O'Connor, Kennedy, Ginsburg, and Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Scalia, and Thomas.

161. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, § 203; 2 U.S.C. § 441b(b)(2).

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court held that § 203 was not facially overbroad, and, in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410 (2006), it held that it had not purported to resolved future as-applied challenges. Now it holds that § 203 is unconstitutional as applied to issue ads that mention a candidate for federal office, when such ads are not the "functional equivalent" of express advocacy for or against the candidate.

Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007).
Justices concurring: Roberts, C.J., Alito, Scalia, Kennedy, and Thomas.
Justices dissenting: Souter, Stevens, Ginsburg, and Breyer.

162. Act of March 27, 2002, the Bipartisan Campaign Reform Act 2002, Pub. L. 107-155, § 319(a) and (b); 2 U.S.C. § 441a-1(a) and (b).

A subsection of BCRA providing that, if a "self-financing" candidate for the House of Representatives spends more than a specified amount, then his opponent may accept more contributions than otherwise permitted, violates the First Amendment. A subsection with disclosure requirements designed to implement the asymmetrical contribution limits also violates the First Amendment.

Davis v. Federal Election Commission, 128 S. Ct. 2759 (2008).
Justices concurring: Alito, Roberts, C.J., Scalia, Kennedy, and Thomas.
Justices dissenting (except as to standing and mootness): Stevens, Souter, Ginsburg, and Breyer.

STATE CONSTITUTIONAL OR STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

I. STATE LAWS HELD UNCONSTITUTIONAL

936. *Stogner v. California*, 539 U.S. 607 (2003).

A California statute that permits resurrection of an otherwise time-barred criminal prosecution for sexual abuse of a child, and that was itself enacted after the pre-existing limitations period had expired for the crimes at issue, violates the Ex Post Facto Clause of Art. I, § 10, cl. 1.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg.
Justices dissenting: Kennedy, Scalia, Thomas, Rehnquist, C.J.

937. *Virginia v. Black*, 538 U.S. 343 (2003).

The provision of Virginia's cross-burning statute stating that a cross burning "shall be prima facie evidence of an intent to intimidate" is unconstitutional.

Justices concurring: O'Connor, Stevens, Breyer, Rehnquist, C.J.
Justices concurring specially: Souter, Kennedy, Ginsburg.
Justices dissenting: Scalia, Thomas.

938. *Lawrence v. Texas*, 539 U.S. 558 (2003).

A Texas statute making it a crime for two people of the same sex to engage in sodomy violates the Due Process Clause of the Fourteenth Amendment. The right to liberty protected by the Due Process Clause includes the right of two adults, "with full and mutual consent from each other, [to] engag[e] in sexual practices common to a homosexual lifestyle."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.
Justice concurring specially: O'Connor.
Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

939. *Blakely v. Washington*, 542 U.S. 296 (2004).

Washington State's sentencing law, which allows a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence," is inconsistent with the Sixth Amendment right to trial by jury.

Justices concurring: Scalia, Stevens, Souter, Thomas, and Ginsburg.
Justices dissenting: O'Connor, Breyer, Kennedy, Rehnquist, C.J.

940. *Granholm v. Heald*, 544 U.S. 460 (2005).

Michigan and New York laws that allow in-state wineries to

sell wine directly to consumers but prohibit or discourage out-of-state wineries from doing so discriminate against interstate commerce in violation of the Commerce Clause, and are not authorized by the Twenty-first Amendment.

Justices concurring: Kennedy, Scalia, Souter, Ginsburg, and Breyer.
Justices dissenting: Stevens, O'Connor, Thomas, Rehnquist, C.J.

941. *Halbert v. Michigan*, 545 U.S. 605 (2005).

A Michigan statute making appointment of appellate counsel discretionary with the court for indigent criminal defendants who plead nolo contendere or guilty is unconstitutional to the extent that it deprives indigents of the right to the appointment of counsel to seek "first-tier review" in the Michigan Court of Appeals.

Justices concurring: Ginsburg, Stevens, O'Connor, Kennedy, Souter, and Breyer.
Justices dissenting: Thomas, Scalia, and Rehnquist, C.J.

942. *Roper v. Simmons*, 543 U.S. 551 (2005).

Missouri's law setting the minimum age at 16 for persons eligible for the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment as applied to persons who were under 18 at the time they committed their offense.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: O'Connor, Scalia, Thomas, and Rehnquist.

943. *Jones v. Flowers*, 547 U.S. 220 (2006).

Arkansas statute violated due process when interpreted not to require the Arkansas Commissioner of State Lands to take additional reasonable steps to notify a property owner of intent to sell the property to satisfy a tax delinquency, after the initial notice was returned by the Post Office unclaimed.

Justices concurring: Roberts, C.J., Stevens, Souter, Ginsburg, and Breyer.
Justices dissenting: Thomas, Scalia, Kennedy.

944. *Randall v. Sorrell*, 548 U.S. 230 (2006).

Vermont campaign finance statute's limitations on both expenditures and contributions violated freedom of speech.

Justices concurring: Breyer, Roberts, C.J., Alito, Kennedy, Thomas, Scalia.
Justices dissenting: Stevens, Souter, Ginsburg.

945. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1659 (2007).

Texas capital sentencing statute impermissibly prevented

sentencing "jurors from giving meaningful consideration to constitutionally relevant mitigating evidence."

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito.

946. *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709 (2007).

"Texas capital sentencing statute impermissibly prevented sentencing jury from giving meaningful consideration to constitutionally relevant mitigating evidence."

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito.

947. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2641 (2008)

Louisiana's statute that permits the death penalty for rape of a child under 12 is unconstitutional because the Eighth Amendment bars "the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.
Justices dissenting: Alito, Roberts, C.J., Scalia, Thomas.

948. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

A District of Columbia statute that banned virtually all handguns, and required that any other type of firearm in the home be dissembled or bound by a trigger lock at all times violates the Second Amendment, which the Court held to protect individuals' right to bear arms.

Justices concurring: Scalia, Roberts, C.J., Kennedy, Thomas, Alito.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

225. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003).

Alabama's usury statute is preempted by sections 85 and 86 of the National Bank Act as applied to interest rates charged by national banks.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, and Rehnquist, C.J.
Justices dissenting: Scalia and Thomas.

226. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

California's Holocaust Victim Insurance Relief Act, which requires any insurance company doing business in the state to

disclose information about policies it or "related" companies sold in Europe between 1920 and 1945, is preempted as interfering with the Federal Government's conduct of foreign relations.

Justices concurring: Souter, O'Connor, Kennedy, Breyer, and Rehnquist, C.J.

Justices dissenting: Ginsburg, Stevens, Scalia, and Thomas.

227. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

Suits brought in state court alleging that HMOs violated their duty under the Texas Health Care Liability Act "to exercise ordinary care when making health care treatment decisions" are preempted by ERISA § 502(a), which authorizes suit "to recover benefits due [a participant] under the terms of his plan."

228. *Gonzales v. Raich*, 545 U.S. 1 (2005).

California law allowing use of marijuana for medical purposes is preempted by the Controlled Substances Act's categorical prohibition of the manufacture and possession of marijuana.

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.

Justices dissenting: O'Connor, Thomas, Rehnquist, C.J.

229. *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

Arkansas statute that imposes lien on tort settlements in an amount equal to Medicaid costs, even when Medicaid costs exceed the portion of the settlement that represents medical costs, is preempted by the Federal Medicaid law insofar as the Arkansas statute applies to amounts other than medical costs.

230. *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

Part III of the opinion found a Texas redistricting statute to violate the federal Voting Rights Act because it diluted the voting power of Latinos.

Justices concurring in Part III: Kennedy, Stevens, Souter, Ginsburg, Breyer.

Justice dissenting from Part III: Roberts, C.J., Alito, Scalia, Thomas.

231. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007).

A national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law.

Justices concurring: Ginsburg, Alito, Breyer, Kennedy, Souter.

Justices dissenting: Stevens, Roberts, C.J., Scalia.

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

Overruling Case	Overruled Case(s)
221. Lapides v. Board of Regents, 535 U.S. 613 (2002).	Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945).
222. Atkins v. Virginia, 536 U.S. 304 (2002).	Penry v. Lynaugh, 492 U.S. 302 (1989).
223. Ring v. Arizona, 536 U.S. 584 (2002).	Walton v. Arizona, 497 U.S. 639 (1990).
224. Lawrence v. Texas, 539 U.S. 558 (2003).	Bowers v. Hardwick, 478 U.S. 186 (1986).
225. Crawford v. Washington, 541 U.S. 36 (2004).	Ohio v. Roberts, 448 U.S. 56 (1980).
226. Roper v. Simmons, 543 U.S. 551 (2005).	Stanford v. Kentucky, 492 U.S. 361 (1989).
227. Central Virginia Community College v. Katz, 546 U.S. 356 (2006).	Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989).
228. Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).	School Comm. of Boston v. Bd. of Education, 389 U.S. 572 (1968).
229. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).	Stenberg v. Carhart, 530 U.S. 914 (2000).

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